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GRADUALLY DEVELOPED DISABILITIES: A DILEMMA FOR WORKERS' COMPENSATION

M. THOMAS ARNOLD*

INTRODUCTION

ONE CATEGORY of work-related disabilities may fit neither the traditional tests for accidental injury nor the definition of occupational disease employed by a number of states. This is the category of incapacities which results from gradually worsening conditions, sometimes called "wear-and-tear" injuries. These conditions may be as debilitating as those caused by compensable accidental injuries or occupational diseases. In many cases, the connection between performance by the employee of the usual job duties and the disabling condition is equally apparent. The question is whether any valid reason exists for denying compensation in the case of the gradually developed work-related condition. One might easily conclude that the purposes behind and objectives of workers' compensation laws would support the extension of coverage to these situations. This, however, may involve more complexities and difficulties than imagined at first glance. This article will examine some of these problems and attempt to make a few modest suggestions as to the direction future consideration of the compensability of gradually developed disabilities should take.

A consideration of the topic of gradually developed disabilities must begin with a word about the problem of causation. A number of cases have denied compensation for gradually developed disabilities. However, these cases must be divided into those which deny compensation on the basis that a gradually developed disability is not compensable, and those which deny compensation because the employee has failed to meet his burden of showing that the condition is, in fact, causally connected to the employment. If an employee is unable to establish causation between his employment and his disability, this fact alone will provide sufficient basis to deny compensation.¹

I. THE PURPOSES AND OBJECTIVES OF WORKERS' COMPENSATION

This article will not attempt to trace the development of the American

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¹ See, e.g., *Morgan v. State*, 281 N.W.2d 710 (Minn., 1979), where the court upheld a denial of compensation to an employee's widow based on her failure to sustain the burden of establishing a causal link between his death and his employment as a steamfitter; *Berardino v. General Molding, Inc.*, 586 S.W.2d 365 (Mo. App., 1979), where the evidence indicated that excessive smoking and not asbestos inhalation caused the employee's lung condition; and *Barry v. Bank of California*, 25 Or. App. 269, 548 P.2d 997 (1976), where the court affirmed a denial of compensation on the basis that the claimant had failed to establish a causal connection between his employment at a bank and his cataracts and glaucoma.

experience regarding workers' compensation. However, it is imperative as a starting point to review the philosophical underpinnings of workers' compensation in the United States.

A number of theories have been advanced to explain and justify the system of workers' compensation. Some of these theories are economic while others are legal. Possibly the most popular and widely cited theory is that the "ultimate purpose of the Workmen's Compensation Act . . . is to treat the cost of personal injuries incidental to the employment as a part of the cost of the business."² Thus, "[a]ccording to a slogan attributed to Lloyd George, the cost of the product should bear the blood of the working man."³ Another economic theory holds that employers should bear the cost of industrial accidents inasmuch as they are best able to spread the risk or cost of such accidents.⁴ A third theory goes, perhaps, to the heart of the matter by suggesting a considerably different rationale. This theory is that "workmen's compensation can best be understood as a kind of 'fringe benefit' incorporated by law into the basic employment contract. The law in effect compelled the employer to provide, as a term of employment, an industrial accident policy for his employees."⁵ A final economic theory holds that an enterprise should bear all costs which are within the scope of that enterprise, not merely so that the costs may be passed onto and borne by consumers or because the employer is the superior risk bearer, but, more importantly, because to fail to do so results in improper resource allocation.⁶

² *Bundy v. State Highway Dept.*, 102 V. 84, 87, 146 A. 68, 69 (1929). In *Kenny v. Union Ry. Co.*, 166 App. Div. 497, 502, 152 N.Y.S. 117, 121 (1915) the court stated:

The plain purpose of the statute was to make the risk of accident one of the industry itself, to follow from the fact of the injury, and hence that compensation on account thereof should be treated as an element in the cost of production, added to the cost of the article and borne by the community in general.

³ NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 21 (1973) (compiled by C. William & P. Barth) [hereinafter cited as COMPENDIUM].

⁴ One commentator explains:

The compensation claimant is usually a poor risk bearer whereas industry generally is able to shift to consumers the cost of workmen's compensation based on liability without fault.

Thus, the avowed goal of the absolute liability approach is allocation of loss to the party better equipped to pass it on to the public: the superior risk bearer.

Morris, Hazardous Enterprises & Risk Bearing Capacity, 61 YALE L.J. 1172, 1176 (1952).

⁵ *Blum & Kalven, Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U. OF CHI. L.R. 641, 664 (1964).

⁶ This resource allocation theory of workers' compensation has been concisely articulated as follows:

Not charging an enterprise with a cost which arises from it leads to an understatement of the true cost of producing its goods; the result is that people purchase more of those goods than they would want if their true cost were reflected in price. On the other hand, placing a cost not related to the scope of an enterprise on that enterprise results in an overstatement of the cost of those goods, and leads to their underproduction. Either way, the postulate that people are by and large best off if they can choose what they want, on the basis of what it costs our economy to produce it, would be violated.

Calabresi, Some Thoughts on Risk Distribution and The Law of Torts, 70 YALE L.J. 499, 514 (1961). The effect of this proper resource allocation is "in the long run in a

In addition to economic justifications for the existence of systems of workers' compensation, there is a commonly accepted legal theory, called the "compromise" or "social compromise" theory. "According to the social compromise theory both employers and employees gained and lost when workmen's compensation replaced employers' liability." Thus, workers' compensation can be viewed as a legislative "bargain" between workers and employers. This justification or theory has been discussed in a number of workers' compensation cases where the constitutionality of all or part of the workers' compensation system has been at issue.⁸

competitive economy to shift resources from hazardous to safe industries and from unsafe employers within an industry to safe employers." COMPENDIUM, *supra* note 3, at 25. This theory is a refinement of the first theory in that it recognizes that, at least to an extent, "the American compensation system does not place the cost on the 'public' as such, but on a particular class of consumers, and thus retains a relation between the hazardousness of particular industries and the cost of the system to the industry and consumers of its product." LARSON, WORKMEN'S COMPENSATION LAW, § 3.20 at 17 (1981).

One might argue that proper resource allocation could be obtained if workers demanded higher pay in order to insure themselves against injury. Calabresi has a twofold answer to this suggestion. First, "no single employee deems the risk of injury arising out of his employment to be great enough to justify him either in insuring or in asking substantially higher wages because of it." Calabresi, *supra* at 543. Second, "if workers were to insure themselves and to demand higher wages to pay for the insurance, the fact that insurance would probably cost them more than their employers would mean that injury costs in the industry would be overstated." *Id.* at 544. Calabresi concludes that "[t]he master is the best insurer, both in the sense of lower rates and in the sense of being most aware of the risk." *Id.* at 543.

⁷ COMPENDIUM, *supra* note 3, at 23. This trade-off works as follows:

Employers were made responsible for all occupational injuries, regardless of fault, and compensation benefits were calculated in a more logical, equitable manner than tort liability awards. On the other hand, workmen's compensation became the exclusive remedy of employees against employers, with the effect that injured employees ordinarily lost the right to seek a higher tort liability award than their compensation benefits. This compromise is commonly termed "the *quid pro quo*" of workmen's compensation.

Id.

