Report to the Legislature on Occupational Disease

Massachusetts Workers' Compensation Advisory Council

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INTRODUCTION

This report will be the Advisory Council's initial research in the area of occupational disease. As part of its mandate in the 1985 reform law the Council was authorized (section 17 of Massachusetts General Law Chapter 23 E) to make a study of occupational diseases and their relationship to the workers' compensation system. In order to attempt to bring this report into focus, we will look at some of the historical elements which have shaped the law in this area as it exists today. We will also try to look at some of the more important aspects that influence this area in terms of the impact on the system and the parties in the system. At the same time, we will be looking to expand on the scope of this report with additional data in the future as the necessary information becomes available.

This report will examine the interrelationship between occupational diseases and workers' compensation, with a specific emphasis on how, in light of the rapidly changing nature of the work place today, questions surrounding the impact and extent of liability may be effected. This relationship is one which presents a myriad of problems and concerns for the plethora of participants in the field of workers' compensation. Unlike other areas of governmental administration, the laws which provide remedies for those workers who believed they are injured at work envelop a number of ancillary areas beyond the reach of the main participants: injured workers, employers, and insurers. The compensation system, as it is generally found throughout the United States today also involves attorneys; rehabilitation specialists; medical providers; and safety, health, and disease control regulators at both the state and federal levels. As a result of its diverse elements, viewed in terms of entitlement to workers' compensation, occupational diseases present a number of distinct problems for all of the participants in the system.

It has long been apparent that some of the fundamental principles of workers' compensation may obstruct the goal of full and complete coverage for occupational diseases. The workers' compensation system is intended to compensate injuries and illnesses arising "out of and in the course of" employment. This criterion is relatively easy to establish for most traumatic injuries, where the source of

injury is apparent and the physiological effects are generally immediate and visible. In contrast, the causes of occupational illnesses are often difficult to establish with certainty. Occupational illnesses may be virtually indistinguishable from diseases with non-occupational causes and may become manifest only years after exposure to a harmful stimulus. They therefore present special problems in determining eligibility for workers' compensation.

Occupational diseases cover a wide range of illnesses. Typical causative agents include toxic and carcinogenic chemicals and dusts, as well as other biological and physical agents. Undoubtedly the best known of the various occupational diseases is asbestosis, which has drawn attention for its tragic consequences upon workers in construction, shipbuilding, and other industries utilizing asbestos. Less visible have been the painters and automobile mechanics who develop lead poisoning, rubber workers who suffer from leukemia due to exposure to benzene, electroplates who develop cancer of the prostrate from breathing cadmium fumes, workers in chromate production industries who die of lung cancer, and numerous other occupational diseases which range across industries and occupational groupings.

The National Institute for Occupational Safety and Health (NIOSH), developed the following rankings of work-related diseases in 1982: 1) occupational lung diseases, including asbestosis, byssinosis, lung cancer, and occupational asthma; 2) occupational cancers other than lung cancer including leukemia and cancers of the bladder, liver, and nose; 3) cardiovascular diseases, including hypertension, myocardial infarction, and coronary artery disease; 4) reproduction disorders; 5) neurotoxic disorders; 6) hearing loss; 7) dermatologic conditions; and 8) psychologic disorders.

Whatever the difficulties in identifying the work-relatedness of illnesses, there is no question that occupational diseases affect the lives of many American workers and their families. In order to fully explore how occupational diseases impact on the various compensation systems, it may be helpful to briefly review the scope of

workers compensation and its purpose, with a particular focus on its evolution in Massachusetts. The impact of occupational diseases cannot be overemphasized. In analyzing its impact on the overall system, many different estimates have been proffered. One author has stated that over 100,000 employees will die each year and more than 50,000 will pass away each year over the next few decades as a result of exposure to asbestos alone.[1] The United States Government, in 1972, estimated that at least 390,000 new cases of disabling occupational diseases occurred each year.[2] Other reports have stated that as many as 500,000 employees develop official occupational diseases each year.[3] It is understandable, due to the difficulty in diagnosing these diseases and the long latency periods, why the numbers differ. Any of these estimates is equally disturbing, but in fact, as technology advances, and creates additional elements for exposure, the problem may continue despite the dedicated efforts to find a solution.

The premise behind workers compensation has been characterized as a series of basic objectives. These objectives, without placing any preferential order on them, are the broad coverage of employees and work-related injuries and diseases; substantial protection against interruption of income; provision of sufficient medical and rehabilitative care; the encouragement of safety; and an effective system for delivery of benefits and services.[4] Other important goals, such as dependency benefits and job retention rights are also important, but play a lesser role with respect to the actual litigation of occupational diseases. There is an increasing recognition today that occupational diseases create special challenges for workers' compensation systems.

CHAPTER 1

GENERAL HISTORY

Many of the problems surrounding the compensation of workplace diseases can be traced to the very beginnings of workers' compensation in this country. When the first workers' compensation statutes were introduced in the early part of the century, little was known about the work-relatedness of many types of illnesses, and the statutory provisions as they were then formulated sought specifically to compensate traumatic injuries. Since that time much has been discovered about the harmful effects of hazardous substances and conditions in the workplace. Occupational diseases are now recognized as a serious workplace problem and are covered in all state workers' compensation laws.

Prior to the enactment of workers' compensation laws, actions for damages from work related injuries required that a suit be brought by the injured party. If the plaintiff could prove that a tort had been committed, then recovery was possible. In order to be compensated for an industrial injury an employee had to establish and prove that the injury was the result of the employers' negligence. This process not only required a great deal of time and expense, but the application of the common law principles by the courts often created doubtful conclusions as to the respective parties chances in the litigation process. In addition to the hardships encountered in cost, proof, and time, the plaintiff had to contend with the "unholy trinity of defenses", which were available to employers: the fellow servant doctrine, assumption of the risk, and contributory negligence.[5] As industrial accidents increased, it was evident that demands for some sort of institutional change would have to be addressed in a meaningful manner.

One response to the problem was the enactment of employer liability laws. In 1838 Prussia passed an employers liability law for railroad employees and England passed an act in 1880. The first law initiated in the United States was enacted in Georgia in 1855.[6] Most of these acts abrogated or limited the use of the fellow servant defense and mitigated the use of the assumption of

the risk defense.[7] Dissatisfaction with both common law remedies and employer liability statutes was widespread. These actions often left the injured employee, or the employer, facing the prospect of uncertain verdicts and damage awards. The sums that were awarded were often inadequate (paying only for past injuries and medical benefits) and the cases created both a backlog on the court dockets as well as hostility between employees and employers.[8]

Change initially came in 1884, when Chancellor Bismarck of Germany put through the first modern workers' compensation act, the Accident Insurance Act, which removed the civil law requirement of negligence and provided an injured employee with two-thirds of his/her pay while incapacitated.[9] While the German law created a state administered fund for the payment of benefits, it also was a cooperative act, which required employees and employers to pay into the fund. The vast majority of compensation laws have not required employees to pay into any funds. The key, however, was that benefits were paid without regard to issues of fault.

Thirteen years later, England passed the Workmen's Compensation Act of 1897[10], which as a wage loss statute paid to the employee fifty percent of the average weekly earnings during incapacity, and became the model upon which many states in this country patterned their laws.[11] The English system provided for private companies to write the insurance policies and so doing in effectively built in the cost of industrial accidents as a factor to be considered in the costs of production.[12] Other European nations followed the lead of England and Germany, due in part to certain prevalent progressive movements at the time, which called for a more enlightened approach to industrial relations, and also as a result of increasing concerns over the growing unrest amongst the workers who were advocating changes in the employer/employee relationship.[13]

In the United States, the initial attempt at enacting some form of workers' compensation law was in Maryland. The law was similar to the German statute in that it was a cooperative law, but it only covered specific occupations.[14] Although declared unconstitutional by a municipal court (and not appealed) it

set in motion a trend that was quickly seized upon in other areas of the country.[15] There was mounting pressure to address this problem, as the casualties due to industrial accidents increased.[16] Ironically, the first law passed by a legislative body in the United States provided benefits for laborers and employees of the Insular Government of the Phillipines.[17] Two years later Congress passed an act to provide coverage to artisans and laborers employed by the federal government in manufacturing establishments, arsenals, navy yards, certain construction projects, and work on the Isthmian Canal Commission.[18] While this law was narrow in scope, it has been labeled the first workers' compensation law in the country.

At the state level, there were numerous studies and commissions empowered to research this topic but in many respects, while recognizing the necessity for some form of system to alleviate this problem, there were concerns raised that states which did enact laws would place their business' at a competitive disadvantage in the open marketplace. Montana enacted a law in 1909, which taxed coal mines in order to pay compensation to injured miners.[19] The Montana Supreme Court struck down the law on the grounds that it violated equal protection guarantees in that it only applied to one class of industry.[20]

Some of the advocates of reform came from unexpected quarters, such as the steel industry. U.S. Steel implemented its own safety program in 1908 and two years later started its own compensation plan for industrial accident victims.[21] The philosophy behind this plan is described as not an entirely altruistic one, but rather it is predicated on a purely economic rationale, in part based upon a commonly held belief at that time that federal administration of any system should be avoided, since state legislatures would be more susceptible to political pressure to keep benefits at lower levels.[22]

At the state level, the start of workers' compensation can be seen in 1910. New York enacted two statutes, one of which was compulsory upon hazardous industries.[23] The compulsory law was declared unconstitutional on the general grounds that liability without fault was a taking of property in violation of the state and federal constitutions.[24] In the next year ten states, including

Massachusetts, enacted statutes.[25] This began a period of almost universal acceptance, practically overnight in legislative terms, so that by 1915 thirty-one states and two territories[26] had replaced or supplemented their employer liability laws with workers' compensation statutes, and by 1921 a total of forty-two states[27] had acts on the books. This quick adoption of workers' compensation, which in many ways was the first institutional piece of social legislation, has not been equaled since. Today, each of the states has a workers' compensation law, with Hawaii being the last state to pass such a law in 1963.

MASSACHUSETTS HISTORY

Massachusetts passed an Employers Liability law in 1887, which modified the existing common law system by providing an employee with the same rights for legal action against an employer as those held by any other person and by restricting the legal defenses available to an employer.[28] These provisions nevertheless did little to resolve the problems of delay, expense and hardship faced by an injured employee. A number of commissions were established during the early years of the twentieth century, to look into this matter and seek a solution to rectify the problem.

The initial Commission was established in 1903.[29] The Commission realized that suit involving personal injuries were encumbering the courts' dockets, and of these cases being filed approximately 12%-14% involved claims by injured employees.[30] As part of their final report, they included a draft of a workers' compensation law modeled extensively on the English law, but the time was not yet ripe for passage.[31]

Legislation was filed in 1905 and 1906 but neither was successful. A joint Special Commission was formed in 1907 to study the issue and again presented a workers' compensation bill but it too was not enacted.[32] However, support was growing for a voluntary format of compensation, which would allow employers to enter into contracts with employees to substitute a plan of compensation for legal liability under the existing laws. An act was ultimately passed in 1908.[33] It was thought that these plans would inure to the employees benefit, without burdening employers. In 1909 the law was amended to permit the Massachusetts Board of Conciliation and Arbitration to review and approve agreements submitted by either employers or employees.[34]

Finally, the impetus for the enactment of a workers' compensation law in the commonwealth came to a head. In 1910 a resolve was passed to provide for a five member commission, the purpose of which was to investigate the effect of the present laws relating to the liability of employers for injuries received by employees in the course of employment.[35] In the resolve, the General Court stated

that the public good required changes in the existing system of determining compensation for injured employees and that as a result it was incumbent on the Commonwealth to provide more suitable relief.[36]

This commission held extensive hearings through the state and issued a number of reports.[37] Prior to passage, the legislature requested an advisory opinion from the Supreme Judicial Court on the constitutionality of the proposed law. The Court stated that the question submitted to it concerning the act didn't violate any right secured by either the state or federal constitutions, basing its opinion primarily on the voluntary nature of the act.[38] As a result of the work of the commission, a bill was finally passed in 1911, most of which took effect on July 1, 1912.[39]

During the three decades between enactment and the onset of World War II, the law was reviewed, studied, and investigated numerous times.[40] The law itself was an elective compensation scheme, which gave injured employees of companies, which elected to come under the law, the right to be compensated for their loss irrespective of proof of negligence. One intent was to provide incentives for employers to elect to come under the act by eliminating the "unholy trinity of defenses" and thereby placing non-subscribing employers at an economic disadvantage.[41]

The Supreme Judicial Court upheld the constitutionality of the law in 1914.[42] In ruling that the law was valid, the Court stated that the law "was a humanitarian measure enacted in response to a strong public sentiment that the remedies afforded by actions of tort at common law, and under the employers liability act, had failed to accomplish that measure of protection against injuries and relief in cases of accident which it was believed should be afforded to the workman."[43] The Court also held that the act was to be interpreted in light of its purpose and, perhaps more importantly, so far as it may reasonably be interpreted in order to achieve its "beneficent design".[44]

NATIONAL HISTORY

One of the primary purposes of a workers' compensation law is to ensure a quick remedy for injured workers and a certainty of costs for employers. As a result of this most laws are administered by governmental agencies which both oversee the law and adjudicates the disputed cases.[45] The focus of any system should be to resolve the case quickly and get the injured employee back to work as a active, useful, and productive member of society. By far, the most significant aspect is to provide the required benefits, irrespective of fault.[46] Workers' compensation is intended to be a no fault system, and as such, employers and insurers are not liable for awards and damages that would be generated under a "tort system", where the prerequisite for recovery is the establishment of liability and is almost universally the exclusive remedy for an employee injured at work.

While all of the various acts were enacted in response to the alarming rates of injuries, in many ways the legislative and administrative schemes were developed to address traumatic injuries. These injuries, for the most part, have finite elements of causation, not chronic injuries where the epidemiology of the causation and the effect is at issue. As a result many legislatures did not include occupational diseases in the compensation laws. In some respects this focus on traumatic injuries may be explained by a reluctance to relinquish certain common law concepts, such as "accidental injuries" or inherent employment hazards, which were often used as the basis for legal action and which rarely included occupational diseases. On a national scale, the first major accomplishment came in 1917 when the U.S. Supreme Court upheld the constitutionality of three separate state statutes.

In response to its initial workers' compensation law being struck down, New York amended its constitution in 1913, and in so doing eliminated any limitation on the legislature's right to pass laws for the protection of lives or for the payment of compensation for injured employees. As a result a law was passed where employers were required to secure the payment of compensation through either a state fund, private insurance, or by providing

satisfactory proof of ability to pay compensation.[47] The Supreme Court held that the compulsory scheme did not violate the fourteenth amendment of the federal constitution as an unlawful taking of property without due process.[48] In light of the earlier rejection of the first New York law, this case provided a major stepping stone towards the fulfillment of the goals of the many reformers seeking to address the needs of the injured worker as it removed concerns over possible constitutional restraints.

That same year, the Court also held that Iowa, in enacting an elective law, could establish a burden of proof consistent with the United States' Constitution and that there was no right to have common law defenses perpetuated in civil actions.[49] The Court also upheld mandatory contributions to a Washington state fund, by declaring that it was within a states' rights to pass laws necessary to promote health, safety, and the general welfare and as such, the state had the right to regulate industries which regularly resulted in injuries.[50] Despite these cases, which gave the states much needed guidance on the outer parameters of their legislation, this liberality did not spread to expand the coverage of occupational diseases.

OCCUPATIONAL DISEASE HISTORY

Occupational diseases are not recent discoveries. As early as 1775 coal soot was a known source of skin cancer and by 1889 radioactive chemicals were known as a source of lung cancer.[51] By 1877, Switzerland published a list of forty-five chemicals which could cause specific occupational diseases.[52] In the United States reports were written as early as 1837 describing problems in this area, and by 1850 Massachusetts was conducting studies into occupational safety.[53]

England amended its statute in 1906 to expand coverage to a schedule of occupational diseases.[54] Most legislatures in the United States did not mention diseases when defining the extent of coverage in the initial passage of workers' compensation acts. In 1917, California put specific provisions in its law for the extension of coverage to occupational diseases and a few other states followed suit.[55] The first state to incorporate a schedule into its act was New York (which was modeled on the English law)[56] and while many states have experimented with this format, only six states today depend on schedules to determine compensability.[57] While schedules enable parties to establish the necessary factors in the proof of their case with greater certainty and ease, they also limit claimants in a work environment that is constantly expanding as access to technological advancements increase.

