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# CONCEPTS OF DISABILITY

# UNDER WORKMEN'S COMPENSATION STATUTES

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# CONCEPTS OF DISABILITY

## UNDER WORKMEN'S COMPENSATION STATUTES



During the present week, we have been privileged to meet in an atmosphere of learning to reconsider the problems presented by "pneumoconioses". Certainly there is no place in this country where that subject has received more conscientious scientific and intensive consideration than here at the Saranac Laboratory.

We have renewed our associations with the memories and teachings of those two grand men of industrial medicine--LeRoy U. Gardner and Arthur J. Vorwald--together with their many associates who have rendered such distinguished service in this field of medicine.

The previous meetings of the symposium have been devoted to the medical aspects of pneumoconioses; beginning with the present session, we turn to the legal aspects of these problems to consider:

1. Legislative provisions for compensation for the victims of these diseases, and

2. The evaluation of disability or injury arising therefrom.

These problems are complex and give rise to differences of opinion, dependent upon the point of view of approach.

In order that I may identify myself for the record, I wish to state that in my professional practice, I have always represented employers and insurers in matters dealing with this subject, except in a number of instances where my employer clients

have requested me to represent their employees in the presentation of claims. While my professional representation has been on the side of employers, my thinking has always been influenced by deep sentiment and regard for those tragic figures who become disabled or die from diseases for which the medical profession has found no cure.

Our brothers of the medical profession have already admitted that they do not know all about pneumoconioses. There are many unsolved questions that should stimulate continued laboratory research of the type and character that has distinguished the activities of this Laboratory. From the legal standpoint, our legislatures, commissions and courts have been wrestling with the legal problems relating to employer liability for compensation; and here again, we find that they have not found all the answers to those problems.

In my remarks, please consider that I am thinking outloud with no conclusive opinions, but still am one of a group who is trying to find answers to questions that have so perplexed my legal brethren.

Dr. Vorwald has asked me to discuss the legal concept of the term "disability" under the compensation statutes. As a prelude to that discussion, may I remind you of the nature of an employer's liability to pay compensation for those diseases. The liability is two-fold: (1) that imposed by the common law, and (2) that imposed by the Workmen's Compensation Acts of the several states. Common law liability results from the employer's negligence in providing for employees a safe place in which to work, safe tools with which

to work and failure to warn employees of dangers incident to their employment. In such actions the employer retains the common law defenses of:

1. The Fellow Servant Doctrine,
2. Assumption of risk by the employee, and
3. Contributory negligence of the employee.

The cause is tried in a Court of Law, before a jury, and technical legal principles of procedure and rules of legal evidence prevail. The ultimate questions of liability and damages are within the discretion of the jury.

Several decades ago, our society became dissatisfied with that procedure and devised the Workmen's Compensation Acts to provide remedies for that type of industrial injury. Today all of the states and federal jurisdictions have enacted such Acts; they differ in form and in benefits; 4 states(1) do not provide compensation for occupation diseases, and in 21 states(2) benefits for the pneumoconioses are subject to limitations that are not placed on benefits for accidental injuries, while in 14 states(3) no benefits are paid for partial disability. By the acceptance of the provisions of the Compensation Acts, the employer becomes an insurer of the health of his employees as to those diseases made compensable thereby and loses his common law defenses in such actions, while the employee surrenders his right of common law actions and accepts the Compensation Act as his exclusive remedy of the injury so sustained. In such claims there is no issue of negligence, either on the part of employee or employer and the technical rules of procedure and evidence are abandoned.

Perhaps one of the most troublesome aspects of providing compensation for the dust diseases results from the varying concepts of the term "disability" under the Law. Some compensation laws define that term; some leave it to commission or court determination. Certainly one of the basic purposes of the compensation statutes was to provide monetary compensation for injuries resulting in loss of wage-earning capacity of the injured employee.