⁸ In the landmark case of *New York Central R.R. v. White*, 243 U.S. 188 (1917), the United States Supreme Court, in upholding the constitutionality of the New York workers' compensation law, described the legislative compromise attained as follows:

If the employee is no longer able to recover as much as before in the case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations

Id. at 201-02. This theory or justification for workers' compensation has, however, been used for purposes in addition to that of upholding the constitutionality of a workers' compensation act. Recently, for example, the Supreme Court of Alabama referred to this theory in overturning a 1975 amendment to the Alabama Workmen's Compensation Act which provided co-employee immunity from a tort suit for injuries covered by the act. *Grantham v. Denke*, 359 S.2d 785, 787 (Ala. 1978). There was a strong dissent in this case by Justice Maddox who argued, correctly in the opinion of this author, that a proper application of the theory would have supported the constitutionality of the statutory provision. *Id.* at 789-90.

Workers' compensation systems, in general, attempt to perform a number of functions.⁹ These include the payment of cash¹⁰ and medical benefits¹¹ to injured workers, the payment of death benefits to the dependent survivors of workers who are killed,¹² the payment of burial allowances,¹³ rehabilitation¹⁴ and, in some cases, the promotion of workplace safety.¹⁵

Since the purpose of workers' compensation is to provide compensation on a no-fault basis to employees who are injured because of their employment, it is not surprising that a requirement for compensation is a relationship between the disability and the employment. This is generally reflected in the requirement that the disability must have "arisen out of and in the course of the employment."¹⁶ Workers' compensation was not intended to be a system of general health insurance for the employee.¹⁷

II. A BRIEF OVERVIEW OF THE CONCEPTS OF "INJURY" AND "OCCUPATIONAL DISEASE"

If there is, in fact, an actual causal relationship between the employment and the disability, the question of whether a gradually developed disability is compensable must be faced. Most states have required, either by

⁹ See generally, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, 35-40 (1972) [hereinafter cited as REPORT]; COMPENDIUM, *supra* note 3, at 24-6.

¹⁰ See, e.g., OHIO REV. CODE ANN. §§ 4123.56-58 (Page 1980).

¹¹ See, e.g., *Id.* § 4123.66.

¹² See, e.g., *Id.* §§ 4123.59-60.

¹³ See, e.g., *Id.* § 4123.66, allowing for the payment of reasonable funeral expenses, not to exceed \$1,200.

¹⁴ See, e.g., *Id.* §§ 4121.61-69.

¹⁵ See, e.g., *Id.* § 4121.37 (creating a bureau for prevention of industrial accidents and diseases within the Ohio Industrial Commission); *Id.* § 4123.28 (requiring employers to keep records of and make reports in writing to the Ohio Industrial Commission of injuries and occupational diseases, or death therefrom); *Id.* § 4123.34(C) (permitting experience or merit rating of premiums to "encourage and stimulate accident prevention"); and OHIO CONST. art. II, § 35 (authorizing an award of additional compensation to an employee injured as a result of an employer's failure to comply with a specific safety requirement).

¹⁶ "All States use the phrase 'arising out of and in the course of the employment' or a variant, as the test to determine when an injury or disease is work-related." REPORT, *supra* note 9, at 50. See, e.g., OHIO REV. CODE ANN. § 4123.01(C) (Page 1980); UTAH CODE ANN. § 35-1-45 (1953) ("arising out of or in the course of his employment").

¹⁷ The National Commission on State Workmen's Compensation Laws recommended that the "arising out of and in the course of employment" test continue to be a requirement of compensability. REPORT, *supra* note 9, Recommendation 2.14 at 50. The Commission's Report states:

[W]e do not believe that workmen's compensation should be converted into a general insurance scheme: its function is not to protect against all sources of impairment or death for workers. One of its objectives is to provide incentives for employers to improve their safety record. Impairments to workers from non-work-related sources are largely beyond an employer's control. Moreover, there are many private and public benefits which are available to workers and their families regardless of the source of disability or death.

statute or judicial interpretation, that an injury be accidental in character.¹⁸ This usually demands that the cause and the result of the injury be examined in terms of both unexpectedness and time definiteness.¹⁹

The courts in a number of jurisdictions have gone beyond the traditional strict definition of an accidental injury and have decided that it is unnecessary to pinpoint the exact point in time when an injury or disability occurred. These courts accept the gradually developed injury as compensable and focus on the question of causation, *i.e.*, whether the condition was caused by the employment or working conditions.²⁰ A number of cases have gone so far as to allow compensation for gradually developed *mental* disabilities without a specific, stressful work-related incident.²¹ If one were to speak in terms of trends, it would appear that the direction is toward recognition of gradually developed injuries as compensable.²²

¹⁸ LARSON, *supra* note 6, § 37.10 at 7-1. Iowa is an example of the small minority of states which do not require an injury to be accidental to be compensable. See IOWA CODE ANN. §§ 85.3 & 85.61(5) (West Supp. 1979); *Jacques v. Farmers Lumber & Supply Co.*, 242 Iowa 548, 47 N.W.2d 236 (1951); and *Littell v. Lagomarcino Grupe Co.*, 235 Iowa 523, 17 N.W.2d 120 (1945).

The Pennsylvania statute was amended in 1972 to remove the accident requirement. See PA. STAT. ANN. tit. 77, §§ 411 & 431 (Purdon Supp. 1981-82); *Workmen's Comp. App. Bd. v. Bernard S. Pincus Co.*, 479 Pa. 286, 388 A.2d 659 (1978).

¹⁹ LARSON, *supra* note 6, § 37.20 at 7-7.

²⁰ See, *e.g.*, *North American Compress & Warehouse Co. v. Givens*, 445 P.2d 270, 274 (Okla., 1968) (claimant, who became disabled after breathing dust and cotton fibers over a period of three years, suffered an "accidental personal injury compensable within the provisions of the Oklahoma Workmen's Act"); *Central Motor Express, Inc. v. Burney*, 214 Tenn. 118, 377 S.W.2d 947, 949 (1964) (in affirming an award of compensation to an employee who developed a herniated disc while lifting heavy loads over a period of time, the court stated, "we think that the present rule in this state is that when a condition has developed gradually over a period of time resulting in a definite work-connected unexpected, fortuitous injury, it is an 'accident' within the meaning of our Workmen's Compensation Act, and compensable."); and *Scobey v. Southern Lumber Co.*, 218 Ark. 671, 238 S.W.2d 640 (1951) (reversing denial of claim for compensation for an aggravation of lung cancer through inhalation of emery and steel dust).

²¹ The leading case allowing compensation for a mental disability caused by ordinary stress, or that usual to the workaday world, is *Carter v. General Motors Corp.*, 361 Mich. 577, 106 N.W.2d 105 (1960).

In a number of cases involving gradually developed mental injuries, the employee has been required to show that the stresses he or she was subjected to were unusual or "out of the ordinary from the day-to-day stresses and strains which all employees must experience." *Swiss Colony, Inc. v. Dept. of Indus., Labor and Human Relations*, 72 Wis. 2d 46, 51, 240 N.W.2d 128, 130 (1976). This type of requirement appears to be aimed at the problem of multiple and hidden etiology in mental disability cases. While desiring to compensate all disabilities actually caused by the employment, courts do not want to compensate mental disabilities due to nonoccupational causes or to promote malingering. Larson has endorsed the approach adopted in *Swiss Colony*. LARSON, *supra* note 6, § 42.23(b) at 7-639.