One of the problems that was initially encountered for the newly enacted workers' compensation laws was the interpretation by the courts in reviewing claims for compensation that were not the result of a traumatic injury. These differences were recognized by state administrators in that the results for diseases are not as apparent nor did diseases involve the same element of suddenness that was such a strong factor in calling attention to industrial accidents.[58] The courts often looked to the common law for guidance in their interpretation of the laws. Under the common law however, the term personal injury did not refer to an occupational disease, and as a result in many jurisdictions there was no case law to substantiate an employee receiving compensation for an occupational disease at common law.[59]

A seminal Massachusetts case in the formulation of later workers' compensation court decisions concerned the interpretation of an insurance contract, for employers liability insurance, between a dairy and its carrier.[60] An employee had contracted glanders, an infectious disease, for his work with the employers' horses, and had brought an action against the employer.[61] After receiving notice of the action, the defendant insurance company declined to take on the defense of the action claiming that the injury did not come within the terms of the policy which covered accidents in the workplace.[62] The Supreme Judicial Court held that the infection causing the disease was contracted as a result of an accident.[63] In reaching its conclusion, the Court held that there was no reason not to construe the policy terms "bodily injuries accidently suffered" as covering any accident which causes a bodily injury, even if the injury is the result of a disease.[64]

The first case to hold that an occupational disease was a personal injury was decided in Massachusetts in 1914. The Court held that there was nothing in the law that lead to the conclusion that the term "personal injury" was to be used in a narrow or restricted sense.[65] The fact that the term accident was omitted from the Massachusetts act differentiated it from other statutes and decisions, and therefore the vapors which caused the employee's blindness created a compensable injury under the law.[66] The Supreme Court subsequently expanded the definition to include any injury or disease that arises out of employment which causes incapacity and impairs the employees' earning capacity.[67] Further expansion of the phrase "injury" led the court to conclude that the common understanding would have the term apply to whatever part of the body was incapable of normal use so that it was unavailable for the purpose for which it was adapted.[68]

The decisions in other jurisdictions varied from state to state. In many instances the state courts looked to the statutes' definition of the term "injury". As noted above, Massachusetts used the term "personal injury", while other jurisdictions followed the English law and construed the term injury to include only those caused by accidents.[69] One court held that the interpretation of the term "accident", as set forth in the workers' compensation law, meant an unexpected or undesigned occurrence and therefore

an employee who contracted typhoid fever from drinking contaminated water at work was entitled to be compensated.[70] Another court rejected the premise set forth by the Commonwealth in Hurle's Case, 217 Mass 223, 104 NE 336 (1914). Since the holding in Hurle defined the term "personal injury", not "accident", and the Michigan Court concluded that since there was no common law right of action for an occupational disease the legislature had not intended to include it's coverage under the law, but rather only injuries arising from accidents.[71] In another jurisdiction, death from ivy and septic poisoning was determined not to be an occupational disease, but because it was held to be accidental, it was therefore compensable.[72]

The concern over the impact of occupational diseases on the workers' compensation system was not ignored in Massachusetts. In 1913 the state established a joint board composed of the industrial accident board and the department of labor and industries.[73] The goal of the board was to decrease occupational illness' and diseases, in part through determining which devices were best suited for preventing diseases, and also by preparing lists of diseases which are regularly reported upon. By 1915 fifteen states mandated the reporting of certain occupational diseases.[74] During the first three years of the Massachusetts act, the numbers of reported occupational disease cases increased from 106 to 364 to 702 respectively.[75] One point of particular note was the average number of lost work days per case in the third year of the act was 18 days greater for occupational diseases, which made this type of injury more of a burden on the individual claimant, even though the cumulative effect of occupational diseases on the total accident rate was small.[76]

During the Massachusetts statute's fourth fiscal year, the number of nonfatal disease cases increased 93% and fatal disease cases increased almost 800%.[77] Occupational diseases were responsible for 2% of all tabulatable injuries (those where the worker missed at least one shift).[78] The average number of days lost per case decreased from 44 to 23.3, in part because it was believed that as the numbers of accidents reported increased, through greater recognition and more regular reporting, the

larger universe contained a higher number of disease related injuries that incapacitated workers for short periods.[79] Also, in 1916 the legislature, against the recommendation of the Governor, transferred all of the authority formally held by the joint board directly to the department of labor and industries.[80] This transfer removed what may have been a important data base into a separate administrative system, and bifurcated the enforcement mechanism into punitive functions, by the state, and positive economic functions, by insurers who relate injury experience to premiums paid.

While these administrative and statutory changes were taking place, the Massachusetts Court continued to define its interpretation of the statute's intent. In 1916 the Supreme Judicial Court held that the law did not only protect a healthy employee, and as long as the employment was a proximate contributing cause of the injury, there was no exclusion from coverage where a pre-existing diseased physical condition may have rendered the employee unusually susceptible.[81] This decision affirmed the proposition that the employer, and therefore the insurer, takes the employee "as is". If work exacerbates a condition, such as heart disease, the insurer is liable. The term "personal injury" included a pre-existing heart disease which is accelerated by strain or exertion at work.[82]

This principle was upheld by the Massachusetts Supreme Court when it decided that a pre-existing constitutional disease, which was aggravated by a work accident and rendered the employee insane, was compensable.[83] The Court modified its perspective in this area when it decided that the gradual breaking down or degeneration of tissues caused by work was not a personal injury within the meaning of the act.[84] The court was in essence stating that the gradual erosion of an employee's health, or "wear and tear", even if work related and disabling, would not fall within the confines of a personal injury. Since exposure to occupational diseases was often a debilitating process that occurred over time, and was extenuated by work, it was unclear how the Court was going to reconcile the two decisions.

Based upon the prior interpretations of the term personal injury one could have concluded that as long as there was a causal relationship between the injury and the disease that the employee would be compensated. Until 1920, it was assumed that the law covered occupational diseases.[85] In that year, the court issued a decision in Pimenthal's Case and stated that the law does not include diseases and it cannot be held to cover diseases contracted by employees in the course of and arising out of employment.[86] While finding that there was no evidence to warrant compensation for a cigar maker's occupational neurosis of the nerves, the Court backtracked to state that the liberal interpretation in Johnson's Case, 217 Mass 388, 104 NE 735 (1914), was limited to the precise facts of that case and was not to be construed to include matters outside the scope of the statute.[87] This holding also retreats from the intent of the beneficent design outlined in Young v. Duncan, 218 Mass 346, 106 NE 1(1914) (which upheld the act's constitutionality) and from the arguments noted in Hurle's Case which emphasized the statutory amendments which changed the reporting requirements for employers from accidents occurred to injuries occurred.[88]

As a result of the Court's retreat from its earlier holdings, there was encouragement to include within the definition of a personal injury any disease which was peculiarly incident to employment.[89] The retreat was halted in 1929 when the court issued a decision that held that pneumoconiosis was a personal injury under the law. The court stated that while a simple disease resulting from a job wasn't compensable, an injury through a foreign substance, set in motion by the employer's business, is compensable.[90]

Within a few years the issue as to which insurer, where the employer had changed carriers, was liable for occupational diseases finally reached the highest court in Massachusetts. Due to lengthy latency periods, difficulties in diagnosis, and questions concerning the breadth and extent of exposure, it was inevitable that this issue would be litigated. In DeFillipo's Case, the Court upheld an Industrial Accident Board decision finding that a successor insurer, not the first insurer, was liable for a stonecutter's incapacity from pneumoconiosis.[91] The decision once again set forth the dicta that an insurer

takes the employee "as is", holding that it is immaterial if an employee is unusually susceptible to a disease, and that liability accrues whenever an injury occurs within the policy period.[92] This was an important point to reemphasize for occupational disease claimants. Another aspect of this case, and other precedential cases at the time, is that specific attention was finally focused on the drastic toll inflicted on the Massachusetts worker and economy generally by occupational diseases, and in particular by silicosis.

The impact of the devastation of silicosis was not felt solely in the Commonwealth. Silicosis, which is the most prevalent form of pneumoconiosis, is contracted when workers inhale silica dioxide (in crystalline form), or dust containing silica particles.[93] It is often found in workers who have worked in foundries or quarries. It came into the public eye as a result of a tragedy which occurred in the construction of the Gauley Tunnel, in West Virginia, at the beginning of the 1930's. While reports of the extent of the workers inflicted did not surface immediately, estimates showed over 470 dead and 1,500 disabled as a result of breathing dust which had a silica content at times of 90-95%.[94] This incident focused national attention on one aspect of the occupational disease problem, yet little was accomplished legislatively to either adequately compensate victims or create viable incentives for prevention of future disasters.

Massachusetts faced a crisis of its own with silicosis. In 1933 a five member commission was established to investigate certain specific questions for the granite and foundry industries and the problems concerning industrial disease compensation generally.[95] The problem had reached such proportions that insurers had almost completely withdrawn from writing policies in these industries, and when they did provide coverage, the rates were based upon assumptions that every worker would succumb to silicosis within ten years.[96] In addition to the direct effect of silicosis, many of the workers exposed either developed tuberculosis or pneumonia which further compounded an already existing problem.

The Commission's report notes that of the forty-four states which at that time had enacted some form of a workers' compensation statute, ten covered occupational diseases and only five would allow a claim for silicosis.[97] However the real problem facing the state was that insurers, as a result of difficulties in predicting future losses, would not insure employers in these industries. Within three years the premium rates, per $100 of payroll, had increased 250%.[98] The report recommended making coverage under the law compulsory for the foundry and granite industry, while equitably spreading the risks amongst insurers.[99] At the time, 15.2% of all employees in the granite industry had silicosis and 7.6% of the workers had silicosis and tuberculosis.[100] Since the former represented such a significant percentage of the workforce and the latter had a life expectancy of about eighteen months, annual physicals were proposed for all employees.[101] Another recommendation, in addition to an increase in preventative measures, was the use of a medical review board to assist the board in determining occupational disease cases.[102] This last aspect was enacted as part of the law in 1935.[103] These studies had one unforeseen benefit and that was to focus the attention of the political arena on meeting the needs of the injured employee.[104]

The crisis with silicosis continued and once again the legislature decided to investigate it.[105] Premiums had continued to rise until, with the agreement of the Granite Cutters union, employees were paying one-half of the employers insurance premium.[106] In order to provide coverage for injured quarry workers, the law became a cooperative statute, and the cost of insurance was no longer totally a cost of production for the employer alone. The majority of the commission issued a number of recommendations, among which was a cap on death benefits for silicosis victims of $3,000; the elimination of partial disability (due to the widely held opinion was that no one injured by silicosis could be less than totally disabled) limitations on insurer liability for disability; and the pooling of risks and the capping of rates at six percent.[107]

The General Court responded by enacting the $3,000 limit for total incapacity benefits, eliminating partial incapacity benefits for silicosis or occupational dust disease, and capping rates for the first year at 6% of payroll.[108] These amendments also set stringent eligibility criteria for filing a claim. Employees must have worked, where the exposure occurred, for at least 180 days and total incapacity or death must take place within three years of the last exposure.[109] Under the amendments there was no presumption of silicosis unless the employee was exposed for five of the ten years prior to total incapacity; the last insurer was liable as long as the employee was exposed for more than sixty days; and the time of the injury was defined as the date of total incapacity.[110] This was the first attempt to limit, within the workers' compensation law, the right of an employee to file a claim. The amendments were narrow in scope and of limited analytical value since the changes did not apply to exposures prior to August of 1939 and most were repealed in 1950, so it is questionable how many claimants met the eligibility requirements and had their cases processed under these sections.[111]

In addition to the extensive case law on dust related diseases, the Commonwealth addressed a number of other areas in the first few decades of the workers' compensation statute. The Supreme Judicial Court upheld decisions finding other forms of diseases to be compensable. Although a voluntary member of a local fire brigade, an employee was found to be acting in a dual capacity when answering a fire alarm near his place of employment and since his contraction of pneumonia, as a result of fighting the fire could be traced to his employment, it was a compensable personal injury.[112] Exposure to asbestos was held to be compensable.[113] Tuberculosis was found not to be a personal injury if the only causal connection of the disability was the presence of the germs of the disease in a tuberculosis ward of a hospital.[114] This effect was changed in 1941 by the inclusion of infectious or contagious diseases inherent in employment, under the definition of personal injury in the statute.[115] However, the state Supreme Court held that if the tuberculosis was dormant, and as a result of changes in working conditions the disease became active and resulted in incapacity, a causal connection would have been established between the

employment and the injury.[116] Finally, in 1946 the Supreme Judicial Court invalidated section 9B of the law, which stated that the diagnosis of a medical panel was binding on the parties. The decision rested on the fact that under the law an ex-parte investigation was conducted by the medical panel, without any provision for representation of the parties, and as such this was held to be a violation of both the state and federal constitutions due process requirements.[118]

CHAPTER 2

PROBLEMS IN OCCUPATIONAL DISEASE CASES

Any examination of workers' compensation must include a brief review of the term "arising out of and in the course of" as it applies to the employment of a claimant. This term has perhaps even greater significance when it is analyzed with respect to occupational diseases and illnesses. As mentioned previously, part of this is a result of the lengthy latency periods of many occupational diseases and part is a result of the difficulties which occur as a result of the problems in diagnosing the causation of the injury as being work related. If an employee suffers a traumatic injury while at work, such as breaking an arm, there is little problem with establishing a connection between the injury and work. If however, the employee develops a lung disease, whether the injury is a result of the inhalation of dust particles at work, or the product of smoking two-packs of cigarettes a day for the last twenty years is often a source of contention between the parties. The fact that many occupational diseases result in permanent and total incapacity and present little possibility of rehabilitation or total recovery may add incentives for the defendant to contest the case.

The fact that these phrases have been the source of so much litigation should not be surprising. When only a handful of laws had been enacted serious concerns were raised over the use of these terms. As early as 1912 one noted commentator had stated that workers' compensation statutes should be drafted to prevent rather than encourage litigation and that the term "arising out of and in the course of employment" was not calculated to secure the necessary certainty to eliminate fault and prevent the controversion of claims.[119] Supreme Court Justice Murphy, in an oft quoted case, wrote that the phrase is deceptively simple and litigiously prolific.[120] The terms have been the source of numerous articles and commentaries, and yet is still a major source of contention between parties.

One of the earliest cases to interpret this phrase was a Massachusetts decision which held that an injury arose from the job when, upon consideration of all the

circumstances, there existed a causal connection between the conditions under which the work was performed and the resulting injury.[121] The Court also stated that the causative danger must be peculiar to the work, not common to the neighborhood, and incidental to the character of the business.[122] The holding in this case was followed by a number of other jurisdictions and added to the voluminous case law for this phrase.[123] This dicta often foreclosed recovery for employees where it was the job itself that brought the worker in contact with the elements that brought about the injury. One of the issues in this area for occupational diseases is that at one time or another almost every disease has been found to be causally connected to employment either by original causation, aggravation, or hastening of the disability.[124]

The line of cases ended in Massachusetts in 1940 when the court issued a decision which avoided the severe limitation of the need to have the exposure peculiar to the work of the employee. In Caswell's Case, the court set forth a definition of arising out of that has liberalized the term and provided a wider latitude in determining compensability.[125] The Court sustained a finding of the Industrial Accident Board that an injury received by a stitcher when a wall collapsed during a hurricane, something that was not peculiar to his employment, was compensable.[126] In deciding the case, however, the Court provided new guidance for determining "arising out of or in the course of employment". It stated, when discussing an injury, that "It need not arise out of the nature of the employment. An injury arises out of the employment if it arises out of the nature, conditions, or obligations or incidents of employment; in other words out of the employment looked at in any of its aspects".[127] The elimination of the risk creating the injury being "peculiar" to the job as a factor in determining compensablity, allows courts to uphold that where there has been any reasonable relation to the employment, or the employment is a contributing cause, that the injury arises out of the employment of the claimant.[128]

STATUTORY ISSUES IN OCCUPATIONAL DISEASE CASES

The lack of uniformity across jurisdictional boundaries has led to many different approaches to compensating victims of occupational diseases. In part, the response has often been to address concerns that have emerged over the last forty years. In the 1930's there was concern over the high rates of silicosis. In the 1940's, there were incidents of beryllium poisoning, in part as a result of the war production effort. The 1950's and the early 1960's saw an increase in the concern for victims of job related radiation poisoning. At the time most state compensation laws were not prepared for the atomic age. In the late 1960's and to the present, there has been a great deal of attention focused on the workers who were exposed to asbestos and who are just now beginning to evidence symptoms of the various cancers which are caused by such exposure.

In general, there have been a number of methods employed by states that have attempted to provide a mechanism to manage these types of cases. A number of states set forth a schedule which lists various occupational disease for which compensation may be awarded. Certain states have separate occupational disease laws. Others set specific time limitations on filing claims, or require that exposures be within a specific time frame, or within the boundaries of the state where the claim is filed. A number of jurisdictions placed restrictions on diseases of ordinary life. A number of jurisdictions, such as Massachusetts, include within its definition of personal injury occupational disease, while others have defined it separately.