The common law concept of the term is that of "injury to the body"; while under the compensation statutes, three distinct concepts of the term have been adopted:

1. Disability implies an inability on the part of the injured employee to earn full wages in the employment in which he was last employed. (New York)

2. Disability shall mean that an employee is totally unable to perform any further work in his then occupation or in any other trade, business or occupation. (Vermont)

3. Disability means the event of an employee becoming actually incapacitated, either partially or totally from performing his work in the last occupation in which he was exposed to the hazards of such disease. (Maryland)

Bearing in mind those concepts of disability, let us consider only briefly the three main special provisions of our Compensation Acts that apply to the pneumoconioses:

1. Limitation Provisions of Monetary Benefits.

2. Limitation Provisions Relating to Filing Claims after Disablement or Death, and

3. Denial of Compensation for Partial Disability.

Time does not permit detailed discussion of these subjects, but I would like to refer to their purposes and objectives. When laws were first amended to provide compensation for dust diseases, it was recognized that many employees who had been previously exposed to dust had accumulated dust in their lungs over the period of employment antedating the effective date of the Law. This created so-called "accrued liability" or "potential liability" because when the law was amended, employers were liable as insurers and deprived of their common law defenses. Therefore, many of the states adopted provisions known as escalator clauses of monetary benefits, providing a low benefit at the effective date of the Act with gradual increases in benefits each successive month thereafter. Such provision was contained in the New York Dust Disease Act of 1936. This served to relieve the immediate impact of liability and to discourage an avalanche of claims as soon as the amendment became effective. This pattern was followed in many states.

While many of the states have retained these legislative provisions, others have since repealed them. The fact is that the employee disabled from dust diseases is just as much entitled to compensation as the employee suffering from other types of disability.

Limitation provisions relating to the filing of claims present a serious question. Employers and their insurance carriers properly desire to ascertain and discharge their liability under the law within a reasonable time after last exposure or the termination

of employment. They wish to avoid continuing liability for an extended time. Our courts have interpreted these statutes liberally, giving to the claimant the benefit of doubt. With that philosophy, I am in accord, but there should be some reasonable time limit within which claims must be filed. However, our courts have adopted the general theory that limitations of time for the filing of claims do not begin to run until the employee knows or ought to know that he has contracted the disease. The result is that claims are filed and allowed years after the employment has terminated. Legally, such doctrines do not make sense. With respect to other types of injuries or in cases of damage actions, all state laws provide some fixed period of time within which claim must be filed or suit brought. Why not as to these diseases? I pose the question, but do not profess to know the answer.

With respect to the matter of compensation for partial disability for the pneumoconioses, a far more serious problem is presented, and the legal profession is awaiting informed opinion from our medical brethren before finding the solution. If, as and when the medical profession can find some satisfactory formula for evaluating such disability, I have no doubt that our laws will be amended in this respect; but we do not seem to have reached that stage yet.

As stated before, the laws of 44 states provide that no compensation shall be paid for partial disability while in 4 states(4), legislative provisions attempt to provide limited compensation therefor. It is not my purpose to advocate provisions for or against such benefits as we shall be enlightened upon that subject by the

speakers who are to follow, but I believe it will be of interest for me to outline briefly the reasons for this problem and to state the arguments for and against the allowance of compensation for partial disability.

The old story is true that the day we were born, we began to die. With advancing age, most of us show lung changes demonstrable upon x-ray examination. Every employee engaged in a dusty trade may show such markings which the medical profession may attribute in part to his exposure. As a matter of fact, many silicotics are engaged in trade and should be continued in their employment even though they have demonstrable evidence of the disease without impairment of wage loss or embarrassment in the performance of their duties. From the standpoint of the employer, he feels that to allow that employee compensation would mean that he would be on the compensation payroll for life, with the privilege of reopening his claim from time to time with increasing benefits; in other words, every employee is a potential claimant where he has been subjected to any dust exposure. In many instances such employees may continue to perform their regular duties for a normal lifetime without wage loss. But from the standpoint of the employee, he feels that he has suffered some injury--as distinct from the concept of disability; that his disease may later become complicated with some other infection, resulting in wage loss or leading to death; furthermore, if his employment is terminated, he may be denied employment in a similar trade upon physical examination. He may not be "disabled" but he is injured. Recently in a meeting where I participated in a discussion of this subject with Dr. Vorwald

and Dr. Mayer, they used the term "disfunction". Perhaps during the course of their remarks, they may attempt some definition of that term.