²² This can be viewed as part of an overall judicial and legislative trend towards expanding the coverage of the workers' compensation scheme. This expansion has been evidenced in several ways. One is the increasing number of persons entitled to benefits under the scheme. While this has been in some part due to judicial decisions (*see, e.g., Gallegos v. Glaser Crandell Co.*, 388 Mich. 654, 202 N.W.2d 786 (1972), holding that special treatment of

Some cases have allowed compensation for a gradually developed injury while attempting to avoid a wholesale abandonment of the traditional concept of accidental injury, by applying the so-called "repeated or cumulative trauma" doctrine.²³ These cases are often difficult to distinguish from

agricultural employees under the Michigan act was a denial of equal protection), most of the expansion here has been legislative in nature. For example, in most states today, employers of one or more employees are covered by the applicable workers' compensation act. *See, e.g.,* OHIO REV. CODE ANN. § 4123.01(B)(2) (Page 1980), and CAL. LABOR CODE § 3300 (West 1971). Even under those statutes requiring more than one employee for coverage, the trend has been to reduce that number. *Compare* GA. CODE ANN. § 114-107 (1973) (statute inapplicable to employers with less than five regular employees, unless coverage voluntarily elected), *with* the amended section (Supp. 1980) (less than three employees).

Another way in which the scheme has been expanded is through extending coverage to new situations. For example, initially claims for workers' compensation benefits for injuries caused by acts of God met little success. Increasingly, courts have been willing to find such injuries compensable. *See, e.g.,* Whetro v. Awkerman, 383 Mich. 235, 174 N.W.2d 783 (1970) (injury caused by tornado compensable, overruling prior cases). *Accord,* Wiggins v. Knox Glass, Inc., 219 So. 2d 154 (Miss., 1969). Another example is the constant chiseling away by the courts of the "coming and going rule" which denies compensation for injuries sustained while commuting. *See, e.g.,* Hornyak v. Great Atlantic & Pacific Tea Co., 63 N.J. 99, 305 A.2d 65 (1973) (refusing to apply the coming and going rule to a trip to a restaurant for lunch); Hammond v. Great Atlantic & Pacific Tea Co., 56 N.J. 7, 264 A.2d 204 (1970) (court refused to apply the coming and going rule to defeat recovery based on the close proximity of the employee to the employer's premises at the time of injury).

Finally, the workers' compensation scheme has been broadened through the provision of increased benefits. Some of the liberalization here has been through court decision. For example, a number of cases have recently held that an employer or an insurer may be liable for nursing services provided by a family member of the injured employee. *Sisk v. Philpot*, 244 Ark. 79, 423 S.W.2d 871 (1968); *Kushay v. Sexton Dairy Co.*, 394 Mich. 69, 228 N.W.2d 205 (1975); *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978) (overruling prior cases). Most of the increase in benefits, however, has been as a result of legislative action. For example, most state statutes now provide medical benefits which are unlimited in duration and amount. *See, e.g.,* OHIO REV. CODE ANN. § 4123.66 (Page 1980). Professor Larson states, "It is interesting to observe that in the space of about thirty-five years the number of states providing full medical coverage has risen from about a dozen to more than four times that number." LARSON, WORKMEN'S COMPENSATION LAW § 61.11 at 10-666 (1981).

²³ An early case adopting this approach is *Sears-Roebuck & Co. v. Starnes*, 160 Tenn. 504, 26 S.W.2d 128 (1930), in which the Supreme Court of Tennessee affirmed an award of compensation to an employee of a department store who developed an infection in her fingertip following the formation of callouses due to the operation of a listing machine requiring approximately 10,000 strokes daily. *Id.* at 507, 26 S.W.2d at 129. The Supreme Court of Tennessee has reaffirmed the result in the *Sears-Roebuck* case on a number of occasions. For example, in *Brown Shoe Co. v. Reed*, 209 Tenn. 106, 350 S.W.2d 65 (1961), the court held that an injury as a result of the repeated use of the employee's hand and arm in the operation of a machine which trimmed the soles of shoes was compensable under the workers' compensation law. The court apparently treated the final trauma which resulted in the disability which prevented the claimant from doing his work as being the time of injury. *Id.* at 118-19, 350 S.W.2d at 70-71. *Accord,* *Aldrich v. Dole*, 43 Idaho 30, 35, 249 P. 87, 88 (1926) (injury resulting from the repeated striking of the claimant's knee by a gear shift lever held compensable, the court stating, "[t]he statute does not restrict compensation to an injury that results from a single event, and there would seem to be no sound reason for holding that an injury occasioned by a number or series of events is not within the act.").

those which have rejected the traditional definition of an accidental injury.²⁴ In a number of cases, however, the courts have simply refused to allow compensation for a gradually developed or wear-and-tear injury.²⁵ The results in many cases are somewhat troubling in that the employment may be clearly responsible for the disability, yet the burden or cost may be borne not by the employer or by consumers, but rather by the disabled employee.

Workers' compensation laws in most states now include coverage of occupational diseases. Occupational diseases generally do not fit into the traditional definition of accidental injuries because such diseases are neither unexpected nor definite in time as to cause and result. Yet these conditions are clearly the result of continued exposure to certain hazardous employment environments. The problem faced by state legislatures in drafting their occupational disease statutes was how to exclude those diseases thought to be non-work-related. One method was to schedule or list those diseases which could be medically agreed upon as originating from hazardous working conditions.²⁶ This approach covered a number of disabilities and di-

²⁴ Several Florida cases, for example, while speaking sometimes in terms of the "cumulative effect" of exposure to a work-related condition, seem to have, in effect, abandoned the traditional concept of "accidental injury." See, e.g., *Dillow v. Florida Portland Cement Plant*, 258 So. 2d 266 (Fla., 1972) (reinstating award of compensation to a claimant for lung cancer which was probably accelerated by exposure to cement dust); *Brito v. Advance Metal Products, Inc.*, 244 So. 2d 428 (Fla., 1971) (reinstating award of compensation for partial disability due to exposure to smoke and fumes while welding); and *Czepiel v. Krohne Roofing Co.*, 93 So. 2d 84 (Fla., 1957) (ordering award of compensation for aggravation of tuberculosis through inhalation of dust and fumes).

²⁵ The South Dakota case of *Tegels v. Western Chevrolet Co.*, 81 S.D. 592, 139 N.W.2d 281 (1965), provides an interesting example. The claimant there developed a number of conditions including severe headaches, instability, eye trouble, loss of body hair, nervousness and irritability as a result of exposure to and inhalation of fumes from a spray painting operation. Despite the fact that the claimant's disability was clearly caused by the employment environment, the South Dakota Supreme Court reversed an award of benefits by the state Industrial Commissioner. The court held that to constitute a compensable "injury by accident" required "a sudden, unexpected, unforeseen, or unusual physical or traumatic damage or harm traceable to a definite time, place, and circumstance." *Id.* at 598, 139 N.W.2d at 284. Since the claimant's condition "developed gradually and progressively over a relatively long period of time," it did not constitute a compensable injury. *Id.*

The case of *Bess v. Coca-Cola Bottling Co.*, 469 S.W.2d 40 (Mo. Ct. App., 1971), is very similar to *Tegels*. It involved a claimant whose pre-existing tuberculosis was aggravated by print dust and fumes. The court held that the employee's tuberculosis was not aggravated by an "accident" within the meaning of the Missouri Workmen's Compensation Act, inasmuch as "there was no unexpected or unforeseen event happening suddenly and violently producing at the time objective symptoms of an injury." *Id.* at 45. According to the court, "[t]he employee was exposed to these working conditions for over three years." *Id.*

In addition, the court held that the claimant's tuberculosis was not a compensable occupational disease, since it was an ordinary disease of life not peculiar to the employment. *Id.* at 46. See *infra* notes 29 and 30, and accompanying text.