A. Occupational Disease by "Accident"

The number of states which still incorporate the term "accident" into the definition of injury has decreased from thirty-seven to thirty-two in the last few years. Only seven states include occupational diseases under the definition of the term "injury".[129] In many ways as the laws have been amended to include to a greater extent occupational diseases, much of the differentiation between

accident and disease has lessened, but it still remains a factor in some jurisdictions. Two crucial points of distinction exist between accident and disease: the element of unexpectedness and the matter of a definitive time period.[130] In some respects diseases contracted at work were considered, in common law terms, as part of the risk involved in working in that particular job, and in a pure marketplace, would be rewarded with higher wages. Unfortunately, many workers were not told of the hazards they faced, and in some cases the dangers were not known so that this type of theory is rendered inapplicable. Many compensation laws did not mention diseases on the belief that diseases should be covered as part of a health insurance program.[131]

The federal jurisdictions have followed the Massachusetts holding in Hurle, when they decided that silicosis was an injury and there was no need to show that it occurred as a result of an accident.[132] The Federal Employers Liability Act and the Boiler Inspection Act, while including occupational diseases, confined injuries to those happening by accident. The Supreme Court held that in light of the Acts' humanitarian purpose, accepted standard of liberal construction, and absence of legislative intent to require a restrictive purpose, that silicosis was within the coverage of the law where due to the employer's negligence.[133] In jurisdictions that require injury by accident, causation for disease usually rests in the working conditions of the employee over a period of time. As the focus of occupational disease broadens, so too will the definition of the term accident since it is illogical to pay for an occupational disease where disability occurs gradually, and not pay for an unexpected disease which also occurs over time.

B. Ordinary Diseases of Life

Ordinary disease of life have created a problem from the outset of workers' compensation legislation. The question has been argued extensively whether an employer/insurer should be liable if the disease which is contracted is one which could be the result of an exposure from everyday life. This element may take on added importance

in the next few years as a result of the AIDS epidemic. Early decisions, such as Mercier's Case[134], discussed above, held that tuberculosis, an ordinary disease of life, was a compensable personal injury when brought on by five months of temperature changes and overwork due to labor shortages. Other courts held that a communicable disease, contracted at work, had to be one which is commonly regarded as natural, incident to, or concomitant with the job.[135]

Allergies, under the majority view are seen as possibly falling under occupational diseases, while the minority holds that allergies are not covered.[136] An allergy to dust has been found not to be compensable, since the condition was brought on by a nearby construction project which was temporary in nature.[137] Even where the law excluded ordinary diseases of life, tuberculosis was found to be compensable where the inception of the disease was related to work.[138] Asthma from smoke and dust in a plywood plant was compensable in that the conditions of extra-hazardous employment naturally and proximately caused the disease.[139] It appears that in the last few years the number of jurisdictions which exclude diseases of ordinary life has increased from 23 to 28.[140] This trend could be a response to the large number of occupational disease claims that are being filed.

C. Distinctions for Occupational Diseases

There are differences in a number of states for diseases that do not exist for other industrial accidents. At the current time there are six states which enumerate the diseases that it will compensate in a schedule while approximately forty-one have a special act which may deal with a specific type of exposure.[141] One common example which many jurisdictions have adopted, covers ionizing radiation, or radiation generally, and were enacted in response to concerns in the 1960's to radiation exposure within the atomic energy industry.

The distinct treatment for occupational disease has not escaped challenges. A 1935 decision by the Illinois Supreme Court struck down an occupational disease law which

mandated that employers provide safety devices, reasoning that the law and its mandates were a complete stranger to the common law.[142] The same statute was later upheld as a reasonable exercise of police power.[143] Another court held that it is not an unconstitutional denial of due process to deny permanent partial benefits to occupational disease victims where other injured employee could collect, and that the legislature had a rational basis for making such distinctions due to the fact that diseases take a long time to manifest, and such manifestation can change as the diseases progresses making permanent partial disability assessment extremely difficult.[144]

Another common element that has been adopted is to limit coverage, for the purposes of determining causality, to diseases peculiar to the trade or occupation of the employee. At least thirty-three states have adopted this approach.[145] Massachusetts has no statutory definition of causal relationship. The Supreme Judicial Court has held that the harm must come from a single, or series of incidents at work, and while it need not be unique to the trade, the harm must be identified with the job.[146]

Examples of the specific distinct approach taken for occupational diseases can be seen in the Nevada and Maine statutes. The Nevada law makes the administrative rights and remedies under the Occupational Diseases Act an exclusive one. A claim for death or disability after July 1, 1947, must be brought within ninety days of the employees knowledge of the injury, or within one year of death.[147] The law sets forth a schedule of twenty-two diseases and also covers those diseases which are incidental to work, traceable to the job, and for which a causal connection between the job and the disease exists, not from a hazard to which the worker would be exposed to equally outside of work.[148] The statute provides for a medical review board to resolve any medical question in controversy, the decision of which is binding on the insurer, which in Nevada is an exclusive state fund.[149] While Nevada may not be thought of as a highly industrialized state, it has provided employment in the mining and nuclear industries, both of which have seen a high rate of occupational diseases claims.

The Maine act covers diseases which are due to causes and conditions which are characteristic of a particular trade or occupation, arises out of that employment, and the last injurious exposure occurred after January 1, 1946 in the state of Maine.[150] The law imposes liability on the employer, and therefore its insurer, where the last injurious exposure took place, but indemnity benefits are computed on the average wages of the worker when last exposed and incapacity must occur within three years of last exposure.[151] The law has a special section for asbestos related diseases, which eliminates the three year period for incapacity to occur, but which only applies to an exposure which took place after November 30, 1967.[152] Since the largest employer in the state is the Bath Iron Works, which has been building ships for decades, the true effect of this section may be felt in the future by employees working in those ship yards in the 1940's, 1950's and early 1960's.

D. Time Standards

Many of the states have established specific timeframes for exposure to the hazardous substance which has allegedly caused the injury. While this may help the claimant in certain cases, by creating the foundation for a presumption of disability, strict and narrow adherence to the statutory language can often give rise to harsh and painful results. A recent study shows that eighteen states have a minimum exposure for dust diseases, five have a minimum exposure for all diseases, and fourteen have established a maximum exposure for cases which result in the death of the individual.[153] In addition, eighteen states have enacted a maximum exposure for disability and many require that the exposure take place within the state itself.[154]

The legislative timeframes have created problems for all parties, especially where there is a question of medical evidence which would claim or rebut the employee's total disability. The New York Court of Appeals, in interpreting a statute which set a minimum requirement of total disability for compensation for a dust disease, stated that an incongruous result would develop if the employee is denied benefits if, unbeknownst to the worker,

he/she was totally disabled while they continued to work and had not yet filed a claim.[155] This could lead to a result where because of the slow, insidious progress of a dust disease on an employee's health, it would be impossible to pay an employee until total disability sets in, which may create years of hardship until that point is reached.[156] Other decisions have held that where the law requires exposure for two years to silicosis, the claimant did not need to prove continuous exposure, because if the disease exists, the question of exposure would be decided in light of that fact.[157]

Courts have also looked at the objective of the statute, not necessarily the strict language of the law itself in a vacuum. A Colorado statute required that the employee be exposed for sixty days. The state's Supreme Court held that the law was not to be viewed in a overly technical manner, and that sixty different days of exposure were not required, but rather the intent of the legislature was to provide benefits for any period after the effective date of the law.[158] Subsequently, the same court struck down the statute's requirement of exposure to silicosis for five of the last ten years on the grounds that it had no reasonable relation to a legitimate state objective.[159]

Time periods should begin only when the employee, or someone in the place of the employee, knew, or should have known the employee had contracted a disease from exposure on the job.[160] If the time frames are construed literally, an employee may be forced to file prior to having actual knowledge of the disability or diseases, if only to preserve his/her rights. This is a waste of valuable resources and time, as well as a burden on administrative systems that are already often overloaded. A period for filing a claim should be construed from the date of disability or from the date that the effects of the disease is ascertainable.[161] Without such a requirement, if an employee is unaware of their total disability, their claim may be barred.[162] Massachusetts requires a claim to be filed within four years after an employee first became aware of the causal relationship between the disease and the job, or within four years of the employees death.[163]

E. Medical Panels

Eighteen jurisdictions provide for a medical board, or independent examination of the claimant, in occupational disease cases.[164] States use these panels to resolve etiological factors of a disease, and the findings are often conclusive upon the administrative agency. This process has been advocated as a means of removing much of the doubt in disease claims.[165] Criticisms of this process have focused on the ability of an advocate to test the experience of the panel and the neutrality of the process.[166] Another concern is that a delegation of power to a medical board, which was empowered to determine the facts in occupational disease cases and which the agency had to affirm even if it disagreed with the finding, may be a denial to a party of an effective right of review which violates due process protections under a state and the federal constitutions.[167]

F. Dual Causation

Another aspect that is frequently litigated in occupational disease cases is the issue of dual causation. In particular, where an employee has contracted a lung disease, the etiological factors which have produced the ailment may be the result of a workplace exposure, such as brown or black lung, or may be caused by a smoking habit or environmental elements. For example, byssinosis looks like emphysema and may not be diagnosed from an x-ray.[168] Alcohol and tobacco have been shown to have synergistic and co-carcinogenic effects on many diseases and tumor developments. A worker who smokes is exposed to a carcinogenic substance will be more likely to develop cancer than a non-smoker. Some workplace exposures are synergistic in their combination, meaning that they intensify, rather than simply add to the likelihood of developing disease.[169]

One court has held that where the employee, who was a heavy smoker, submitted evidence that chronic bronchitis improved when the claimant left his job, which involved exposure to dust, such evidence was sufficient to sustain a finding of compensability.[170] Even where a claimant smoked

one and one-half packs of cigarettes per day, there may not be any apportionment of liability due to the outside factor, where the respondent offers no proof on the percentage of the claimants disability caused by the non-work related factors.[171] Some jurisdictions have amended their statutes to provide for apportionment. New Jersey, since 1980, allows a credit to employers for functional loss due to smoking.[172] In the long term, this may create some difficulties in this area but its short term effect should be to reduce insurance premiums. It may also remove some incentives for employers to establish "wellness" programs, which some companies have implemented in order to decrease health insurance premiums.

The exposure of an employee to cotton dust has been found to be a significant factor in the development of a compensable disease even if a non-work related factor, smoking, has been found to be a significant causal factor in the disease.[173] Where the immediate cause of death was due to a non-compensable factor, a claimant must show with unequivocal medical evidence that the claimant had an occupational disease and that it was a substantial contributory factor in the claimant's disability or death.[174] In addition, some courts have looked at the ability of the employee to understand, in light of his/her education and experience, that the diagnosis may be related to a work condition.[175] All of these elements have created a large amount of litigation, particularly where liability is an issue, and have established holdings that vary in almost every jurisdiction.

G. Statutory Presumptions

At least twenty-six jurisdictions have enacted presumptions for the purpose further defining the compensability of an injury.[176] Massachusetts does not have any specific presumptions that relate to exposures for occupational diseases, but there are presumptions that may have an impact on the litigation of an occupational disease. Section 7A of Massachusetts General Law chapter 152 establishes a presumption that if a worker is killed or unable to testify, it shall be prima facie evidence that the employee was performing his regular duties on the day

of the injury.[177] This presumption assists employees who are injured at work and there are no witnesses who can substantiate the facts. Another section of the law sets forth a presumption that if the employee receives an injury from certain exposures, without voluntarily assuming the risk, from certain exposures it is conclusively presumed to have arisen out of the employment.[178] In disease cases, as long as the employee can show that it was more likely that the disease was due to work related causes, rather than other factors, the claim will be upheld.[179] Police and firefighters, who are not covered by the workers' compensation act, may be covered by a local option law which establishes a presumption that heart disease is work related, but even that presumption may be altered as a result of recent legislative changes designed to eliminate smoking for public safety personnel.[180]

The United States Supreme Court has addressed the applicability of presumptions set forth in interim regulations for employees filing for black lung benefits. The Court held that a single item of qualifying evidence was not always sufficient under the regulations, and that the claimant had to establish the facts by a preponderance of the evidence.[181] Under the regulations, there were three elements that could be presumed if the claimant worked in the mines for at least ten years, but the probability of compensability was not enough when the claimant offered a single item of qualifying evidence that was overcome by more reliable conflicting facts.[182] West Virginia created a presumption that if the worker inhales minute particles of dust for ten of the fifteen years prior to chronic respiratory disability, it is presumed that the employee suffers from occupational pneumoconiosis.[183] In its analysis of the exposure langauge, the West Virginia court held that the key is length of exposure, not length of time on a particular job, and that the exposure period is not reduced by brief illnesses or labor disputes.[184] Many other states create presumptions for police and firefighters.[185] While all of these legislative elements do provide some assistance to the claimant, it is not a foregone conclusion that the employee will collect if the defendant can satisfactorily rebut the presumption.

CHAPTER 3

CIVIL ACTIONS

In recent years some claimants have attempted to bypass the workers' compensation system and seek redress in the courts. Part of this movement has been generated by an overall dissatisfaction with workers' compensation. In particular, a system that was intended to provide sure and quick treatment to injured workers is often slow in processing cases. Complaints are often raised concerning low benefits levels which are often established by the employee's wages on the date of injurious exposure, not necessarily the date of total incapacity. This can obviously create serious problems if a claimant's indemnity payment for asbestos exposure is based upon two-thirds of his/her wage in 1944, when exposed, and that is the amount paid in 1988. This hardship is exacerbated by the fact that more than fifty percent of occupational disease victims were not entitled to receive Social Security Disability Income in 1981.[186]

A second rationale which has spurred the filing of civil actions is to find a way to get around the exclusive remedy applications of the various workers' compensation statutes. The quid pro quo for the payment of benefits without proof of fault is that the employee is barred from bringing a civil action against the employer. In Massachusetts, where there is liability in a party other than the employer, or in a party which does not share the employer's immunity, a suit may be brought.[187] A physician whose treatment aggravates an injury may be sued.[188] If the injury is not compensable under the law, a worker is not barred from bringing a suit.[189] While this premise is easily identifiable in the Commonwealth, as a result of its definition of an occupational disease as a personal injury, in other jurisdictions it is not as simple. In Georgia, for example, where the list of compensable occupational diseases was expanded with a "catch-all" intended to encompass other diseases, a suit for damages from byssinosis was dismissed as being covered by the law , and in so doing the court re-emphasized that the administrative structure was the sole remedy for a claim.[190]

Massachusetts has long recognized that for an employee who has not elected to maintain his/her common law rights to sue, the only remedy available to the employee is the remedy set forth in the statute.[191] The exclusive remedy section of the law has been characterized as narrow, since only the employee waives any rights.[192] However a number of questions surrounding the issue of the waiver set forth in the statute were raised by a 1980 Supreme Judicial Court decision which allowed recovery by a spouse and children in a civil action against an employer when the employee had already begun receiving the benefits provided by the law.[193] The impact of this holding has been lessened by recent changes in the workers' compensation law to expand the scope of the waiver provision to incorporate family members.[194]

Dual Capacity

One theory that has been attempted by plaintiffs to get around the fact that workers compensation is the exclusive remedy for any work related injury is to bring an civil action alleging negligence in the treatment of the injured employee. This theory of a "dual capacity" for the employer is a judicial exception to the exclusive remedy provided under workers' compensation laws where the employer injures an employee in a capacity other than as an employer. Early cases held that an employee's right under workers' compensation excluded all other rights and as a result, an employee could not sue an insurance physician for malpractice in the treatment of the employment injury.[195] Subsequent decisions permitted actions, stating that workers' compensation was to provide sure and certain relief, but it did not fully compensate an employee for negligence in treatment.[196]

A major change came in 1952 when the California courts held that a nurse could sue her an employer, a chiropractor, where the employer had been negligent in treating a work related injury.[197] The court stated that the employer assumed the same responsibility as any medical provider for negligence, and the injuries received during treatment were actionable.[198] Massachusetts has rejected the dual capacity argument in an attempt to hold an

employer liable in a products liability action. The Supreme Judicial Court dismissed the claim on the grounds that the use of the product was a routine and integral part of the employer's operation and a dual capacity, for the purpose of bringing a civil suit, requires a distinct legal persona.[199]

This theory has been tested in a number of jurisdictions. A part-time physician of a company was not immune to a suit even though the statute precluded actions against co-workers, because the employer had no control over the doctor, as a result of the physician's professional status, and therefore the employee's common law right had not been denied as a result of the law.[200] The court also rejected a products liability claim against an employer for defects in the manufacturing process.[201] Recently, the same jurisdiction denied a claim by a waitress against an architect, who was an officer of the employer's company by holding that the co-employee was immune and the workers' compensation statute provided her exclusive remedy.[202] The court emphasized the lack amount of control exercised by the employer, and found that it was extensive and that where the employee can render the employer vicariously liable, there is no civil action which can prevail.[203] The federal courts have also rejected tort actions against an employer as a landowner and manufacturer, declaring that such suits would devastate the compensation system and that the injury was precisely the type for which the system was established.[204] Claims against a joint venturer have been denied in the courts, where one party was not named on the insurance policy, on the premise that when one party obtained a policy, it covered both joint venturers, so that the employee's only remedy was under the workers' compensation law.[205]