In summary, the reasons for denying and granting compensation for partial disability are as follows:

Reasons for Denying Compensation:

1. Impossibility of medical evaluation of the extent of disability.

2. Compensation should not be paid unless the claimant has sustained a wage loss.

3. Employer's liability should be fully determined and discharged within a reasonable time after termination of exposure or employment.

Reasons for Granting Compensation:

1. Employee has received some injury.

2. If employment is terminated, employee may be unable to obtain other employment because of his condition.

3. Compensation for partial disability from other diseases is generally allowed.

Four states have legislative formulae that attempt to answer this problem. They are Maryland, North Carolina, West Virginia and Wisconsin; and I commend their statutes for your consideration. The gist of their provisions is to provide limited benefits for "partial disability", the payment of which discharges the employer from continuing liability. Such methods avoid the imposition of unjust and unreasonable costs upon industry and make

the liability of the employer terminable and insurable; they also give to the employee monetary benefits during the period of his readjustment in other employment where he is removed from continuing hazards.

May I refer briefly to the provisions of the Workmen's Compensation Act of West Virginia, with which I am perhaps more familiar both as to its subject matter and its administration. The law of that state provides as follows:

> "Section 6-a. Stages of Silicosis; Benefits and Mode of Payment to Employees and Dependents.
>
> An employee shall, for the purposes hereof, be deemed to have silicosis: (1) In the first stage when it is found by the commissioner that the earliest detectable specific signs of silicosis are present, whether or not capacity for work is or has been impaired by such silicosis; (2) In the second stage when it is found by the commissioner that definite and specific physical signs of silicosis are present, and that capacity for work is or has been impaired by that disease; (3) In the third stage when it is found by the commissioner that the employee has silicosis resulting in total permanent disability, whether or not accompanied by tuberculosis of the lungs."

Compensation payable for first stage silicosis is the sum of $1,000; for the second stage, $2,000. Such payment operates as a full release and discharge of the employer for continuing liability. There is no requirement that the employee shall file claim; it is within his election to do so. The purpose of the statute is to provide a fund for his readjustment in other employment where he did not continue to be exposed to the hazard of dust. As a practical matter, this law has worked successfully. Certainly, no state has had more serious problems particularly with reference to dust exposure among coal miners. It may not be the full answer to the question, but

apparently has been administered to the satisfaction of employers and employees.

The foregoing discussion has been presented with the purpose of directing your thoughts toward those questions that are troublesome in the administration of laws dealing with compensation for pneumoconioses. State legislatures will continue to search for proper legislative formulae. Let us hope that our medical brethren may help us to find the answer to these problems and also find some method to effect cure of these diseases.

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## REFERENCES



Reference (1): Four States

KANSAS, MISSISSIPPI, OKLAHOMA, SOUTH CAROLINA.

Reference (2): Twenty-one States

ALABAMA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, IOWA, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW HAMPSHIRE, NEW JERSEY, OREGON, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, WEST VIRGINIA.

Reference (3): Fourteen States

ARIZONA, COLORADO, FLORIDA, IDAHO, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW HAMPSHIRE, NEW YORK, OHIO, PENNSYLVANIA, SOUTH DAKOTA, UTAH, VERMONT.

Reference (4): Four States

MARYLAND, NORTH CAROLINA, WEST VIRGINIA, MISSOURI.