²⁶ Until its amendment in 1977, the Tennessee statute contained a schedule of twelve occupational diseases which were compensable. TENN. CODE ANN. § 50-1101 (1977). (The current version eliminates this listing. TENN. CODE ANN. § 50-1101 (Supp. 1980)). The Tennessee Supreme Court liberally interpreted the prior provision in *Whitehead v. Holston Defense Corp.*, 205 Tenn. 326, 326 S.W.2d 482 (1959). The court held that the section did not require an employee to prove with scientific exactness that the condition from

seases; however, it also excluded a number of legitimate conditions from compensability.²⁷ Because of the potential unfairness of the schedule approach, all states, by 1978, had achieved general coverage of occupational diseases either by adopting an unrestricted coverage or by coupling a schedule approach with a general catch-all provision.²⁸

A number of occupational disease statutes, however, still exclude from coverage "all ordinary diseases of life to which the general public are exposed."²⁹ In addition, a number of the occupational disease provisions still require that, to be compensable, a disease must be "characteristic of and peculiar to a particular trade, occupation, process or employment."³⁰

III. THE TREATMENT OF THE GRADUALLY DEVELOPED DISABILITY IN OHIO: AN UNINSPIRING EXAMPLE

The Ohio experience with respect to gradually developed disabilities is particularly instructive, being illustrative of an approach which leaves much to be desired.

A recent Ohio case is *Bowman v. National Graphics Corp.*³¹ It involved

which he suffered was one of the listed occupational diseases. The court decided that some diseases were so closely related to the listed occupational diseases that they too were compensable. *Id.* at 332-333, 326 S.W.2d at 485. Compare *Ridley Packing Co. v. Holliday*, 467 P.2d 480 (Okla. 1970), where the former Oklahoma provision listing compensable occupational diseases, OKLA. STAT. ANN. tit. 85, § 3(16) (West 1970), was strictly construed. Oklahoma has now also abandoned the schedule approach. OKLA. STAT. ANN. tit. 85, § 3(10) (West Supp. 1980-81).

²⁷ In some states an employee suffering from an occupational disease *not covered* by the workers' compensation act may maintain a common law tort action against the employer. See, e.g., *Boniecke v. McGraw-Edison Co.*, 485 Pa. 163, 401 A.2d 345 (1979); *contra*, OHIO REV. CODE ANN. § 4123.74 (Page 1980).

²⁸ LARSON, *supra* note 6, § 41.10 at 7-353 n.6. TENN. CODE ANN. § 50-1101 (Supp. 1980) and OKLA. STAT. ANN. tit. 85, § 3(10) (West Supp. 1980-81) provide general coverage of occupational diseases. OHIO REV. CODE ANN. § 4123.68 (Page 1980) and PA. STAT. ANN. tit. 77, § 1208 (Purdon Supp. 1981-82) combine schedule coverage with a catch-all provision.

²⁹ See, e.g., NEB. REV. STAT. § 48-151(3) (1978).

³⁰ *Id.* The Ohio statute covers, in addition to the scheduled diseases, all other occupational diseases "peculiar to a particular industrial process, trade or occupation and to which an employee is not ordinarily subjected or exposed outside of or away from his employment." OHIO REV. CODE ANN. § 4123.68(BB) (Page 1980). The Oklahoma statute provides that covered occupational diseases include only those "which [are] due to causes and conditions characteristic of or peculiar to the particular trade, occupation, process or employment in which the employee is exposed to such disease." OKLA. STAT. ANN. tit. 85, § 3(10) (West Supp. 1980-81).

The Pennsylvania catch-all provision extends coverage to non-scheduled occupational diseases "(1) to which the claimant is exposed by reason of his employment, and (2) which are peculiar to the industry or occupation, and (3) which are not common to the general population." PA. STAT. ANN. tit. 77, § 1208(n) (Purdon Supp. 1981-82). The Pennsylvania courts have struggled to determine the meaning and effect of this provision. Compare *Porter v. Sterling Supply Corp.*, 203 Pa. Super. Ct. 138, 199 A.2d 525 (1964) and *Scott v. United States Steel Corp.*, 203 Pa. Super. Ct. 459, 201 A.2d 243 (1964) with *Williams v. Spaulding Bakeries, Inc.*, 464 Pa. 29, 346 A.2d 3 (1975) and *Utter v. Asten-Hill Mfg. Co.*, 453 Pa. 401, 309 A.2d 583 (1973).

³¹ 55 Ohio St. 2d 222, 378 N.E.2d 1056 (1978).

an employee who worked for a number of years as a bookbinder. His duties included, in part, the lifting of heavy bundles from a skid to an elevated work level. The employee began to experience back pains, which became progressively worse until, in January, 1974, he could no longer lift the bundles as required. The employee did not claim that there was any specific incident or incidents which caused his disability. It was simply a result of a progressively worsening condition caused by his employment. The Supreme Court of Ohio, in a very brief opinion, denied compensation, holding that the employee had not suffered an injury within the meaning of the Ohio Workers' Compensation Act. The court stated:

Clearly, under the facts of the instant cause there was no occurrence which was unforeseen, unexpected, and unusual which produced Bowman's disability. His disability simply developed gradually over a period of time as a result of performing his normal work activities. As a matter of fact, given the type of physical work Bowman performed, his disability may well have been predicted and expected to have developed as a result of normal 'wear and tear'.³²

In a very interesting opinion, the dissent pointed out that:

The effect of the majority's holding is to distinguish between an employee, suffering from a gradual worsening back condition, who lifts an unusually heavy object normally not required in his job, and an employee, also suffering from a gradual worsening back condition, who simply is unable to perform further lifting on the job.³³

According to the dissent, the first of these individuals would have suffered a compensable injury, while the second individual, in the position of the plaintiff in *Bowman*, would not.³⁴

What apparently troubled the dissent—and what is indeed troubling—is the fact that in both cases the casual relationship may be equally clear. One of the most intriguing things about the *Bowman* case is that at no point is the causal relationship between the employee's disability and his employment denied.

The dissent also analyzed the result in the case in light of the purposes of the Workers' Compensation Act. It concluded that the result was incompatible with the purposes of the act, and that the employer "should be charged the expense for injuries directly caused by his enterprise. Whether an employee suffers a sudden injury, or is simply injured over a gradual

³² *Id.* at 225, 378 N.E.2d at 1058. The court continued: "[w]hether the members of this court believe that gradually occurring 'wear and tear' type disabilities resulting from normal employment activities should be compensable, the adoption of such a concept is properly a function of the General Assembly and not a function of the Judiciary." *Id.*

³³ *Id.* at 235, 378 N.E.2d at 1063.

³⁴ *Id.*

period of time, should be immaterial in determining the cost to the employer of conducting his business."³⁵

The *Bowman* case has been relied on by the Ohio Supreme Court in several subsequent cases.³⁶ The *Bowman* decision, however, left several questions open. First, the question remained of just exactly what was necessary under *Bowman* to establish a compensable injury. Second, the question of whether a gradually worsening condition, even if not compensable as an injury, could be compensable as an occupational disease.

The first question includes the issue of whether both an unusual cause and an unusual result were necessary under *Bowman*, or whether an unusual result alone would suffice. This issue was resolved in the subsequent case of *Czarnecki v. Jones & Laughlin Steel Corp.*,³⁷ which involved an employee who felt a sharp pain in his back and fell while lifting a drum. The employee alleged that the weight in the drum had shifted during the lifting, causing the injury. The employer denied that anything unusual had occurred.