The treatment of an employee's disease by a public hospital created the same duty for the hospital as it would owe to any member of the public.[206] If an injury occurs from a relationship which is separate and distinct from its role as an employer, the injury invokes separate obligations and there is no reason for the employee not to recover.[207] The same jurisdiction interpreted the workers' compensation law with its products liability law so that the employer did not escape liability for a defective product where any other person would have been entitled to

recover.[208] The decision stated that there was nothing in the law to commend a rule which encourages an manufacturer to do less in product safety if the product is to be used by an employee.[209] As long as the injury is attributable to the employers separate and distinct relationship to the employee, and invokes obligations different than those between employers and employees, the worker can sue.[210] The Supreme Court has held that the Longshoreman's and Harbor Workers Act does not take away the traditional remedies of the sea, so that recourse for an unseaworthy vessel was possible, notwithstanding the available remedies under the statute.[211] In that case, the exclusivity of the act did not obviate the duty of the employer for maintaining a seaworthy boat, which the Court described as traditional, absolute, and non-delegable.[212]

Establishing Liability

Establishing liability in any civil suit always presents problems, but these can be exacerbated in an action seeking redress for an occupational disease. The determination of which insurer is liable is usually hotly contested because premiums in these cases are not often set with the experience of certain diseases factored in. Questions arise as to whether liability should be established when the claimant is exposed (Exposure Theory) or when the disease ultimately manifests itself (Manifestation theory). This problem is compounded by court decisions which state that it is legally and medically impossible to tell when a disease, such as pulmonary asbestos, was contracted or which exposure created the injury.[213]

Some courts have adopted the manifestation theory, holding that a disease, such as asbestosis, does not result in a personal injury in order to trigger insurance coverage, until such time as the accumulation of fibers produce the symptoms of the disease.[214] Another jurisdiction, while specifically rejecting the exposure theory, held that the manifestation of the disease is but one trigger of coverage.[215] The court held that if it was only the manifestation which triggered coverage, an insurer could stop policies so therefore coverage could also be

triggered prior to manifestation by inhalation exposure or exposure in residence.[216] The fact that asbestos was a part of the injurious process was sufficient to equal an injury under the policy.[217]

Other jurisdictions, such as New York, have held that the cause of the action accrues at the time that the body is invaded by the disease.[218] Under this premise, if the disease does not manifest itself within the statute of limitations, an individual may not have knowledge of the exposure, and thus lose their opportunity to remedy the injury. The federal courts, interpreting the Longshoremen's and Harborworkers Compensation Act, stated that all occupational diseases would be barred if the statute of limitations begins with the first contact since the employee has no reason to know at that time that he/she is injured.[219] In particular, the court addressed the administrative ease of determining injury only when it manifests itself and in that manner establish which carrier is liable.[220]

One of the landmark cases for injured employees established that a standard of strict liability would be applied to a manufacturer in an civil action for products liability that resulted from an employee's exposure to asbestos.[221] The court, in Borel, held that contributory negligence was not a defense to a strict liability standard, even though the claimant had information on the possible dangers of exposure from his union newspaper.[222] The employee had the right to know what he was working with and because of the manufacturer's access to scientific data it was considered an expert held to the higher standard of culpability.[223] In this case, the employee had previously settled his workers' compensation claim with the insurance carrier, but by the time the suit was brought to a successful conclusion by the deceased employee's wife, six years had elapsed and the net judgement was just over $32,000.[224]

Decisions in other jurisdictions have maintained a strict adherence to the exclusive remedy standard of workers' compensation. A Delaware court dismissed an action against a manufacturer, rejecting the claim that the employer's conduct was intentionally tortious, and held that workers' compensation, which was designed to provide

benefits without fault and remove the uncertainties of civil actions, was the exclusive remedy for the injured employee.[225]

Concealment of Harm/Failure to Warn

Some courts have adopted certain tort principles when establishing the duty of an employer to their employees. Claims against an employer for fraudulently concealing its knowledge about the dangers of the work environment have provided claimants with some success. The California Supreme Court decided that the aggravation of an existing injury, as a result of the knowledge that an employer had for over fifty years, was not compensable under workers' compensation, but could be remedied with a tort action.[226] A failure to warn a former employee of the dangers of exposure to nuclear radiation, when discovered after the end of the employment relationship, created liability for the employer.[227] The fact that tort cases may provide a greater opportunity for success and the potential size of the awards is often a compelling rationale for the filing of suits, but courts which allow actions for post-termination failure to warn may in the long term undermine the compensation system.[228]

Negligent Inspection Claim

One theory presented to the courts in order to circumvent the exclusive remedy provisions of workers' compensation statutes has been claims against insurers for negligence in the inspection of the employers' premises. In a 1934 case, the Massachusetts Court held that an insurer could be sued as a third party, but where the parties had reached an agreement under the workers' compensation law, even though it was not approved by the Industrial Accident Board, that conduct was an election to choose the statutory remedy and not sue some person other than the insured.[229] The Supreme Judicial Court subsequently moved from this premise and applied certain policy perspectives to the filing of civil actions. In 1965 the Court held that an insurer which engages in

accident prevention, the social desirability of which cannot be questioned, should be able to do so without liability for failure to discover a hazard.[230] This doctrine has recently been reaffirmed when the Supreme Judicial Court rejected a suit against an insurer for failure to warn employees of danger.[231] While the tone of the earlier decision rested on policy grounds, here the Court stated that an insurer does not act in a dual capacity when it performs safety inspections of insureds' premises and therefore there is no third party liability for any injury.[232] In effect, the Massachusetts courts have carried the employers liability over to encompass the insurer.

Other jurisdictions have reached similar conclusions. Indiana has held that a compensation carrier which engages in safety inspections, incident to its coverage of a company, is not truly a third party in the usual sense and if liability was to be placed on insurers, they would cease doing the inspections.[233] A state has been held immune from a failure to inspect civil action where the state was also the insurer.[234] The First Circuit Court of Appeals has held that under Rhode Island law an insurer is not liable for a negligent inspection of the employer's plant.[235] The fourth circuit dismissed a claim for lack of due care in its inspections against an insurer because the insurer had assumed no more than the employer did under the workers' compensation statute.[236] The Second Circuit Court of Appeals, applying Connecticut law, ruled that the insurer was not liable, in part because it did not contract to perform the safety inspections.[237] Arkansas law was interpreted to exclude actions against insurers for failure to inspect because it would include potential unlimited liability for carriers, as well as the potential abandonment of safety precautions.[238]

Decisions in other jurisdictions have not foreclosed the ability of the employee to bring a civil action. At one time New Hampshire held that under the law, the employee was not deprived of his/her common law rights and the insurer's duty was not that of the employer, but as an alleged breach of a common law duty and therefore the insurer did not share the employer's immunity.[239] This holding was short lived as the legislature amended the law in the next year to include generally the insurance carrier

in the definition of employer, which gave carriers the same immunity as employers.[240] A similar decision was reached in Iowa, where the court, noting that the insurer could set off any damages, permitted the suit and agreed with the plaintiff that no inspection by the insurer was preferable to a negligent inspection.[241]

An example of the diversity of opinion in this area are a number of holdings concerning the Michigan statute. Initially, a decision declined to assess liability when an insurer was preforming an act necessary to the proper carrying out of its functions under the law and if there was liability in tort, as well as under the workers' compensation act, it would be the equivalent of strict liability for the insurer.[242] This decision by the federal courts intending to interpret Michigan law was widely cited.[243] A Michigan court subsequently distinguished this decision and held that the insurer assumed duties that were not those of the employer and therefore was held liable for its negligence.[244] The court specifically stated that the result of the defendant insurance company being subrogated to the rights of its own plaintiff for workers' compensation benefits was not overly incongruous.[245] This decision was followed by the same circuit court responsible for affirming the initial decision, finding safety inspectors negligent, after 16 or 17 inspections, for failing to recommend safety improvements.[246] Michigan finally amended its law to forbid actions for negligent inspections in 1972, but the change was not applied retroactively to pre-amendment injuries.[247] Perhaps a better example of the confusing precedents in this area was set forth by the Fifth Circuit Court of Appeals, which remanded a similar action back to the district court for further findings because the stated decisional law was all over the place on this issue.[248]

Preclusion Decisions

Another element that presents itself in the litigation of occupational disease claims is the effect of a prior decision on the merits of the claim at hand. Since the administrative structure may be less stringent than court, and the application of standards of proof may favor

claimants, it is understandable why the issue has been the source of confusion. Indiana has estopped an employer from arguing that a claimant was not an employee in a workers' compensation claim, after successfully defending a civil action on the grounds that he was.[249] Minnesota has held that an Industrial Commission order is a final adjudication on the merits of the matter.[250] In analyzing the effect of a dismissed civil action in a subsequent workers, compensation case, a federal court did not apply collateral estoppel since the administrative process was more free wheeling as to the quantum of proof and all doubts under the law were to be resolved in favor of the employee.[251] An Ohio court held that an employee is not barred from recovery for an intentional tort after accepting workers' compensation benefits, because the issue in the administrative matter, whether the injury arose out of employment, was not the same issue as that raised in the suit.[252]

Massachusetts, under the standard in existence until 1985 and under the latest changes made by the Workers Compensation Reform Act of that year, has not applied any statutory rules of evidence.[253] The agency has been on its own to determine the various procedural guidelines that it will follow. The Supreme Judicial Court has not been persuaded as a matter of policy that collateral estoppel should not apply to workers' compensation claims.[254] In part relying on the deference paid to the expertise of the administrative agency, and also on the basis that the central issue had been fully litigated and essential to the agency's finding, the Court stated that a decision against an insurer could be given preclusive effect when presented defensively by the estate of a homeowner in a subsequent civil action.[255]

CHAPTER 4

ISSUES

There are a number of serious problems that confront any potential solution to the resolution of occupational disease cases under the existing mechanisms which are currently available for injured parties to redress their claims. The Massachusetts courts have stated that while workers' compensation insurance is part of the production cost of the employer and the aim is to give the injured employee the benefits due him/her in an expeditious manner, the act creates rights and remedies all its own.[256] Yet it appears that as long as the courts apply antiquated common law rules into the various workers' compensation acts, which were intended to narrow the harshness of common law decisions, litigation and appeals will continue.[257] This basic principle has been upheld in other jurisdictions. A New York court, in rejecting the narrow interpretation of an insurer in the construction of the statute of limitations for a death from an occupational disease, stated that the law was remedial in nature and should be construed liberally in favor of the claimant, without resorting to common law principles which the law was intended to eliminate.[258]

The differences in the application of occupational diseases varies in each jurisdiction. Almost forty years ago, Ashley St. Clair, an attorney for Liberty Mutual Insurance Company, the largest private workers' compensation carrier in the United States, stated that there was no reason that full coverage not be given to all occupational diseases, without resort to a list, and there was no justification for paying less for an industrial illness than an industrial accident.[259] For any large insurer, the differences in state laws can only create additional administrative costs which are passed on to the insureds.

UNIFORM NATIONAL STANDARDS

In the last few decades there has been a good deal of discussion over some sort of plan which would attempt to federalize the administration of workers' compensation. This type of uniformity, for a program whose social and economic utility have been debated over the last eighty years, would eliminate much of the differences which is evident between jurisdictions for both traumatic injuries and occupational diseases. The concept was rejected by the National Commission on State Workmen's Compensation Laws in its 1972 report which emphasized a number of recommendations which it believed would help improve state systems. Recently, in recognition that the social costs of litigation outweighed the social costs of benefits, federal legislation was proposed that would have replaced workers' compensation coverage for asbestos victims with federal benefits and have foreclosed the opportunity to file products liability suits.[260] As a result of the wide variety of opinion, changes have come in both large and small pieces in almost every jurisdiction in the country.

The National Commission made a number of recommendations on the extent of workers' compensation statutes nationally that were intended to improve the overall effectiveness of the administrative process. Among these were the full coverage of all work related diseases and the elimination of any requirement that the injury occur by accident.[261] Work related diseases should not be excluded due to what is listed in a schedule as a result of the technical applications of the law. The Commission also suggested that disease etiology be determined by a disability evaluation unit and that its findings be accepted as conclusions of fact where possible dual causality exists.[262] Finally, the report stated that the exclusive remedy of workers' compensation be maintained, and while third party suits against negligent persons be allowed, immunity should be extended to any party performing the normal employer functions, such as safety inspections.[263]

BENEFIT COMPUTATION/STATUTES OF LIMITATIONS

In Massachusetts, prior to the recent amendments enacted in 1985, the employee's indemnity payment was determined by the date of the injury. Where there was an accumulation of harmful matter as a result of long term exposure, the injury occurred when the accumulation became great enough to incapacitate the employee.[264] In cases where there was a long latency period this created severe hardships for workers and their families. A vivid example of the problem is set in Squillante's Case, 389 Mass 396, 450 NE2d 599 (1983), where the rate of compensation, twenty-two dollars per week, was established on the date of injury, which was the date of last exposure in 1945, not the date of incapacity in 1974. The Court firmly rejected any argument that would have applied any common law principles, stating that any change in determining the date of injury must come from the legislature.[265] Change did come and under the current law, where there is a difference of at least five years between the date of injury and the date of eligibility for benefits, the date of eligibility determines the level of benefits.[266]

Filing requirements often create difficulties for injured workers. Requirements to file within set statutory timeframes are frequently impossible to meet as a result of etiological factors associated with occupational diseases. In 1965 the Council of State Governments recommended that where the nature of the disease is not known, there should be no limitation on filing until the employee knows, or in the exercise of reasonable diligence should know of the injury.[267] The National Commission made a similar statement, recommending that the period for filing claims be three years after the date the claimant knows of the impairment, or with reasonable diligence should have known of the injury.[268] An example of the extent of the problem can be seen in a recent decision from the Montana courts. Under the Montana law, there was no common law right to sue if the employee is eligible for compensation and the statute of limitations for workers' compensation was three years. An employee who discovered that he suffered from asbestos exposure four years after he left his job was therefore ineligible for compensation, but was entitled to sue.[269] This case leads to the possibility that all one has to do to maintain a civil action (and greater possible

recovery) is to deliberately miss the deadline to ensure ineligibility for benefits under the law. This is clearly the antithesis of the philosophy behind workers' compensation.

In response to the mounting pressure to address this problem a number of jurisdictions have amended their statutes recently in the occupational disease area.[270] Changes made to mandatory statutes that have been applied retroactively in order to remove barriers to lengthy latency periods may withstand arguments that such changes impair the contractual rights of the parties.[271] Debate continues as to whether some form of federal intervention should be considered, if not for all workers' compensation programs at least for occupational diseases, in order to provide the necessary stability and certainty for all parties.[272]

Tort litigation is an adversary process, implemented to correct a wrong, while workers' compensation is a system, not a contest, the purpose of which is to supply security and certainty to an injured worker while distributing the costs among the consumers of the product.[273] The problems with the administrative process and civil suits has long been recognized and change has been championed frequently. Although some commentators, such as Judge Posner, have done research which indicates some positive aspects of the tort process prior to the enactment of workers' compensation laws, for the majority it was an unacceptable process that placed unnecessary burdens on injured employees.[274] Samuel Horovitz, one of the leading practitioners and analysts of workers' compensation, recommended combining the two systems to allow the employee to receive tort remedies when an employer's negligence was proven.[275] Many statutes do permit a greater recovery where there is some form of serious misconduct.[276] Yet a combination of the two elements has never been fully integrated leading to widespread complaints of both.

A recent study of cases pending in the Federal District Court for Massachusetts showed that 77% of the 3,974 asbestos cases filed since 1984 are still pending and of those cases 1,453 have been waiting three of more years, and 750 have been on the list for five or more years.[277]

Since an individual may only have from two to five years to live after diagnosis, and the cases often take as long as one year, the injustice of the process is obvious.[278] One factor that may be at issue is that the Massachusetts courts have stated that even in a civil action an employee is limited in his/her recovery to the amount that they would have been entitled to under the law absent a statute setting out the amount of damages to be recovered.[279] It is this sort of concern that leads to forum shopping by litigants and further complicates the litigation process.