The majority referred to the language of the Ohio act in answering this question. The statute defined "injury" as including "an injury, whether caused by external accidental means or accidental in character and result."³⁸ The majority stated that the meaning of this language was not clear.³⁹ Turning then to the history behind the enactment of the Ohio definition of injury and at the statutory provision requiring that the act be "liberally construed in favor of employees and the dependents of deceased employees,"⁴⁰ the majority concluded that injuries which were not preceded by unusual events were compensable under the Ohio act.⁴¹

³⁵ *Id.* See *supra* notes 2 and 3, and accompanying text. The dissent also stated that: [The majority opinion, in adopting an artificial distinction with respect to the compensability of a back injury, will encourage fraud.

Under the majority view, workers will be encouraged to 'remember' that at a particular time and place they received a back injury while lifting an unusually heavy item normally not required by their job duties.

Id. at 235, 378 N.E.2d at 1063. It is probably not unlikely that this is already happening in jurisdictions which deny compensation for gradually developed disabilities. See, e.g., *Love v. Ralph's Food Store, Inc.*, 163 Mont. 234, 516 P.2d 598 (1973), where it appears that the claimant may have "conveniently" remembered several such incidents.

³⁶ See, e.g., *Peavy v. Flowers*, 58 Ohio St. 2d 407, 390 N.E.2d 832 (1979) (holding that chronic myositis which developed over a long period of time and gradually worsened was not compensable) and *Ratner v. Daugherty*, 58 Ohio St. 2d 410, 390 N.E.2d 1194 (1979) (holding noncompensable a gradually worsening heart condition eventually resulting in a heart attack; plaintiff must identify a specific incident as a cause).

³⁷ 58 Ohio St. 2d 413, 390 N.E.2d 1195 (1979).

³⁸ OHIO REV. CODE ANN. § 4123.01(C) (Page 1980).

³⁹ 58 Ohio St. 2d at 415, 390 N.E.2d at 1197.

⁴⁰ OHIO REV. CODE ANN. § 4123.95 (Page 1980).

⁴¹ 58 Ohio St. 2d at 420, 390 N.E.2d at 1200. *Accord*, *Duff Hotel Co. v. Ficara*, 150 Fla. 442, 7 So. 2d 790 (1942) (affirming an award of compensation to a claimant who suffered an inguinal hernia from lifting a heavy pot of meat; no evidence of a slip, fall or other untoward event).

After *Bowman*, the decision in *Czarnecki* is somewhat surprising; and one wonders, as did the dissent in *Bowman*, whether *Bowman* draws a meaningful and practical line between compensable and non-compensable injuries.⁴²

The confusion about what constitutes a compensable injury has been compounded by the Ohio Supreme Court's most recent pronouncement. In *Szymanski v. Halle's Department Store*,⁴³ the court was faced with the question of "whether disabilities caused solely by emotional stress without contemporaneous physical injury or physical trauma are compensable injuries under Ohio workers' compensation laws."⁴⁴ The court answered this question in the negative, upholding the Industrial Commission's denial of compensation. There was, as in *Bowman*, a vigorous dissent.⁴⁵ The claimant, Alicja Szymanski, had alleged that she suffered a disabling heart condition as a result of being verbally humiliated by a co-worker in the presence of others.⁴⁶ The dissent stated that this decision raised another artificial distinction between compensable and non-compensable injuries. According to the dissent:

If the co-worker herein had slapped appellee across the face during their argument, the requisite physical contact would presumably exist, and, assuming a causal connection could be established, the resulting heart attack would be a compensable injury. Yet, what logical basis is there for distinguishing this hypothetical from the instant facts?⁴⁷

Indeed, what logical basis is there? The Ohio Court seems to have taken two steps forward in *Czarnecki*, and then a big step backwards in *Szymanski*.

As to the compensability of a gradually developed condition as an occupational disease, a case decided after *Bowman* clarified the matter somewhat. In *State ex rel. Miller v. Mead Corp.*,⁴⁸ the Ohio Supreme Court dealt with an employee's claim that he had sustained a partial hearing loss in both ears caused by employment-related noise. The claimant had a pre-existing, war-related hearing loss. The court held, first, that the disability was not an injury within the meaning of the Workers' Compensation Act, citing the *Bowman* case.

⁴² See *supra* notes 33-35, and accompanying text. If the decision in *Bowman* is an invitation to fraud, does not the decision in *Czarnecki* renew the invitation?

⁴³ 63 Ohio St. 2d 195, 407 N.E.2d 502 (1980).

⁴⁴ *Id.* at 196, 407 N.E.2d at 504.

⁴⁵ *Id.* at 199, 407 N.E.2d at 505.

⁴⁶ *Id.* at 195, 407 N.E.2d at 503. This verbal assault was triggered when the claimant undertook to demonstrate to a customer an item which was part of a product line assigned to the co-worker.

⁴⁷ *Id.* at 200, 407 N.E.2d at 506. The dissent asserted that this distinction could lead to "inequitable results." *Id.*

⁴⁸ 58 Ohio St. 2d 405, 390 N.E.2d 1192 (1979).

The court went on to state that the disability was not a compensable occupational disease, and held that the Ohio statute required that an occupational disease be contracted in the course of employment to be compensable. The employee, according to the court, clearly had not *contracted* the disease within the meaning of the act.⁴⁹

It is clear, then, that a pre-existing disease, aggravated in the course of employment, is not a compensable occupational disease in Ohio. What, however, of a situation where an employee without a pre-existing condition or disease is disabled as a result of a gradually developed work-related condition? Does this constitute a compensable occupational disease? The answer to this question may be no, depending upon the nature of the condition.

Ohio is one of the states which use a schedule of compensable occupational diseases coupled with a catch-all provision.⁵⁰ Scheduled or listed occupational diseases, such as anthrax, glanders, lead poisoning and mercury poisoning, should present little difficulty so long as contracted in the requisite manner.⁵¹ The difficult cases will involve knee injuries, heart conditions, and so forth, which are the result of degenerative changes in the body. In the case of *Popham v. Industrial Commission*,⁵² the employee had worked every summer for twenty-two years as a ticket seller at an amusement park. She alleged that each time she sold a ticket she struck her knee against a bar to activate a turnstyle, admitting the patron. She claimed that these repeated traumas caused a degenerative arthrosis in her right knee and that this condition was a compensable occupational disease. Upon being denied compensation by the Bureau of Workmen's Compensation and the Industrial Commission, the employee brought a mandamus action, seeking review of the order denying compensation. The Supreme Court refused to overturn the order, holding, in part, that there was no error of law. The court stated, "[I]t is the common and generally held consensus that arthrosis results 'from ordinary "wear and tear"' and is usually an affliction incidental to aging; hence it does not meet the requirements of subparagraph (X) of Section 4123.68, Revised Code, in being a disease *peculiar* to a particular employment."⁵³

The court thus excluded degenerative diseases incidental to the physio-

⁴⁹ *Id.* at 406, 390 N.E.2d at 1193.

⁵⁰ See OHIO REV. CODE ANN. § 4123.68 (Page 1980).

⁵¹ A number of occupational disease statutes, including the one in Ohio, prescribe the manner in which some or all scheduled occupational diseases must be contracted in order to be compensable as a listed disease. A disease not contracted in the required manner may still be compensable under a catch-all provision. See *State ex rel. General Motors Corp. v. Indus. Comm'n*, 42 Ohio St. 2d 255, 327 N.E.2d 761 (1975), where compensation was permitted under the general or catch-all provision of the Ohio act for a listed disease which had not been contracted in the requisite manner.

⁵² 5 Ohio St. 2d 85, 214 N.E.2d 80 (1966).

⁵³ *Id.* at 87, 214 N.E.2d at 82. (Emphasis in the original).

logical process of aging from compensability. It indicated that to be compensable, a disease must be peculiar to the employment. This requirement was elucidated in the subsequent case of *State ex rel. Ohio Bell Telephone Co. v. Krise*.⁵⁴ Upholding an award of compensation for the occupational disease of histoplasmosis contracted by a telephone installer and repairman from contact with pigeon droppings and dead pigeons, the court pointed out three statutory criteria which must be met before a claimant is entitled to receive benefits for a non-scheduled occupational disease. These are: "(1) A disease contracted in the course of employment, (2) a disease peculiar to a particular industrial process, trade or occupation, and (3) a disease to which the claimant is not ordinarily subjected or exposed outside of or away from his employment."⁵⁵ The court held that this means that the claimant's employment must result in a risk of the disease, which is different in character from the risk of employment in general, and that this risk must exist in a greater degree and in a different manner from the risk of this disease to the public generally.⁵⁶

In sum, an employee with a gradually developed disability may be denied compensation in Ohio under a variety of theories even though the disease may be a natural consequence of the employment.

IV. SHOULD THE GRADUALLY DEVELOPED DISABILITY BE COMPENSABLE? A WORD OF CAUTION

There is a lack of uniformity among the states on the question of whether the gradually developed disability of the "wear-and-tear" variety constitutes a compensable injury or an occupational disease within the meaning of the applicable workers' compensation statute—and, if so, under what circumstances. The treatment of such disabilities within a given jurisdiction, such as Ohio, may be somewhat lacking in rationality. There may seem to be a lack of a logical basis distinguishing between compensable and non-compensable conditions.

The question might fairly be asked at this point, should the employee who "wears out" on the job be compensated for his or her condition? Many would answer this question affirmatively. The National Commission on State Workmen's Compensation Laws has recommended both that the accident requirement be abandoned as a test of compensability,⁵⁷ and that

⁵⁴ 42 Ohio St. 2d 247, 327 N.E.2d 756 (1975).

⁵⁵ *Id.* at 250, 327 N.E.2d at 758.

⁵⁶ *Id.* at 253-54, 327 N.E.2d at 760-61. See also *State ex rel. Republic Steel Corp. v. Indus. Comm'n*, 61 Ohio St. 2d 193, 399 N.E.2d 1268 (1980), for a recent example of an occupational disease which the Ohio Supreme Court held met the criteria for compensability under the general catch-all provision.

⁵⁷ REPORT, *supra* note 9, Recommendation 2.12 at 49.

states provide full coverage for all work-related diseases.⁵⁸ The Commission recognized, however, that:

A serious problem for workmen's compensation occurs when the impairment or death is associated with several contributing factors, and the factors are both work-related and non-work-related, or when there is doubt about the etiology. A classic example is heart damage, which may result from an interaction of congenital, degenerative, and work-related factors.⁵⁹

The Commission recommended that full compensation benefits be paid for any disability or death resulting from a combination of work-related and non-work-related causes if the work-related cause was a significant factor.⁶⁰

The proposed National Workers' Compensation Standards Act of 1979 would have prohibited states from denying compensation for a disease or excluding any disease

on the basis that a disease (1) is not peculiar to or characteristic of a particular occupation or employment; (2) is not the result of an accident, or the onset of such disease was unrelated to any accident or accidental occurrence; (3) does not appear on a list of compensable diseases where exclusion from the list renders a disease conclusively noncompensable, or appears on a list of diseases which are conclusively noncompensable if such disease might, under some circumstances, arise out and in the course of employment; or (4) is an ordinary disease of life or is a communicable disease, if the risk of contracting such a disease is increased by the nature of the employment.⁶¹

⁵⁸ *Id.*, Recommendation 2.13 at 50.

⁵⁹ *Id.* at 50.

⁶⁰ *Id.*, Recommendation 2.17 at 51. Most courts probably would allow compensation in such a situation. *See, e.g.*, *International Vermiculite Co. v. Indus. Comm'n*, 77 Ill. 2d 1, 394 N.E.2d 1166 (1979), allowing compensation for a blockage of an artery in the claimant's legs. Referring to medical testimony that the claimant had a pre-existing arteriosclerosis and that factors such as smoking and diet might accelerate this degenerative condition, the court said:

The claimant's injury need not be the sole factor which aggravates a pre-existing condition, so long as it is a factor which contributes to the disability. . . . If the injury is a contributing factor, compensation will be allowed even if it is also possible that the claimant's disability may have resulted from natural degenerative change or from other contributing factors, such as smoking.

Id. at 3-4, 394 N.E.2d at 1167.

⁶¹ S. 420, 96th Cong., 1st Sess. § 4(F) (1979). The proposed National Workers' Compensation Act of 1975, S. 2018, 94th Cong., 1st Sess. (1975) also would have required states to provide workers' compensation coverage for a broad range of conditions. It defined "injury" as "any damage or harmful change in the human organism, which results in illness, disability, impairment, disfigurement, disease or death, whether or not the result of an accident." *Id.* § 3(7)(a). This would seem to cover the gradually developed disability.

This definition did not go uncriticized. "The problem here now is that the injury and disability definitions are so broad as to cover anything. I am dealing in the administration of workers' comp day in and day out. Your definition here opens Pandora's Box. There is no limit to it." *Hearings on S. 2018 Before the Subcomm. on Labor of the Senate Comm. on Land and Public Welfare* [hereinafter cited as *Hearings*], 94th Cong., 2d Sess. 160 (1976) (statement of Robin Obetz, a Columbus, Ohio attorney).

The federal workers' compensation bills which have been introduced over the years

This provision would seem to have required compensation of gradually developed work-related disabilities of all varieties including the so-called "wear-and-tear" injury, such as a heart or arthritic condition.

Compelling arguments can be made that gradually developed work-related disabilities should be compensable. These arguments can be couched in terms of the theories and justifications for workers' compensation.⁶² One should, however, guard against being too hastily swept away by an uncritical assumption that any and all disabilities which are in any part caused by the employment should be compensated under the workers' compensation system. There are several reasons why such caution should be exercised.

The first reason is that the concept of causation is potentially misleading and sometimes meaningless. Take, for example, the situation of an employee who suffers a heart attack while at work, performing his duties.⁶³ The first question is whether the employment simply provided the occasion for it. "It seems beyond dispute that a large segment of our population is affected by cardiac disorders of one form or another. In many there is a good possibility that the employment duties provided only the occasion and not the cause for the episode."⁶⁴

Sorting out those situations in which the employment is the cause from those in which it is merely the occasion for the heart attack is by no

would, among other things, create "a federal occupational disease law to be administered as part of the states' workers' compensation laws." Millus, *Federal v. State Control of Workmen's Compensation Programs*, TRIAL, March, 1979, 27, 29.

⁶² Consider, e.g., the language from an opinion of the Ohio Court of Common Pleas ordering an award of compensation to an employee who suffered a herniated disc while lifting a fifty-pound bag:

The curious thing about the administrator's position is that had a machine been doing this job and broken at this stage of the operation no one would claim it was not properly a chargeable expense of production.

A human back used to save the expense of a machine for thirteen years is, when it breaks, somehow regarded with less favor than a machine.

Such injuries to employees are an economic cost of production. They always have been and they always will be.

Stull v. Keller, 11 Ohio Misc. 45, 51-52, 228 N.E.2d 682, 686 (1967).

⁶³ The use of the heart attack situation is merely illustrative. Similar problems would arise with respect to other types of disabilities, e.g., degenerative arthrosis or impairment of hearing.