The dual capacity doctrine, which established the precedent upon which many of the third party actions have been based, has been replaced by a tighter standard in many jurisdictions. Most laws deal with persons, not capacity, so that the issue is not the relationship or activity, but rather the identity of the third party.[280] The dual capacity doctrine has been replaced by a dual persona doctrine. This is primarily a theory of Professor Arthur Larson, who advocates that an employer is a third party liable in tort only if there is a second persona so independent from and unrelated to the normal status of employer that by established standards the law recognizes a separate legal person.[281] This corrects the possible broad application of the term "capacities" and if the "dual persona" is to apply, the injury must flow solely from the non-employer persona, not be just coincidental to it.[282] In viewing this aspect of the insurer/employer relationship a number of courts have held that if the compensation carrier occupies another capacity with the insured, such as general liability carrier or risk management consultant, the employers' immunity does not protect it from third party actions.[283]

On a national scale, each jurisdiction has its own parameters which have been established for the filing of any suit. Some states, such as New York, begin the period of limitations when the substance enters the body (first exposure rule), while others have the cause of action accrue on the last day of injurious exposure (last exposure rule). The application of the last injurious exposure is basically a rule of proof and liability which relieves the moving party from proving specific causation to any particular employer.[284] Another concept is to use medical evidence in order to ascertain when the plaintiff was

injured and begin the period of limitations from that point. The discovery rule, which is similar to that recommended for workers' compensation statutes, begins to toll the period of limitations when the plaintiff knew, or should have known, of the injury. These differences can lead to forum shopping between jurisdictions where the employer is a national company. In diversity actions where service requirements, which are an integral part of any statute of limitations, are at issue state law will control.[285]

In addition to raising the statute of limitations as a defense, defendants have used other arguments in order to avoid liability. The state of the art defense holds a distributor or manufacturer liable only if the potential dangers were scientifically discoverable at the time the product was placed into the stream of commerce. This defense rests primarily on the level of scientific achievement at any point in time. However this defense has been rejected and liability has been assessed for a failure to warn even though there may have been presumed awareness of the danger in the medical community.[286] In this case the product was not reasonably safe, and where the users are unaware of the danger, the burden of the injury should be placed on the manufacturer who profits from the sale of the product.[287]

EXTENT OF PROBLEMS WITH OCCUPATIONAL DISEASE

The size and scope of this problem for our society cannot be overestimated. A recent study in New York found that occupational disease was the fourth most frequent cause of death in the state (after heart disease, cancer, and strokes), with twice as many dying each year than from murder or suicide, yet only one percent of the workers compensation awards went to its victims.[288] While stating that these figures most likely underestimate the problem, there was only one occupational health physician for each 108,000 workers and only about fifty enter practice each year nationally.[289] There are approximately one half million physicians in the United States, yet only 800 are Board certified in occupation health, which is .16% of all the doctors who are licensed.[290] However, since in 1972 there were only 72 doctors with a board certification in this area, it appears that the problem is improving.[291]

At the same time approximately 700,000 of the almost two million reported employees partially or severely disabled by occupational disease suffer from long term disability, but only about five percent of those severely disabled receive workers compensation as their major source of income.[292] A study of product liability suits showed that seventy percent of the claims involved industrial products and fifty-eight percent of the claimants were hurt at work.[293] The problem for the courts and the administrative process is clear, but statistics show that the problem is only going to get worse.

Studies have shown that it can take six times as long for the administrative system to respond to occupational disease claims as for accident claims.[294] Sixty three percent of all occupational disease cases were controverted as opposed to ten percent of accident cases, and of those litigated work relatedness was the primary reason in seventy-three percent of the disease cases versus just twenty-one percent of the accident claims.[295] A breakdown of those controverted matters shows that where the claim concerned a dust disease, it was contested eighty-eight percent of the time and if the case concerned respiratory conditions due to toxic conditions it was contested seventy-nine percent of the time.[296]

Data has shown that less than three percent of all workers' compensation cases deal with occupational diseases and while the average payment for a person totally disabled for life with an occupational disease is $9,700, it is $23,400 for accident cases.[297] The difference is even more dramatic when comparing the $3,500 cash payment of a survivor of an occupational disease against the $57,500 paid to the survivor of an injury case.[298] The major sources of income for adults severely disabled from diseases was Social Security (53%) pensions (21%) and welfare (16%), with workers' compensation being the major source for only five percent.[299] One reason for this could be that the vast majority of SSDI cases are accepted for payment with only five percent of the cases under SSDI involving administrative or legal appeals.[300]

The problem is not new, but it is becoming more severe. During the four year period from 1966-1970 more workers were killed as a result of injuries on the job than were killed in Vietnam.[301] In 1980 2.4 billion dollars of the Social Security Trust fund went to employees suffering from occupational diseases.[302] The United states Department of Labor in 1986 put forth estimates that the cost of occupational diseases to the Social Security Insurance Program and Medicare was 3.3 billion dollars in 1984. California has seen an increase of sixty-three and one half percent in its number of occupational disease cases from 1977-1983.[303] Arkansas saw an increase of forty-six percent in reported illness from 1983 to 1984 while at the same time the average cost per case was fifty-five percent higher for disease cases.[304] The Florida Department of Labor and Employment Security, Division of Workers' Compensation recently reported an almost sixteen percent increase in occupational disease cases. It has been predicted that by the year 2000 there will be 200,000 deaths due to asbestos exposure and the potential liability against all manufacturers may be as much as 170 billion dollars.[305]

Proposals have been discussed to reform the tort system, by placing limits on product liability claims, and constant discussion takes place on amending the various workers' compensation laws. Proposals to federalize disease claims, in order to provide greater uniformity to the standards for occupational diseases have so far been

rejected. Removal of only the most serious and disabling of diseases into a separate administrative system or for just asbestos cases have been suggested, but as of yet have not received widespread support.[306] In New Jersey insurers and manufacturers have voluntarily joined a non-profit organization, the Asbestos Claims Facility, which has an objective of attempting to provide a central place for filing a claim, without resort to court, as well as trying to settle claims in an expeditious fashion while conserving assets for compensation for the injured worker.[307] Presentation of a claim to the facility does not bar a plaintiff from bringing a suit if no settlement is reached but after one year of operation more than twelve hundred cases had been resolved.[308] Unless legislative bodies begin to address this problem, it is not inconceivable that similar mechanisms will be developed all of which may not have the appropriate objective, which workers' compensation is intended to have, in mind.

OCCUPATIONAL DISEASE REPORTING IN MASSACHUSETTS

There is no statewide reporting and surveillance system for determining the incidence of occupational disease in Massachusetts. The most recent surveys of occupational illnesses and injuries in the commonwealth were conducted in 1979 and 1980, when Massachusetts participated in the Supplementary Data System (SDS), organized by the federal Bureau of Labor Statistics. This data system was created as a means for gathering detailed information on the characteristics of occupational injuries and illnesses and demographic information on affected populations. States participating in the SDS system submitted uniform data items from first reports of injury or illness for workers' compensation.

The current incidence of occupational illnesses in Massachusetts is unknown. Nevertheless, some observations can be made on the basis of existing information.

An examination of first reports of injury submitted to the Massachusetts Department of Industrial Accidents during the 1987 calendar year tends to support the general characterization of occupational disease claims cited earlier. A total of 52,276 first reports were received during 1987. Of these, 2,882, or 5.5%, were for an occupational illness. This figure closely mirrors the 5% figure which is generally offered as an estimate of illness claims in the workers' compensation system(s).

The distribution of reported illnesses also largely reflects typical patterns of workers' compensation illness claims. There tend to be relatively few reports for complex occupational illnesses, such as respiratory conditions, asthma, hepatitis and pneumoconiosis, while there are relatively large numbers of such evidently work-related illnesses as dermatitis, inflammation of the joints, and conjunctivitis.

For instance, nearly half of the reported illness reports are for either inflammation of the joints (24%) or for infective and parasitic dermatitis (24%). Conversely, conditions of the nervous system account for just 6% of the illness reports, while conditions of the respiratory system and hepatitis are reported even less frequently, 3% and 2% respectively.

These same general trends are corroborated by the distribution of illnesses in available data from the 1980 SDS reports. In 1980, 4.4% of 33,891 first reports submitted in manufacturing and construction industries were for occupational illnesses. Of the 1,505 illness reports, 33% were for inflammation of the joints and 30% were for infective or parasitic dermatitis. More complex conditions were reported much less frequently. Only .4% of the illness reports were for heart conditions, with still fewer--less than .1%--reports for conditions of the respiratory system and conditions of the nervous system.

While difficult to quantify, the true dimensions of occupational disease in Massachusetts may be greater than those suggested by first reports filed with the Department of Industrial Accidents. Problems with determining etiology and diagnosis can contribute to this underreporting as well. If the national estimates indicating that only 3% of cases of occupational diseases involve claims for workers' compensation are applied, then perhaps the 1,500 to 3,000 employees for whom first reports of injury are filed in Massachusetts represent only a portion of new cases of illness each year. First reports, at present, involve lost work days and long latency periods may impede reporting.

The industrial mix of the Massachusetts economy provides an additional framework for scrutinizing reported occupational illnesses. Nonagricultural employment in the state averaged 3,045,800 in 1987. Much of this workforce was engaged in the manufacturing and construction industries. In the manufacturing sector, employment averaged 597,000 and in construction, it stood at 136,700.

The service, government, and wholesale and retail trade sectors also employ large numbers of Massachusetts workers. Employment in the service industries in 1987 averaged 847,300, while in the wholesale and retail trade sector it was 719,000. Government employment was 397,500. While these are not traditionally considered high risk industries, they are by no means free of hazards, particularly with the wider use of new technologies in commercial establishments and in the office. The primary concern here is nevertheless with the construction and manufacturing industries.

Given the large number of Massachusetts workers employed in the construction and manufacturing industries, it is reasonable to expect that occupationally related cancers, asthmas and other diseases will occur with some frequency. These expectations are not borne out by the diseases reported in the 1980 and 1987 first reports of injury. For instance, first reports of injury were filed for only 4 cases of pneumoconiosis and one case of asbestosis in 1987. Considering the long latency periods of pneumoconiosis and asbestosis, the wide use of asbestos in the construction and shipbuilding industries, and the traditional importance of these industries to the Massachusetts economy, it is intuitively clear that the actual incidence of asbestos related diseases must be much higher than the five cases reported in 1987. Stricter controls over the present use of asbestos and the virtual elimination of shipbuilding in the Massachusetts economy will not necessarily affect the incidence of asbestosis for some years into the future. Thus, what the first reports of injury reveal is not that asbestos related diseases are not very prevalent, but simply that they are not surfacing in the workers' compensation system.

Occupational cancers also were infrequently reported in 1987 first reports of injury, with a total of 13. The true number of cancers arising from workplace exposures during that period in Massachusetts is impossible to determine, but it is possible that the figure is much greater than the 13 cases reported to the Department of Industrial Accidents. Medical experts generally estimate that 10% of cancer deaths are caused by occupational exposures. A very conservative estimate would place the number of cancer deaths in 1989 in Massachusetts at 14,100.

Some of the reasons for the underreporting of occupational diseases in the workers' compensation system have already been specified. However, along with those factors which complicate the identification of the work-relatedness of diseases, some disease cases which are clearly occupational in origin are discouraged from even seeking relief through the workers' compensation system. One example in this regard is asbestosis.

It has been noted that workers' compensation data reveal very few first reports of injury for asbestosis. In contrast, however, the Boston Globe reported in 1988 that since the late 1970s, more than 4,600 workers diagnosed as having asbestosis had filed liability cases against manufacturers in the federal court in Massachusetts. In addition, new cases were reported to be entering the court system at the rate of 150 to 200 a year. These figures are instructive for several reasons. At the most obvious level, they conclusively--if still imprecisely--verify that asbestosis is a larger occupational health problem than statistics from the workers' compensation system would suggest. But these cases would also appear to represent a specific trend in the relationship between occupational disease and workers' compensation, one in which even a disease whose occupational relatedness is not questioned will go outside the system for compensation.

One reason that someone with asbestosis might seek a third party recovery in the tort system is fairly straightforward. The disease may not be so far advanced as to be disabling, thus allowing the employee to continue working and disallowing eligibility for workers' compensation. Obviously, such a worker who seeks compensation for pain and suffering or other noneconomic cause can only turn to the court system for relief.

There are also occasions in which workers' compensation claims are not filed for workers who are disabled by asbestosis. A claim which is eligible for workers' compensation may not be filed if a client's attorney considers the financial recovery too low to justify the amount of time required to pursue the case. A study by the Workers' Compensation Research Institute indicates that workers' compensation claims are filed by attorneys whose clients are experiencing financial hardship in order to ease pressures to accept a lower tort settlement. In addition, research by Barth on asbestos insulators who died of asbestos related diseases between 1967 and 1976 revealed that medical costs were paid under workers' compensation for only 4 percent of those studied. For some, the need or incentive to file for workers' compensation is reduced by the availability of private pensions and disability insurance benefits.

ASBESTOS SUITS IN MASSACHUSETTS

In the last year there has been an increased amount of attention which has focused on the delays in the federal district court system in Massachusetts for the processing of asbestos cases. Numerous newspaper articles have publicized the lengthy period necessary for adjudicating these suits. In addition to actions by the state legislature, nine members of the Massachusetts congressional delegation publicly criticized the U.S. District Court for its inability to speedily handle the thousands of asbestos cases in its docket. This complaint was shared by union leaders and other public officials as well.

Published statistics indicate that asbestos cases made up 38% of the civil docket for the U.S. District Court as of early 1988.[309] Other figures indicated as of 9/30/87, of the 2,085 pending cases over three years old, approximately 1,400 were asbestos cases.[310] Not only did a very high percentage of the cases concern asbestos suits, but the average time from filing to termination of all civil cases in the district court was one year, one-sixth of the average time necessary to conclude asbestos litigation.[311] A partial explanation for these figures may lie in the fact that the discovery process for the parties may be complicated by the fact that due to the long latency period, a plaintiff may have changed jobs or there may simply be no way to identify or recall an abusive stimulus due to the passage of time.

Research into the number of asbestos related product liability suits has also been examined by the Cambridge based Workers' Compensation Research Institute. The study, in part, looked at the relatively non-restrictive system in Massachusetts in order to examine the strategies employed under a liberalized state system. The approach for the report was a case study methodology consisting of lengthy interviews with 41 key participants in asbestos cases in both the state worker's compensations and in the civil trial system.[312] In particular, the focus on the Massachusetts system looked at the process and the law prior to the 1985 reform.

The report noted that in the systems studied, neither of which had any significant bars to bringing a workers' compensation claims, the majority chose not to do so.[313] This is explained as possibly resulting from a number of factors. The smaller amount of benefits from workers' compensation (in comparison to a tort suit) and the possibility that disability has not yet manifested itself are possible reasons for not pursuing a workers' compensation claim.[314] The report also notes that attorneys may be concerned over the preclusive effect of the workers' compensation case in future product liability actions and may see the low net return as possible reasons for foregoing the administrative remedy.[315] However, compensation claims are pursued when the plaintiff (or family) is in need of benefits sooner than a suit can provide them.

The study conclusion calls into questions some of the assumptions about the utilization of a federalized system for occupational diseases.[316] In particular, the use of current systems as a model for a federal format and the availability of other sources of benefits will still provide incentives to use the courts.[317] While some concerns with respect to the Massachusetts statute itself have hopefully been addressed by the 1985 changes the administrative burdens and costs of joining defendants, and adjudicating the case, still remains.

Case decisions in the courts will also impact the decision to pursue that avenue. Recent decisions in asbestos cases have decided that for the products liability claim there can be no negligence without a finding of the implied warranty of merchantability.[318] In a wrongful death action, the "discovery rule" may not be applied under the statute to avoid the limitations imposed by the legislature.[319] It is clear that the court system will continue to see litigation as long as the uncertainty over these cases remains.

CONCLUSIONS

There are many elements which impact on the resolution of occupational disease cases. Issues concerning liability, causation, statutes of limitations, apportionment, extent of disability, rehabilitation, risk management, and claims management are all interwoven into one common fabric that is often tattered and frayed around the edges. But while it may have its faults, the intent and the focus of the governing principle of workers' compensation should not be lost. The law provides compensation for workers, hopefully in a equitable and judicious fashion, and should eliminate the time and expense of litigation in the courts for workers and employers, and those who stand in the place of employers. It is obvious that with respect to occupational illnesses that this goal is often forgotten.

As a result of the lengthy time periods and difficulties in diagnosis for disability, courts should consider the intent of a law, in view of its statute of limitations, and look to applying the law in a broad and liberal manner in order to fulfill to overall purpose of workers' compensation. Reliance on common law principles, particularly for occupational diseases, is a contradiction since the premise of workers' compensation was to eliminate, or at least ameliorate, the harshness, delay and expense that is endemic to common law litigation.

Statutes which require specific periods of exposure should be amended. It is generally true that the longer exposure to a health hazard, the greater the liability of developing a disease. However, not all diseases are dose related. Even a brief exposure to some substances may be sufficient to cause some diseases. At the same time, long periods of minor exposure may not be harmful while short periods of intense exposure may. The individual susceptibility of workers is also likely to effect who does and does not develop a disease. Limitations, based upon length or time of exposure, on filing claims within certain time frames should be abandoned. To allow them forces the legitimately injured employee to seek other avenues of redress, and rightfully so, such as filing a tort action or seeking benefits under some other format such as SSDI. In this manner the cost is generally shifted to society as a whole.

If the costs of industrial injuries is to be borne by the employer, as a cost of the production process, it is important to ensure that the cost is placed there, and not in another forum. Artificial barriers for filing claims place employees in the position of filing prior to any manifestation of the exposure taking place. This presents an anathema to our whole concept of jurisprudence if claims are filed prior to any cause of action accruing. The period for filing should be tied to knowledge of the injury.

Legislatures should eliminate any reference that mandates the disease be peculiar to a trade or that excludes an ailment that may also be caused by elements from ordinary life. These restrictions can be overcome by a consistent and certain standard of proof applied by the agency and the courts that proves a causal nexus with the employment process. The employer should take the worker as he/she is, and if the work environment has contributed in any way, then liability should be apportioned accordingly. An example of such apportionment is evidenced in the Crum and Foster Report of its Occupational Disease Task Force which stated that if the work related factor was the predominant cause, workers' compensation benefits should be paid. To do otherwise would establish a cost shifting precedent that would impact on the health care delivery system, and ultimately fall on the tax payer to address.

The establishment of proof that there has been negligence in the workplace is difficult, uncertain, and costly in terms of time and money. Plaintiffs must deal with statutes of limitations and establish both causation and liability. This is difficult because while epidemiological studies, which look at the pathology of a disease, can ascertain that the employee has had an injurious exposure, it will not necessarily prove that the disease is caused by that exposure. Often one of the possible culpable parties, the employer, is immune (due to the exclusiveness of workers' compensation as a remedy) and the plaintiff doesn't know who made the product that was used. While the recovery in a suit can encompass all of the civil remedies, this potential liability provides a greater incentive for the defendant to controvert the dispute.

The patterns of occupational disease reporting in the workers' compensation system have prompted concern with the systems ability to provide adequate relief to injured employees. In turn, questions have been raised regarding the impact under-reporting of occupational diseases has on some of the goals of workers' compensation. For instance two of the most important policy goals of workers compensation are the encouragement of safe workplaces and the provision of adequate wage replacement to disabled workers. If occupational disease victims are not compensated, then not only are they deprived of benefits, but incentives to maintain healthful work environments are undermined. This problem is often identified by health professionals and policymakers as grounds for reconsidering the relationship between occupational disease and workers' compensation.

Filing civil actions does nothing to create an atmosphere conducive to returning the employee to work as a productive and useful member of the work force. Costs of litigation are not only borne by the parties, but also by society as court dockets throughout the country remain backlogged. Since a suit is a win-lose proposition, there is little or no incentive for a worker to seek vocational rehabilitation while the action is pending. In fact, successful rehabilitation may result in less damages being awarded if the plaintiff can return to a well paying position. This is antithetical to the workers compensation system where one public policy goal should be to return the employee to being a productive part of our society.

Settlements are negotiated by and for individual clients, and do not provide any useful precedent for injured workers generally. These agreements aid the plaintiff who can come to terms first and for the greatest amount. Agreements which absolve the defendant of any liability will not provide incentives to remedy the causes of occupational disease nor will they encourage employers to report such exposures for fear of future lawsuits. Any solution to this problem must include a greater awareness of the problem and move to the establishment of data bases, such as occupational disease registries, which can provide the proper assessment of the problem in the workplace.

No solution to this problem can be viewed in a vacuum. There is a need to incorporate the expertise of other disciplines in order to provide a meaningful answer. The need for more occupational health physicians trained to diagnose and treat these problems must be addressed. If the same doctor to patient ratios existed for cancer victims or heart attack victims as exist for occupational health practitioners to occupational disease victims, there would be a tremendous outcry. But because so many of us work, and the costs of employment injuries is considered as a cost of production, society as a whole does not focus on the extent or breadth of this potential disaster.

Any recommendation for change must incorporate a greater emphasis on safety and prevention. Experience rating should be strongly encouraged to provide the necessary economic incentives to reduce injuries. The costs of accidents must be internalized by the employer if workers' compensation is to be effective. Causality determinations may be made easier if pre-employment physicals are given by qualified health care personnel. Regular examinations may assist in discovering possible health problems. For example Connecticut passed a law to require lung function tests for foundry workers at least once every two years and for its tumor registry and hospitals to record the occupational history of each newly reported cancer patient. This cost may be applied as a tax credit if the trend towards universal health benefits continues, or a credit against insurance premiums, since it should help to defray problems where there are allegations of multi-factorial causation.

More thought should be given to the use of objective standards to assess impairment, as well as the use of joint medical panels as a possible alternative. For example, silicosis can be mistaken for other lung diseases while byssinosis may appear the same as emphysema and may not show up on an x-ray. Without qualified and trained health professionals, not only will these factors be missed, but the issues of causation and disability will probably result in lengthy litigation. There must be the proper etiological evaluation and diagnosis for any occupational disease. Case law abounds with compensability being denied on the basis of the injury being a disease of ordinary life, or its not peculiar to the trade, or on the schedule,

or it was not an accident. None of these reasons should bar recovery, yet for years they have.

The administrative systems still provide a greater opportunity for both employees and employers, the principal parties in workers' compensation, to voice their concerns. Federalization, while providing the necessary standardization, is not politically feasible for only occupational diseases. The enactment of separate administrative systems for certain diseases, while having some attractive advantages, will may lead to endless discussion on which diseases should be included. If reform can not be accomplished at the state level, this alternative may be worth pursuing.

In a pure capitalistic market setting, it is assumed that the jobs with the greatest dangers will pay more in order to attract workers to the company. The market no longer functions on such a pure economic theory, and in fact, low paying jobs may expose employees to greater dangers due to the ever increasing nature of scientific research. Without a mechanism for workers to seek redress for their injuries, both they and society will be forced to bear the brunt of the costs of those injuries.

Occupational diseases have changed the focus and impact of workers' compensation systems. The principles around which the system is based, liability without fault and quick, certain justice for work injuries, are nowhere to be seen for diseases. Diseases have transferred the administrative mechanisms back to the early part of the century, when reformers decried the plight of those employees injured at work. Despite the outcry at that time, states were hesitant to take the first step in removing the barriers that left so many workers in misery. The artificial barriers (e.g. such as schedules, exposure periods, ordinary diseases of life) must be removed and the benefits must be sufficient to provide a decent standard of living for disabled workers.

Changes to the state systems must recognize the long latency periods for many diseases as well as increasing safety and health enforcement to reduce injury rates in the future. Many of problems have surfaced in response to parties seeking to avoid liability, and its ultimate

economic consequences. In turn, those costs have been shifted onto society. The costs must be placed on the responsible parties and each state must take the necessary steps to remove barriers that preclude the injured workers and their families from receiving the benefits necessary to remedy their injuries and survive in modern society.

APPENDIX A

ADVISORY COUNCIL COMMENTS

The issuance of this report by the Advisory Council is intended to fulfill its obligation under M.G.L. Chapter 23E, §17. Its issuance does not imply complete agreement of its contents by each of the voting members of the Advisory Council. The following comments reflect individual responses by Advisory Council members to some of the contents of the report.

Comments by Chairman Linda Ruthardt - Management Representative

The following viewpoints may well be perceived as heresy, but the report's contents have forced me to re-think many of the "givens" of the past 70 years.

The report illuminates some of the most compelling reasons to eliminate "Occupational Illness/Disease" from the coverage of workers' compensation. The discussions of latency, inconclusive evidence, heredity, other environmental factors, aggressive litigation and lack of timely knowledge of risk, leads one to the conclusion that we've been trying to do the impossible for years at the expense of forcing persons who are disabled through a system that pretends it knows the often unknowable.

How can one hope to assign the costs of occupational illness to the right employer when very often at the time of the exposure the effect is unknown? How can one discern what portion of a loss of earning capacity is attributable to the exposure (that may never have been measured or understood), the life style of the person, the effect of other chemicals, other employments, the general environment and the genetic make-up of the person? How can one say that through the costs, often not known for years, safety will be enhanced? Yes, for the future, but what of all those exposed in the past? Most of the examples were of conditions that were ascribed to employment long after the insurance premiums were paid, and the chance to avoid the exposure was lost for many.

The report talks about the inequity of placing the costs on society as a whole rather than the employer. In fact, all workers' compensation costs are borne by society as a whole: that's who buys the products and services, after all, so that's where the employers get the money. The report's argument fails.

Occupational illnesses/diseases are probably best paid for through a funding mechanism that is designed to handle long periods of time between income and benefits, has medical benefits and does not waste time trying to have injured people guess how they came to be disabled. Social Security Disability Income, with Medicare, is the current program that fits the bill for most Massachusetts workers.

Perhaps those illness/diseases that appear virtually at the same time as exposure, with an acute onset, and are logically attached to actual employment could remain in the system. Tuberculosis contracted by a hospital worker who was exposed comes to mind. But, there are even suspicions that certain people may be more predisposed to contracting this disease than others, so perhaps even that "clearly defined" case, isn't! Was there also exposure at the Town Meeting he or she recently attended? Who Knows? And TB is emotionally far easier to deal with than AIDS. Remember when the way to defend an accused rapist was to cast aspersions on the victim? Why put diseases into a "no-fault" system that is experiencing more and more litigation?

The "wear and tear" disabilities are even more difficult to force through the system. How much time and money is wasted arguing whether a back's abnormalities existed before the injury that allegedly caused them? The typical human is not a physically perfect specimen. The current method of discerning disability for orthopedic injuries pretends the opposite. Again, when aging makes employment impossible, the Social Security Disability System is a rational alternative. It doesn't waste effort on deciding "why" someone is disabled, just "if". With an expanding aging workforce we shouldn't be wasting our assets on litigating theories of cause.

I do not expect that my conclusions will be immediately accepted--certainly not while there remain many uninsured both in the SSDI and health insurance arenas. However, this report showcases the impracticality of having occupational illness/disease in a system primarily designed to help people hurt at work at their (current) employer's cost. Probably the money spent defending and proving claims would be better spent on caring for the disabled people: no matter exactly how they came to be disabled.

I do not have an immediate answer for the employers' liability issue that will arise if we remove occupational illness/disease from the workers' compensation sole remedy umbrella. But I am convinced that continuing to pretend that we are rational when we try to use the workers' compensation system for managing the problem is indefensible. It's time to face reality and get going on solving the challenge.

FOOTNOTES

1. White, Lawrence, Human Debris: The Injured Worker in America, Seaview/Putnam, New York, 1983, page 15, citing a 1980 report from the U.S. Department of Labor, "An Interim Report to Congress on Occupational Diseases".

2. Barth, Peter, Workers' Compensation and Work Related Illnesses and Diseases, MIT Press, 1980, p.16, citing the President's Report on Occupational Safety and Health, Washington, D.C., U.S. Government Printing Office, 1972, p. 111.

3. Stellman, Jeanne and Daum, Susan, Work is Dangerous to Your Health, Pantheon Books, New York, 1973, p.3, citing U.S. Department of Health, Education and Welfare, Environmental Health Problems, Washington, D.C, Government Printing Office 1970.

4. The Report of the National Commission on State Workmen's Compensation Laws, Washington D.C., 1972, p.35 Other commentators have a different view from the Commission. Lawrence White, note 1 supra, outlines six basic goals of any workers' compensation system; internalize the cost of industrial accidents, compensate workers without regard to fault, provide medical care, provide wage-loss replacement, provide swift and certain compensation, and limit the liability of the employer. p.74 and p.75. It is only in this last category that he believes that the system has met its goal. p.95

5. Locke, Laurence, Massachusetts Practice, v.29, Workmen's Compensation, 2nd Edition, West Publishing, 1981, §21, p.17

6. Larson, Arthur, The Law of Workmen's Compensation, Matthew Bender, New York, 1986, v.1, §4:50, p.30. The first law was enacted by Georgia, and applied only to railroad employees. See also Labor Firsts in America, U.S. Department of Labor, G.P.O, 1977, p.26. Massachusetts enacted a law in 1887 (chapter 270 of the Acts of 1887) and was reorganized in 1920 as Chapter 153 of the Massachusetts General Laws. Locke, in Massachusetts Practice, note 5 supra, states at page 20, n.14, that the Massachusetts act was the first in the country, which may refer to the first all encompassing law, unlike the Georgia statute. Senate bill 370 of 1917, Report of the Joint Special Recess Committee on Workmen's Compensation Insurance Rates and Accident Prevention also claims Massachusetts as having the first law.

7. House bill 1190 of 1908, Report of the Joint Special Committee on Labor, p.75

8. Brodie, Abner, The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals, in Labor Management and Social Policy, Gerald Somers, Editor, The University of Wisconsin Press, Madison, 1963, p.163

9. Larson, note 6 supra, §5.10, p.35

10. Sts. 60 and 61 Vict. c37

11. Larson, note 6 supra, v.2, §57.14, p10-51, and also Locke, note 5 supra, §23, p.22 .

12. Madden's Case, 222 Mass. 487, 495 (1916) A more cynical view, but embodying the same thought is outlined in Bitter Wages, by Joseph Page and Mary-Win O'Brien, Grossman Publishers, 1973, at p.55 which attributes a quote to Lloyd George, Prime Minister of England that states "The cost of the product should bear the blood of the workman."

13. The following countries passed laws during this period: 1887-Austria; 1894-Norway; 1895-Finland; 1898 France (in 1919 established an occupation disease schedule), Denmark, the Industrial Insurance Act (in 1933 put occupational diseases under the system) and Italy; 1901 Greece; 1903 Belgium (in 1927 a fund was established for occupational diseases)

14. For a more detailed explanation of the law, see Workmen's Compensation for Public Employees, Leifur Magnusson, Public Administration Services, #88, Chicago, Illinois, 1944, p.2 or Workmen's Compensation Coverage of Public Employees, U.S. Department of Labor, Arthur Goldberg, Sec., Bulletin #210, May 1962, p.4

15. Report of the Commission on Compensation for Industrial Accidents, 1912, p.77, states that the law, Chapter 139 of the Maryland Acts of 1902, was held invalid by a Court of Common Pleas on the ground that it deprived the employer of his/her right to a jury trial. The decision was not reporte in the official reports.

16. See Page and O'Brien, note 12 supra, where at p.47 they outline that in 1907 there were 3,242 deaths recorded in the anthracite and bituminous mines and 4,534 death in the railroad industry alone. The National Commission, note 4 supra, note similar figures at p.33.

17. These benefits were part of the Phillipine Act of 1906.

18. 33 Stat 556, effective 8/1/08. See also Larson, note 6 supra, at vol.1 §5.20, p.18 and Goldberg, note 14 supra, at p.5

19. Chapter 67 of the Montana laws of 1909

20. Cunningham v. Northwest Improvement Co., 44 Mont 180, 119 P. 554 (1911).

21. Page and O'Brien, note 12 supra, at p.54

22. id, at 58

23. Report of the Commission on Compensation for Industrial Accidents, House bill 300 of 1911, p6, lists the compulsory law as Chapter 624 of the Acts of 1910 and the other, Chapter 352 of the Acts of 1910, which amended the employers liability law to cover all other employments and allowed the parties to reach an agreement on a voluntary scheme of compensation, providing certain amounts in accordance with the compulsory law.

24. Ives v. South Buffalo Railway, 201 NY 271, 292, 94 NE 431, 441 (1911)

25. The ten states were Massachusetts, Washington, New Jersey, Wisconsin, California, Kansas, Ohio, New Hampshire, Illinois, and Nevada. Both Washington and Ohio established state funds along the lines of the initial German model, but without employee contributions.

26. White, note 1 supra, p.60

27. Report of the National Commission, note 4, supra

28. See note 6, supra. While the law is still in existence, it is seldom relied on today.

29. Chapter 87 of the Resolves of 1903.

30. Report of the Committee on Relations between Employers and Employees, January 13, 1904, p.38

31. id, at p.47-55. The Report of the Commission on Compensation for Industrial Accidents, note 15 supra, at p.14 speculates on two possible reasons for the bill failing. One was concern over competitive disadvantages for the state's business community. The other was that the issue was not a priority of the public at that time.

32. House bill 402 of 1907

33. Chapter 489 of the Acts of 1908

34. Chapter 514 of the Acts of 1909, sections 136-140. This agencys' efficiency is outlined in the Report on the Relations between Employers and Employees, note 30 supra, p.10 et seq, where the Committee recognized the excellent work of this agency in discussing whether it would be productive for the state to have an industrial court. It should also be noted that Chapter 751 of the Acts of 1911, (the initial workers' compensation act) provided for arbitration of disputed cases by a committee chaired by a member of the Industrial Accident Board.

35. Chapter 120 of the Resolves of 1910

36. id

37. See House bill 300 of 1911; also the Report of the Commission for Compensation for Industrial Accidents, 1912 and House bill 346 of 1912.

38. Opinion of the Justices, 209 Mass 607 (1911)

39. Chapter 751 of the Acts of 1911, now, Chapter 152 of the Massachusetts General Laws.

40. See Report of the Commission to Investigate Rates and Practices in Workmen's Compensation Insurance, 1915; Report of the Joint Special Recess Commission on Workmen's Compensation Insurance Rates and Accident Prevention, Senate bill 370 of 1917; Report of the Special Recess Commission on Workmen's Compensation, Senate bill 334 of 1919; Report of the Special Commission to Investigate the Operation of the Workmen's Compensation Law, House bill 999 of 1927; Report of the Special Industrial Accident Commission, House bill 1350 of 1934; and the Report of the Special Recess Commission for the Purpose of Investigating Workmen's Compensation, Silicosis, and Hazardous Employments, House bill 356 of 1939.