⁶⁴ Dwyer v. Ford Motor Co., 36 N.J. 487, 520, 178 A.2d 161, 178 (1962) (Haneman, J., dissenting). Accord, In re Madden, 222 Mass. 487, 494-95, 111 N.E. 379, 382-83 (1916), where the court stated:

The act is not a substitute for disability or old age pensions It does not afford compensation for injuries or misfortunes, which merely are contemporaneous or coincident with the employment or collateral to it. Not every diseased person suffering a misfortune while at work . . . is entitled to compensation The personal injury must be the result of the employment

On the other hand, "[w]hile a heart attack may be inevitable in the sense that the victim will some day have a heart attack, such a statement begs the question whether job stress caused the attack to occur when it did or aggravated the attack and the extent of damage." Kostamo v. Marquette, 405 Mich. 105, 119; 274 N.W.2d 411, 417 (1979).

means an easy task. There are a number of factors which cause difficulty, including:

(1) the many varieties of "heart disease," (2) the distinction between an original onset of an episode where a perfectly healthy heart had theretofore existed and the aggravation of an existing cardiac or systemic condition which eventuates in a disabling or terminal episode, (3) the uncertainty of the medical profession as to the cause of the cardiac episode in the case of an aggravation, i.e., whether the employment efforts of the employee finally triggered the seizure or whether it resulted from the inexorable progress of the disease.⁶⁵

The very recent Illinois case of *Johns-Manville Products Corp. v. Industrial Commission*⁶⁶ graphically illustrates the difficulties here. The employee in this case died several hours *after* returning home from work. At the time of death, the employee was 60 years old, five feet, six inches tall and weighed about 350 pounds. In addition, the employee had a pre-existing cardiac deficiency. The medical testimony was sharply conflicting.⁶⁷ Are the courts and the medical profession capable of answering the riddles that cases such as this pose?⁶⁸

⁶⁵ 36 N.J. at 519, 178 A.2d at 177-78 (Haneman, J., dissenting).

⁶⁶ 78 Ill. 2d 171, 399 N.E.2d 606 (1980).

⁶⁷ *Id.* at 176-77, 399 N.E.2d at 609. The court affirmed an award of compensation as not against the manifest weight of the evidence. *Id.* at 181, 399 N.E.2d at 611-12.

⁶⁸ Because of the problem of causation in the case of a heart attack, some courts adopted the unusual stress or unusual strain doctrine. This doctrine required that "for a heart attack to qualify as an injury . . . there must be evidence which will support a conclusion that the attack resulted from a strain or exertion not ordinarily required of the employee in the performance of his duties." *In re Taylor*, 69 Wash. 2d 19, 21, 416 P.2d 455, 456 (1966). This doctrine was intended to help solve the causation problem by denying compensation for those heart attacks deemed merely coincidental to the employment. The problem, however, was that application of the doctrine resulted in denial of compensation in situations where there was actual causation.

A number of states, however, do not require any showing of unusual strain in heart attack cases. *See, e.g., Workmen's Compensation Appeal Bd. v. Bernard S. Pincus Co.*, 479 Pa. 286, 388 A.2d 659 (1978); *Dwyer v. Ford Motor Co.*, 36 N.J. 487, 178 A.2d 161 (1962). Whereas the unusual strain doctrine perhaps excluded from compensation cases in which the employment was a factor in the heart attack, the abandonment of the rule probably resulted in compensation for heart attacks which were merely coincidental to the employment. In other words, the employment simply provided the occasion for the heart attack. Larson has suggested what may be the most workable and fair solution to this dilemma:

If there is some personal causal contribution *in the form of a previously weakened or diseased heart*, a heart attack would be compensable only if the employment contribution takes the form of an exertion greater than that of non-employment life. Note that the comparison is not with *this employee's* usual exertion *in his employment*, but rather with the exertions present in the normal *non-employment* life of this or any other person. On the other hand, if there is no personal causal contribution, that is, there is no prior weakness or disease, *any* exertion connected with the employment and causally connected with the collapse as a matter of medical fact would be adequate to satisfy the legal test of causation. This is the heart-case application of the actual risk test: *this* exertion in fact causally contributed to *this* collapse. In both situations, whether or not there was prior personal weakness or disease, the claimant would also have to show that *medically* the particular exertion contributed causally to the heart attack.

Larson, *The "Heart Cases" in Workmen's Compensation: An Analysis and Suggested Solution*, 65 MICH. L. REV. 441, 470 (1967) (emphasis in the original). Larson states: "In other

The problem of causation is particularly acute in the situation of the employee with a previously weakened or diseased heart. The question, again, is whether the heart attack is caused by the employment, or whether the employment simply provides the occasion for the heart attack—and the answer is generally even more obscure.⁶⁹

A second reason is that it is not clear that the total cost of a gradually developed disability can fairly be allocated to merely one of its causative factors. For example, an employee with a heart condition in which his employment has played a role has probably been subjected to a number of other causative factors as well.⁷⁰ These may include general old age, excessive smoking, excessive drinking, fights with the neighbors, domestic difficulties, financial problems, and so on. Why then, in the situation of such a multiple etiology disability, should the entire cost be allocated to the employer? Should not part of the cost be allocated to the tobacco industry, the liquor industry, the social security system, or the neighbors with the barking dog? The reason is probably that it is more convenient and expedient to place the cost on the employer. Given the problems—perhaps impossibility—of establishing the role of each causal factor, as well as the impracticality of handling large numbers of cases with so many parties, the path of least resistance is to place the entire cost on the employer. It might be asked whether this is even undesirable.

One objection to placing the entire burden on the employer is that the employer may be competitively disadvantaged in relation to similar businesses in other states or in other countries. Recently there has been a skyrocketing of workers' compensation costs in a number of jurisdictions. Caterpillar Tractor Company, for example, has stated that its workers' compensation costs in Illinois increased from \$3.4 million in 1975 to \$9 million in 1978, and that "the company's per-hour workmen's compensation costs in Illinois are twice those in Wisconsin, three times those in Ohio and nine times those

words, under the proposed rule, there will be cases in which employment exertion was medically capable of accounting for the collapse, and in which denials will nevertheless result because the exertion does not rise above the 'wear and tear of life' level." *Id.* at 471 n. 138.

⁶⁹ John Lewis, an attorney and former general counsel of National Commission on State Workmen's Compensation Laws has testified:

Also, there are a significant number of diseases in which the medical profession at this time cannot separate the cause, and cannot say, yes, this was occupationally related, or no, it was not.

Those of us who practice law in the compensation field know, for example, in the heart disease area there are many, many very fine cardiologists, some of the best around, who, when you get them involved in an individual case say, no, I cannot tell you whether this particular heart attack was occupationally related. There are too many other factors involved, going to genetics and lifestyle, and things of that nature.

All I can tell you, is that individual had pre-existing heart disease, that exertion on the job may or many [sic] not have caused the attack at the time it occurred.

Hearings, supra note 61, at 85.

⁷⁰ See *supra* note 69.

in Iowa."⁷¹ At the time of this statement, the company was considering alternate sites for building a new plant. The company stated that "successful resolution of matters affecting the state's business climate will be crucial factors in deciding whether the plant is located in Illinois or in other states where such costs are lower."⁷² It appears, then, that there may be something of a trade-off between being a progressive state, with liberal compensation for gradually developed disabilities, on the one hand, and jobs and industry on the other.⁷³

A third reason is that the cost, in absolute terms, may be quite high. It has been estimated, for example, that if the cost to employers of workers' compensation in the District of Columbia were as low as the cost in neighboring areas of Maryland or Virginia, a new townhouse in the District now costing \$95,000 could be sold for \$5,000 less.⁷⁴ While it is undoubtedly

⁷¹ Columbus Dispatch, June 17, 1979, at K-3, cols. 3-4.