41. Greem v. Cohen, 298 Mass 439, 11 N.E.2d 492 (1937).

42. Young v. Duncan, 218 Mass 346, 106 NE 1 (1914)

43. id, at 349, 106 NE 3.

44. id

45. At the current time 46 states adjudicate their cases through an administrative agency. New Mexico has just changed its law to take the workers' compensation out of the courts, while most of the other states have had administrative agencies handle the cases from the outset. The trend is to take the cases out of the courts and at the present, only Alabama, Wyoming, Tennessee, and Louisiana process disputed cases in the court system.

46. Somers and Somers, Workmen's Compensation: Unfulfilled Promises, Industrial and Labor Relations Review, v.7, #1, October, 1953, p.39

47. Chapter 816 of the New York laws of 1913.

48. New York Central Railroad Corporation v. White, 243 US 188, 37 SCt. 247, 61 LEd. 667 (1917)

49. Hawkins v. Bleakly, 243 US 210, 37 SCt. 255, 61 LEd. 678 (1917).

50. Mountain Timber Co. v Washington, 243 US 260, 37 SCt. 260 61 LEd 685(1917)

51. Barth, note 2 supra, p. 7,

52. id, at p.2

53. See Labor Firsts in America, note 6 supra, at p.15

54. Third Schedule, St.6 Edw. VII c.58

55. Barth, note 2 supra, at p.2. Barth notes Wisconsin and Connecticut.

56. Chapter 538 of the New York Laws of 1920. See also Barth, note 55, supra.

57. Barth, note 2 supra, at p.99. The six states are Alabama, Arkansas, Louisiana, Tennessee, Wyoming, and Oklahoma.

58. Third Annual Report of the Industrial Accident Board, Public document #105, Wright and Potter, Boston, 1916, p.102

59. Adams v. Acme White Lead and Color Works,182 Mich 157, 148 NW 485,486 (1914)

60. H.P. Hood and Sons v. Maryland Casualty Company, 206 Mass 223, 92 NE 329 (1910)

61. id

62. id

63. id at 225, 92 NE at 330

64. id, at 225,226, 92 NE at 330

65. Hurle's Case, 217 Mass 223,225, 104 NE 336,338 (1914)

66. id, at 226,227, 104 NE at 338,339

67. Johnson's Case, 217 Mass 388,390, 104 NE 735,736 (1914).

68. Burn's Case, 218 Mass 8,12, 105 NE 601,603 (1914).

69. The title of the initial Massachusetts Act, Chapter 751 of the Acts of 1911 was "An Act relative to Payments to Employees for Personal Injuries received in the Course of their Employment and to the Prevention of Such Injuries".

70. Vennen v. News Dell Lumber Company, 161 Wisc. 370, 154 NW 640 (1915).

71. Adams v. Acme White Lead and Color Works, note 59 supra,

72. Plass v. Central New England Railway Co., 155 NY 854, 855 (1915).

73. Chapter 813 of the Acts of 1913.

74. Third Annual Report of the Industrial Accident Board, Public Document #105, for period 7/1/14-6/30/15, Wright and Potter, Boston, Ma. 1916, p.104

75. id, at 105

76. id, at 110,111

77. Fourth Annual Report of the Industrial Accident Board, Public Document #105, for period 7/1/15-6/30/16, Wright and Potter, Boston, MA, 1917, p.66

78. id, at 77

79. id, at 71

80. Chapter 308 of the Acts of 1916

81. Madden's Case, 222 Mass 487, 111 NE 379 (1916).

82. id, at 496, 111 NE 383.

83. Crowley's Case, 223 Mass 288,289, 111 NE 786,787 (1916).

84. Maggelet's Case, 228 Mass 57,61, 116 NE 972,974 (1917).

85. Report of the Special Commission to Investigate the Operation of the Workmen's Compensation Law, House bill 999, 1927, p.15

86. Pimenthal's Case, 235 Mass 598,602, 124 NE 424,426 (1920).

87. id, at 601,602, 127 NE 426

88. Hurle's Case, note 65 supra, at 226 noting chapter 746 §1 of the Acts of 1913. Also 104 NE at 338.

89. Report, note 84 supra, at p.15 recommended that section 26 of M.G.L. c. 152 be amended to incorporate this premise.

90. Sullivan's Case, 265 Mass 497,499,164 NE 457 (1929) See also Fabrizio's Case, 274 Mass 352,174 NE 720 (1931) and Langford's Case, 278 Mass 461,180 NE 228 (1932)

91. DeFilippo's Case, 284 Mass 531, 188 NE 245 (1933).

92. id, at 533, 188 NE 246.

93. Page, note 12 supra, at p.12

94. id, at p 59-63.

95. Chapter 43 of the Resolves of 1933

96. Report to the General Court of the Special Industrial Disease Commission, House bill #1350, 1934, p.11

97. id, at p.165, 166. The four other states besides Massachusetts were California, Connecticut, North Dakota, and Wisconsin. In forty-two states common law actions dealt with disease calims and in Ohio, the courts had held that if the disease was not on the schedule set forth in the law, even a common law action could not be brought.

98. id, at p.170

99. id, at p.179

100. id, at p.173

101. id, at p.176

102. id, at p.189

103. Chapter 424 of the Acts of 1935 inserted section 9B

104. Occupational Disease Legislation in the United States-1936, United States Department of Labor, Bureau of Labor Statistics, Bulletin 652, December 1937, p. 1 notes that by 1936 44 states had workers compensation laws, up 2 from 1934, of which 16 compensated for occupational diseases, up 6 from 1934. Samuel Horovitz , Injury and Death under Workmen's Compensation Laws, Wright and Potter, Boston, 1944 at p 84, note 4, states that by September of 1943 13 acts covered diseases in schedules and 18 provided full coverage.

105. Chapter 62 of the Resolves of 1938

106. Report of the Special Commission Appointed for the Purpose of Investigating Workmen's Compensation, Silicosis, and Hazardous Employments, House bill 456, 1939, p.12

107. id, at p13-15

108. Chapter 465 of the Acts of 1939 added sections 52A and 76-85 to Massachusetts General law chapter 152.

109. See section 1 of Chapter 465 which became section 79 of M.G.L. c. 152

110. See sections 1 of Chapter 465 which became sections 79, 82 and 83 of M.G.L. c. 152.

111. Chapter 220 of the Acts of 1950, Chapter 234 of the Acts of 1955, and Chapter 301 of the Acts of 1957.

112. McPhee's Case, 22 Mass 1, 109 NE 633 (1915).

113. Donahue's Case, 290 Mass 239, 195 NE 345 (1935).

114. Smith's Case, 307 Mass 516, 30 NE2d 536 (1940).

115. Chapter 437 of the Acts of 1941 amending M.G.L. c. 152 §1 (7A)

116. Mercier's Case, 315 Mass 238,241, 52 NE2d 380,382 (1943).

117. See note 103,supra

118. Meunier's Case, 319 Mass 421, 427, 66 NE2d 198,202 (1946).

119. Bohlen, Francis H., A Problem in the Drafting of Workmen's Compensation Acts, 25 Harvard Law Review, v.25 No.6, April 1912, p517,546

120. Cardillo v. Liberty Mutual Insurance Co., 330 US 469,479 67 S.Ct. 801,807(1947).

121. McNichols Case, 215 Mass 497,499 102 NE 697 (1913).

122. id, at 499, 102 NE 697,698

123. See 99 C.J.S §208-265; Locke, note 5 supra, §211-268; Horovitz, Samuel, The Litigious Phrase: "Arising Out Of" Employment, in 3 NACCA LJ v.3 p.15 , and v.4 p19. He notes at page 87 of volume 4 that Arizona followed McNichol until 1945 until reversed by Goodyear Aircraft Corp. v Industrial Commission, 62 Ariz 398,409 158 P 2d 511.

124. Horovitz, note 123 supra, v.4 at p71

125. Caswell's Case,305 Mass 500, 26 NE 2d 328 (1940). For the acceptance of this case, see Horovitz, note 123 supra, v.3 p.46, note 85.

126. id at 504, 26 NE 2d 330

127. id at 502, 26 NE 2d 330

128. Horovitz, note 123 supra, v. 4, p. 80

129. Larson, note 6 supra, lists in Appendix A (as of April 1986) that there are 37 states that apply such a format. The U.S. Department of Labor, Employment Standards Administration, Office of State Liaison and Legislative Analysis, Division of Workers' Compensation Programs, June, 1988 lists 32 states. The same source also list seven states that include the term occupational disease within the definition of injury under the law.

130. Larson, note 6 supra, §41.31, p7-357

131. Page, note 12 supra, p.58

132. Urie v. Thompson, 337 US 163, 69 SCt.1018, 93 LEd 1282 (1948).

133. id, at 180,181, 69 SCt. 1029,1030, 93 LEd 1298.

134. See note 116, supra

135. Harmon v. Republic Aviation,298 NY 285,288 82 NE 2d 785,786 (1948).

136. Larson, note 6 supra, p7-427

137. Dando v. Binghamton Board of Education, 490 NYS 2d 360, 111 AD 2d 1060 (1985).

138. Gray v. City of St. Paul, 84 NW 2d 606 (Minn.1957) One police officer contracted tuberculosis from another, who had previously had it, as a result of sitting in a squad car for numerous hours on end with his co-employee.

139. Simpson Logging Co. v. Department of Labor and Industries, 32 Wash 2d 472,202 P2d 448 (1949).

140. Larson, note 6 supra, in Appendix A lists 28 states which exclude diseases of ordinary life. Elinor Schroeder and Sidney Shapiro, Responses to Occupational Diseases- The Role of the Markets, Regulations, and Information, Georgetown Law Journal, v.72, no.4, 1984, 1231,1298 lists 23 states which exclude ordinary diseases of life. Over the two year period, if the charts are correct, 5 additional states chose to make the changes. Another article which addresses this topic is Workers' Compensation Disease in Virginia: The Exception Swallows the Rule,Elizabeth Scott, University of Richmond Law Review, v.20, no. 1, Fall 1985 161, at 180, where she states that seventeen states expressly exclude ordinary disease of life but only Virginia has failed to recognize that it can become an occupational disease when its origins lies in a condition of employment. Since the initial two articles list charts which outline the respective states' position, it is the source which was primarily relied upon.

141. Larson, note 6 supra, Appendix A. However, as of 1978 all states with a schedule had added a "catch all" phrase in order to encompass other occupational diseases.

142. Boshuizen v. Thompson & Taylor Co., 360 Ill 160,195 NE 625 (1935).

143. People ex rel Radium Dial Co. v. Ryan, 371 Ill 597, 21 NE2d 749 (1939).

144. Holt v. Industrial Commission, 94 Nev 257, 578 P2d 752 (1978).

145. Larson, note 6 supra, Appendix A

146. Zerofski's Case,385 Mass 590,594,595, 433 NE2d 869,872 (1982).

147. Chapter 617 of the Nevada Revised Statutes (NRS), sections 617.200(2),617.270, and 617.330.

148. Chapter 617 of NRS sections 617.440 and 617.450. There is also specific coverage for police and firefighters under 617.453,617.454, and 617.457.

149. Chapter 617 of NRS section 617.375 and Chapter 616, section 616.190.

150. 39 M.R.S.A. §182 and 183

151. 39 M.R.S.A. §186 and §189

152. 39 M.R.S.A. §194-B

153. Schroeder, note 140 supra, p.1298. Examples are Idaho, which has a minimum exposure to silica dust for not less than 5 years of the last ten, 2 of those years in state; a minimum exposure of 60 days for non-acute occupational diseases; and a maximum period for death cases where it must take place within one year of the last exposure, except where there is continuous disability, and then it must occur within 4 years. In North Carolina, for silicosis and asbestosis, exposure must be at least 2 of the last 10 years, and for mortality, death must occur within 10 years of last exposure to asbestos and within 2 years for lead poisoning.

154. id. Examples are Idaho, note 41, Idaho Code §72-443 and Pennsylvania, note 134, Pa. Ann. Stat. §1401)d).

155. Dunleavy v. Walsh, Connolly, Senior, & Palmer, 309 NY 8,12, 127 NE 2d 727,728 (1955).

156. id, at 12, 127 NE 2d 728.

157. US Coal and Coke Co. v. Hooks,286 SW 2d 918,919 (Ky. Crt App. 1956).

158. Colorado Fuel and Iron v. Alitto, 723 P2d 725,730 (1954).

159. Stevenson v. Industrial Commission of Colorado et al, 545 P2d 712,716 (1972).

160. Consolidated Coal Co. v. Porter, 64 A2d 715,721 (Mary. Crt App. 1949).

161. Free v. Associated Indemnity Corp. et al, 52 SE 2d 325, 329(Ga. Crt. App. 1949).

162. Legate v. Bituminous Fire and Marine Ins. Co., 483 SW 2d 488 Tex. Crt. Civil App.1972) Texas law at the time allowed recovery only if death or total incapacity occurred within three years of last injurious exposure, and even though the employee did not know he had the disease, his wife's claim was barred when filed past the statute of limitations.

163. Section 50 of Chapter 572 of the Acts of 1985 sets this time limit for injuries after January 1, 1986. See M.G.L.A. c. 152 §41. Injuries occurring prior to the date have a one year statute of limitations, unless due to a mistake or reasonable cause, or if the delay does not prejudice the insurer.

164. 1988 Analysis of State Workers' Compensation Laws, US Chamber of Commerce, Chart IV

165. The Report of the National Commission on States Workmen's Compensation Laws, Washington D.C., 1972, p.51 recommendations 2.15 and 2.16, which discusses a disability evaluation unit to determine certain medical questions.

166. Locke, Laurence, Adapting Workers' Compensation to the Special Problem of Occupational Disease, Workers' Compensation Law Review, v. 9 1985-1986 67,98.

167. Hunter v. Zenith Dredge Co., 220 Minn 318, 19 NW 2d 795 (1945).

168. Page, note 12 supra, at 17-18

169. Helton, Edward, Biomedical and Toxicological Exposure p. 479 in Occupational Disease Litigation, Jerold Oshinsky, Chairman, Practicing Law Institute, Book #206, 1982

170. Buchanon v. Allen-Hay Motor Co., 533 P2d 825 (Or. App. 1975).

171. Hanks v. Blair Mills, 335 SE2d 91,95 (S.C. Ct.App 1985).

172. Fields v. Johns-Manville Sales Corp., 507 A2d 1209,1210 (NJ App.Ct. 1986). This case, upholding the apportionment scheme in the law also impacts on the premise that an employer, and therefore the insurer, takes the employee as "he/she is".

173. Gibson v. Little Cotton Mfg. Co., 325 SE2d 698,700 (NC App. 1985).

174. Musiolowski v. W.C.A.B. (U.S. Steel), 536 A2d 858,860 (Pa. Cmwlth 1988).

175. Hanks, note 171 supra, at 94

176. Larson, note 6 supra, Appendix A, Table 2A

177. Massachusetts General Law c. 152, §7A, which was added by chapter 380 of the Acts of 1947 and amended by chapter 702 of the Acts of 1971.

178. Massachusetts General Law chapter 152, §26, added by §1 of chapter 370 of the Acts of 1937.

179. Duggan's Case, 315 Mass 355, 53 NE2d 90 (1944).

180. Massachusetts General Law chapter 32, §94. The recent changes for public safety employees which prohibit many categories from smoking, which will hopefully decrease the numbers of heart cases are outlined in chapter 697 of the Acts of 1987.

181. Mullins Coal Co. v. Director, OWCP, 108 S.Ct 427, pet.re'h den, 108 S.Ct 787 (1987).

182. id at 431,439

183. West Virginia Code 23-4-8c(b). See also Larson, note 6 supra, §80.33 et seq and in particular at page 15-473 which outlines Pennsylvania decisions on its presumptions.

184. Sluss v. Workers' Compensation Commissioner, 327 SE 2d 413,416 (W.VA. 1985).

185. Larson, note 6 supra, §41.72 and §41.72a

186. Locke, note 165 supra, p. 69

187. Massachusetts General Law chapter 152, §15 and 24.

188. Turner v. Guiliano, 350 Mass 675, 216 NE2d 562 (1966).

189. Levin v. Twin Tanners, Inc., 318 Mass 13, 60 NE2d 6 (1945). See also Foley v. Polaroid, 381 Mass 545,413 NE2d 711 (1980), for a discussion of which injuries are the types contemplated by M.G.L. c. 152. The case was also reported at 400 Mass 82,93 508 NE2d 72,78 (1987) after a remand and once again the Court stated that an employee was entitled to receive compensation for those injuries not outside of the act's coverage.

190. Venable v. John P. King Mfg. Co., 331 SE 2d 638,642 (Ga.App. 1985).

191. King v. Viscoloid Co., 219 Mass 420,106 NE 988 (1914) where the Court permitted a parent to sue for loss of services, stating that the son's waiver of his common law rights could not bind the parent.

192. Larson, note 6 supra, §66.00 et seq and in particular his analysis at p 12-70

193. Ferriter v. Daniel O'Connell's Sons Inc., 381 Mass 507,413 NE2d 690(1980).

194. Chapter 572 of the Acts of 1985, §35. This section should be read in conjunction with §65, which deemed the section substantive and §67 which made the effective date the passage of the Act. As a result the changes apply to injuries occurring on or after 12/10/85 or 1/9/86 depending upon which source you use for the effective date of the law.

195. Hoover v. Globe Indemnity Co., 202 NC 655, 163 SE 758 (1932).

196. Hancock v. Halliday, 67 Idaho 119, 117 P 2d 333 (1946).

197. Duprey v. Shane, 39 Cal 2d 781,249 P2d 8 (1952).

198. id at 789, 249 P2d 13.

199. Longever v. Revere Copper and Brass,381 Mass 221,224, 408 NE2d 857,859 (1980).

200. Ross v. Schubert,180 Ind. App. 402, 388 NE 2d 623,628 (1979).

201. Needham v. Fields Frozen Foods, 171 Ind. App. 671, 359 NE 2d 544 (1977).

202. Rogers v. Hembd, 518 NE 2d 1120 (Ind. App. 1 Dist. 1988).

203. id, at 1124.

204. Kottis v. U.S. Steel Corp., 543 F2d 22,26, (7th Cir. 1976).

205. Hudson v. AC & S Co. Inc. et al, 535 A2d 1361 (Del. Super. 1987).

206. D'Angona v. County of Los Angeles, 27 Cal.3d 661, 613 P2d 238 (1980).

207. id, at 666, 613 P2d 242.

208. Bell v. Industrial Vangas Inc., 30 Cal3d 268,278, 637 P2d 266,272(1981).

209. id, at 279, 637 P2d 273

210. id, at 283, 637 P2d 275

211. Reed v. Steamship Yaka, 373 US 410,413, 83 SCt. 1349,1352, 10 LEd2d 448,451 (1963), re'h den. 375 US 872, 84 SCt.27, 11 LEd2d 101 (1963). Larson, note 6 supra, states at §76.61 note 58.2 that the L&HWCA , s. 5(b) as amended by PL92-516, effective 11/26/72, removed liability based upon the seaworthiness of a vessel.

212. id, at 415, 83 SCt.1353,10 LEd2d 452

213. Hardy v. J-M Sales Corp., 509 F Supp 1353,1355 (ED Tex 1981).

214. Eagle-Picher Industries Inc., v Liberty Mutual Insurance Co., 523 F Supp 110,115(MA DC 1981)

215. Keene Corp. v. Insurance Corp. of N.A, 667 F2d 1034,1044 (DC Cir. 1982), cert denied 455 US 1007, 102 S Ct. 1644, 1645, 71 LEd2d 875 (1982), reh. denied, 456 US 951, 102 SCt 2023, 2024, 72 LEd2d 476 (1982).

216. id, at 1045

217. id, at 1046

218. Steinhardt v. Johns-Manville Corp, 54 NY2d 1008,1010, 446 NYS2d 244,246, 430 NE2d 1297,1299 (1981). This decision upheld the premise set out in Thornton v. Roosevelt Hospital, 47 NY2d 780, 417 NYS2d 920, 391 NE2d 1002 (1979). The cause of action accrues at the time of the invasion of the body, not when the injury is apparent. Despite the harshness of the holding the courts in New York have left it up to the New York Assembly and Senate to alter their decisions.

219. Travellers Insurance v. Cardillo, 225 F2d 137,143 (2nd Cir. 1955).

220. id at 145. The court cites with approval Urie v. Thompson,337 US 163,170, 69 S Ct 1018,1025, 93 Led 1282 (1948), note 132 supra, which clearly held that the injury date was when the deleterious substance manifest itself.

221. Borel v. Fibreboard paper Products Co., 493 F2d 1076 (5th Cir. 1973) cert. denied, 419 US 869,95 SCt. 127, 42 LEd2d 107 (1974), pet. for reh. denied,493 F2d 1109 (5th Cir. 1973).

222. id, at 1097

223. id, at 1089

224. Newman, James, Occupational Disease, Insurance Information Institute, 1987, p.44.

225. Kofron v. Amoco Chemical Corp. & E.I.duPont de Nemours & Co. Inc., 441 A2d 226 (Del. Sup. Ct. 1982).

226. Johns-Manville Products Corp. v. Superior Court, 27 Cal 3d 465,165 Cal. Rptr. 858,612 P2d. 948 (1980).

227. Molsbergen v. United States, 757 F2d. 1016 (9th Cir. 1985) cert. dismissed 106 S Ct. 30(1985).

228. Jensen, Mark R., Post Employemnt Failure to Warn: A Viable Means of Circumventing the Exclusive Remedy, v. 17,#4, Pacific Law Journal, 1477,1501 (1986).

229. McDonald v. Employers Liability Assurance Corp., 288 Mass 170,173 192 NE 608,609 (1934).

230. Matthews v. Liberty Mutual Insurance Co., 354 Mass 470,473 238 NE2d 348,350 (1965).

231. Swift v. American Mutual Insurance Co., 399 Mass 373,504 NE2d 62 (1987).

232. id, at 376,377 504 NE2d 623,624

233. Reid v. Employers Mutual Liability Insurance Company, 319 NE2d 769,772 (Ind. 1974).

234. Loger v. Washington Timber Products Inc., 509 P2d 1009,1012 (Wash. Crt. App. 1973).

235. Mustapha v. Liberty Mutual Ins.Co., 387 F2d 631,632 (1st Cir.1967),aff'g 268 FSupp. 890 (D.R.I. 1967). However where the carrier's safety inspection was done as part of its relationship as a general liability carrier, not as a compensation carrier,there may be liability. See Latour v. Commercial Union Insurance Co., 528 FSupp. 231 (D.R.I. 1981).

236. Williams v. U.S. Fidelity and Guaranty Co., 358 F.2d 799,801,802 (4th Cir. 1966).

237. Bartollota v. Liberty Mutual Insurance Co., 411 F2d 15,117 (2nd Cir. 1969), aff'g 276 FSupp. 66 (D.Conn. 1967).

238. Kifer v. Liberty Mutual Insurance Co., 777 F2d 1325,1334 (8th Cir. 1985).

239. Smith v. American Employers Insurance Co., 102 NH 530,163 A2d 564,568(1960). See also Larson, note 6 supra, §72.91 note 28.

240. See New Hampshire Rev. Stat. Ann. §281.2, II, under the definition of employer, where in 1961 the legislature added the following: "except where the context specifically indicates otherwise, the term employer shall be deemed to include the employer's insurance carrier".

241. Fabricus v. Montgomery Elevator Co., 121 NW2d 361,366 (Ia.1963).

242. Kotarski v. Aetna Casualty and Surety Co., 244 F Supp. 547,559,(ED Mich 1965) aff'd, 372 F2d 95 (6th Cir. 1967) The holding was later overruled by a change in the law that is outlined in Ruth v. Butuminous Casualty Company, 427 F2d 290 (6th Cir 1970) note 246 infra.

243. Larson, note 6 supra, §72.91 n. 28. The Massachusetts Court cited it as precedent in Matthews, note 230 supra, at 354 Mass 472.

244. Ray v. Transamerica Ins. Co., 158 NW2d 786,787,790 (Mich. App. 1968)

245. id, at 789

246. Ruth v. Butuminous Casualty Co., 427 F2d 290,292 (6th Cir. 1970).

247. Ray v. Transamerica Ins. Co., 208 NW2d 610, 613,614 (Mich. App. 1973), where the Court upheld its decision despite the change in the law. The legislature was assumed to be aware of the decisional law in this area. The Court was unpersuaded that if liability were attached that there would be no inspections, since the legislature did not seek to encourage inspections and held that a duty was owed to the plaintiff since he was in the orbit of risk. The change in the law is outlined at M.C.L.A. §418.131, MSA 17.237 which includes insurer under the term employer for inspection purposes. The change was effective October 20, 1972.

248. Keller v. Dravo Corp., 441 F2d 1239,1243 (5th Cir. 1971). On page 1243 n.3 cites cases for immunity, n.4 cites cases against immunity.

249. Garrigus v. Kerns, 178 NE2d 212,214, (Ind. App. Ct 1961).

250. Brix v. General Accident and Assurance Corp., 93 NW2d 542,546 (Minn. 1958). See also Fultz v. Pullman Inc., 319 A2d 38,42, (Del. Sup Ct. 1974) where the court held that the workers' compensation claimant runs the risk of the choice to file a claim under the law since collateral estoppel will apply.

251. Young & Co. v. Shea, 397 F2d 185,188 (5th Cir 1968).

252. Jones v. VIP Development Co., 472 NE2d 1046,1054,1055 (Oh.1984).

253. Massachusetts General Law Chapter 152, section 5 under the old law, and also as a result of the changes made by Chapter 572 of the Acts of 1985.

254. Martin v. Ring, 401 Mass 59, 514 NE2d 663 (1987).

255. id at 63, 514 NE2d at 665

256. Ahmed's Case, 278 Mass 180, 173 NE 684 (1932).

257. Horovitz, note 123 supra, v.4 at p.80

258. Nigohosian v. Daub & Co., 90 NYS 2d 562,563(1949).

259. See NACCA Law Journal 1949 , v. 4, p. 329, discussing the presentation made to the International Association of Industrial Accident Boards and Commissions on 10/4/49.

260. Johnson, William, and Heller, Edward, Compensation for Disability from Asbestos, 37 Industrial and Labor Relations Law Review, 529,1984. The authors discuss a 1983 bill HR-3175, which in light of the 8,500-10,000 individuals who die each year from asbestos exposure, would attempt to increase the percentage replacement of wages for widows/widowers from about 36% now to 80%.

261. Report of the National Commission on the State's Workmen's Compensation Laws, Washington D.C, 1972, p.18 R 2.12 and 2.13

262. id, at p. 51, R 2.15 and 2.16

263. id, at p. 52, R 2.18 and 2.19

264. DeFilippo's Case, 284 Mass 531,534, 188 NE 245,246 (1933).

265. Squillante's Case, 389 Mass 396,398, 450 NE2d 599, (1983).

266. Chapter 572 of the Acts of 1985, §45, amending §35C of M.G.L.A. chapter 152.

267. Proceedings of the IAIABC-1965, Report on Radiation, p.21

268. The Report of the National Commission on State Workmen's Compensation Laws, Washington D.C., 1972, p.24, R6.13.

269. Gidley v. W.R. Grace & Co., 717 P2d 21,24 (Mont. 1986).

270. Periodic Report of Significant State Legislative Changes, U.S. Dept. of Labor, Employment Standards Div., Report 1-88, March of 1988 See New Jersey, A.B. 3374, enacted 1/8/88 which established a rebuttable presumption that certain heart diseases which occur while at work are compensable: Indiana, S 402 enacted 3/4/88, Disability due to inhalation of asbestos dust where the last date of exposure occurs after 7/1/88 shall be payable if disability happens within 35 years (formerly it was 20 years): Washington, H 1592, enacted 3/24/88, (which has a state fund) can provide benefits to a party who may have a claim under maritime law for asbestos related disease: Rhode Island,H 8464,enacted 3/2/88 extended the special commission to identify occupational diseases one additional year: See also John Burton's Workers' Compensation Monitor, v.1,#3, March 1988, p14, which lists Missouri, H 564, enacted 8/11/87, to expand to coverage to communicable disease arising out of work: see p.17, Georgia, which has deleted its schedule and statute of limitations for occupation disease so that now claims must be filed within 7 years of the last injurious exposure: p. 19, Michigan, where now suits for damages for occupational diseases caused by an intentional tort are allowed: p. 21, North Carolina, made changes with respect to occupational hearing loss.p. 22, Oklahoma, shortened its filing period from 5 years to 1 year for an occupational disease.

271. Norton v. C.P. Blouin Inc., 511 A2d 1056,1062 (Me. 1986). This decision upheld a change to §194 B of 39 M.R.S.A. to apply to a last exposure after 11/30/67 and remove certain barriers for disease with long latency periods.

272. Elisburg, Donald, Federal Occupational Disease Legislation: A Current Review,in Chelius, James, Ed., Current Issues in Workers' Compensation, W.E. Upjohn Institute for Employment Research, Kalamazoo, Mich.,1986,257,261.

273. The Welfare State and Workmen's Compensation, 5 NACCA Law Journal, 1950, p.50

274. Posner, Richard, A Theory of Negligence, Journal of Legal Studies, v.1 1972 p.29,92 where he figures that the average jury award in the early 1900's was $10,138 at a time when a railroad worker earned about $500 per year.

275. Editorial, 5 NACCA Law Journal, 1950, p.16. Similar changes were advocated by another noted scholar, Benjamin Marcus, in Advocating the Rights of the Injured Worker, 61 Michigan Law Review, 921,933 March 1963, where he recommended that if an employee can show negligence on the part of the employer, he/she should get the full amount of damages, not just a doubled award as a penalty.

276. See for example Massachusetts General Law Chapter 152, §28

277. Daily Lynn Item, June 23, 1988 p 10 col.4., continuation of article from page 1, column 3, on the backlog of asbestos suits in the federal courts.

278. id

279. LaClair v. Silberline Mfg. Co. Inc., 379 Mass 21,30, 393 NE2d 867,872 (1979).

280. Larson, note 6 supra, §72.81(a), p 14-231

281. id, at §72.81, p. 14-229. Professor Larson notes, at p.14-243 note 14.12, that the doctrine flourished in two states primarily, California and Ohio and in 1982 California abolished it in Assembly Bill 684, s.6 amending §3612 of the California Labor Code. At §72.83, p 14-264 he lists the jurisdictions which have adopted his standard as Illinois, Kentucky, Massachusetts (see Longever case, note 199 supra), Michigan, Minnesota, North Dakota, Ohio, and Wisconsin.

282. id, at p14-242

283. Sims v. American Casualty Ins. Co., 206 SE2d 121,130 (Ga.App 1973), aff'd sub nom Providence Washington Ins. Co., v. Sims, 232 GA 787,209 SE2d 61 (Ga 1974). See also Latour, note 235 supra.

284. Spurlock v. International Paper Co., 89 Or. App. 461,464, 749 P2d 611,612 (Or.App. 1988)

285. Walker v. Armco Steel Co., 446 US 740, 100 SCt. 1978, 64 LEd2d 659 (1980).

286. Beshada v. Johns-Manville Products Corp., 90 NJ 191, 447 A2d 530 (1982).

287. id at 209, 447 A2d 549.

288. Occupational Disease in New York State, Report to the Legislature, February 1987, Environmental and Occupational Medicine, p. ii, 9

289. id, at 54,63

290. Schor, Glen, Occupational Disease in California, California Policy Seminar, University of California, 1987, p.15

291. Barth, note 2 supra, p.87.

292. An Interim Report to Congress on Occupational Disease, United States Department of Labor, Washington, D.C. 1980, p.2

293. Research Report of the Interdepartmental Workers' Compensation Task Force, United States Department of Labor, Div. of Workers' Compensation Standards, Employment Standards Div., v.6, Product Liability in the Workplace: The Effect of Workers' Compensation on Rights and Liabilities of Third Parties, Jonathon M. Weisgall, p.176

294. Barth, note 2 supra, p.169

295. id, at 163,165

296. id at 178

297. Interim Report, note 292 supra, at 68,74

298. id

299. id, at 61

300. id, at 84

301. White, note 1 supra, p. 136

302. id, at 118

303. Schor, note 290 supra, p.11

304. Occupational Injuries and Illness Survey of 1984, Published in 1986 by the State of Arkansas, at p.12 and Cost Characteristics of Occupational Injuries and Illness in Arkansas, Annual Report 1984, published 10/86 at p.13

305. Newman, note 224 supra, 39,45

306. Boden, Leslie, Problems in Occupational Disease, p.313,322 and Barth, Peter, On Efforts to Reform Workers' Compensation for Occupational Diseases, p.327, 336 et seq., in Chelius, note 272, supra.

307. Newman, note 224 supra, at 56,57

308. id

309. "I keep Waiting and Waiting", Boston Globe, Sunday 3/20/88, p. 1.

310. Addis and Reed, Adding Insult to Injury: The Federal Judiciary's Treatment of Asbestos Victims in Massachsuetts, May, 1988, p.2

311. id, at 3

312. Robert Field and Richard B. Victor, Asbestos Claims: The Decision to Use Workers' Compensation and Tort, Workers' Compenastion Research Institute, September 1988, p.3

313. id, at iii

314. id, at iii,iv

315. id

316. id, at 22

317. id

318. Caccavale v. Raymark, 404 Mass 93 (1989)

319. Poblieqlo v. Monsanto, 402 Mass 112, 521 NE2d 728 (1988).