⁷² *Id.* Concerns about the effects of workers' compensation costs have been raised by judges as well. In *Dwyer v. Ford Motor Co.*, Justice Haneman pointed out in his dissent that in 1957 there were 820,780 deaths due to hypertension and arteriosclerosis, which was approximately one out of every two deaths. 36 N.J. at 527-28, 178 A.2d at 183. He stated that "[s]ympathy for the workman and his family is no basis upon which to convert the statute into employees' health insurance . . ." 36 N.J. at 526, 178 A.2d at 181.

Justice Coleman of the Michigan Supreme Court has expressed similar concern. In *Deziel v. Difco Laboratories, Inc.*, she dissented from the court's holding that the effect of the perceived (not the actual) work conditions on an employee was the standard for determining the compensability of a mental disability. She stated, "[t]he practical result of the twist given by the majority will be a blow to Michigan industry in a competitive market. The implications to the consumer have been directed to our attention for it is the consumer who must absorb the costs of this newly defined disability." 394 Mich. 466, 484, 232 N.W.2d 146, 154 (1975). The decision in *Deziel* has been legislatively overruled. The Michigan act now requires mental disabilities to be based on actual events of the employment and not "unfounded perceptions thereof" to be compensable. MICH. COMP. LAWS ANN. §§ 418.301 & 418.401 (Supp. 1980).

⁷³ One observer has stated:

On one hand, it is good to be known as a "progressive" state which beats all of the other states in unemployment compensation, workman's compensation, environmental requirements, and other such things. However, in a free society such as ours where businesses have the right and, in fact, the responsibility to their stockholders to seek the greatest stream of income, being a most progressive state in those terms may not be most beneficial to the state's citizens, who, above all, need jobs. In the trade, this is called voting with your feet, and in the case of Detroit hundreds of businesses holding hundred of thousands of jobs voted on the legal climate referendum by moving out.

Mandell, *Quality of Life Factors in Business Location Decisions*, ATLANTA ECON. REV., Jan.-Feb., 1977, 4, 6.

The costs incurred when a business decides to relocate may be substantial. See, e.g., Barthalomew, Joray, & Kochanowski, *Corporate Relocation Impact*, INDIANA BUS. REV., Jan.-Feb., 1977, 2, which examined the impact of the relocation of Associates Corporation of North America. The findings suggest that for every ten jobs exported, an additional thirty-five jobs in local goods production were lost. In addition, the costs may not be solely economic in nature. See Mick, *Social and Personal Costs of Plant Shutdowns*, 14 INDUS. REL. 203, 205 (1975), concluding that reduced social interaction, political alienation, increased cholesterol levels and elevated blood pressure may result from a plant relocation or shutdown.

⁷⁴ *On the Waterfront: How Congress Torpedoed the Longshoremen's Act*, J. OF AM. INS., Fall, 1979, 24, at 25. This article states that in the District of Columbia, "workers' compensation rates are three to four times higher than those in neighboring areas of Maryland and Virginia, even though the district rates as one of the safest in the United States in terms of incidence of work-related injuries and illnesses." *Id.*

true that not all of the increased cost of workers' compensation is attributable to benefits paid on account of gradually developed disabilities, it is certain that this is a factor, perhaps more so in some states than in others. The Governor's Workmen's Compensation Advisory Commission in Michigan studied, among other things, the payment of workers' compensation benefits to retirees in the state of Michigan. The commission's report states:

In 1973, the 'Big Three,' General Motors, Ford and Chrysler, paid out over 24 million dollars to retirees. With the additional costs of administering these claims and, where necessary or appropriate, retaining counsel, the total cost to the companies exceeded \$30 million. According to the Michigan Department of Commerce Data Base, other self-insurers and the insurance carriers paid almost as much, over 20 million dollars. Hence the total cost of claims by retirees exceeded 60 million dollars in 1973, the most recent year for which reasonably firm statistics are available. With increased benefit levels since 1973 and an increased volume of claims, reasonable estimates for the retiree cost in Michigan for 1975 range from 80 to 90 million dollars.⁷⁵

One form of gradually developed disability has by itself probably cost employers enormous amounts of money. This condition is occupationally induced hearing loss. It is likely that workers' compensation due to industrial noise will increase substantially in the future, and will not be limited to costs related to hearing loss.⁷⁶

⁷⁵ GOVERNOR'S WORKMEN'S COMPENSATION ADVISORY COMMISSION, WORKERS' COMPENSATION IN MICHIGAN: A REPORT TO GOVERNOR WILLIAM G. MILLIKEN 17 (1975).

John Thodis of the Michigan Manufacturers Association has stated that "[m]ore than \$100 million a year in workers' compensation is paid to retirees who have . . . left the labor market and, if disabled at all, suffer from disabilities more normally associated with the aging process . . . workers' comp[ensation] is the greatest disincentive to creating employment in our state." *Quoted in What They're Saying About Federal Standards Legislation, J. OF AM. INS., Fall-Winter, 1978, at 11.*

It has been said that "[i]n the State of Michigan, the workers' compensation program has come very close to being the equivalent of a pension program for retired workers." *Hearings, supra* note 61, at 123 (statement of William H. Brewster). It has been claimed that almost a quarter of all workers' compensation payments in Michigan are being received by retirees. *Id.* at 138 (Appendix III to Mr. Brewster's statement).

⁷⁶ Joseph H. Hafkenschiel, an economist for the Communications Workers of America, has stated:

Noise is somewhat different than many occupational hazards. First, it is all pervasive rather than confined to selected industries or processes. Second, the damage caused by noise is regarded by many as qualitatively different and less significant than the damage caused by other hazards. Yet, if an index of the magnitude of the noise problem reflecting both incidence and severity could be developed, noise would probably emerge as the number one occupational health problem in the nation.

. . . . The most obvious direct cost to industry is workmen's compensation claims for compensable hearing loss. Although many state laws have relatively restrictive laws, the average claim paid is probably in the neighborhood of \$2,000. (The average award in 1974 in Oregon was \$2,656 and \$2,504 in Wisconsin.) Assuming that approximately 10,000,000 production workers are currently overexposed to noise, . . . the potential workmen's compensation liability is approximately \$20 billion.

Social, Economic and Physiological Problems Caused By Industrial Noise, Hearings Before the Subcomm. on Government Regulation of the Senate Comm. on Small Business, 94th

A final reason for caution is that it is questionable whether workers' compensation is truly an efficient method of compensating work-related disabilities, much less gradually developed ones.⁷⁷ Disputes over liability under workers' compensation laws can be costly and wasteful of economic and judicial resources.

V. ALTERNATE APPROACHES TO THE GRADUALLY DEVELOPED DISABILITY

What approach, then, should be taken to the problem of gradually developed work-related disabilities? There are a number of possible alternatives, four of which will be examined.

One possibility is to enact statutory provisions which as clearly and unambiguously as possible cover some or all "wear-and-tear" disabilities. The language of the Texas Workmen's Compensation law indicates that some gradually developed disabilities are to be covered. It states:

An "Occupational Disease" shall also include damage or harm to the physical structure of the body occurring as the result of repetitious physical traumatic activities extending over a period of time and arising in the course of employment; provided, that the date of the cumulative injury shall be the date disability was caused thereby.⁷⁸

This provision codifies the judicially developed cumulative or repeated

Cong., 1st Sess. 407-08 (1975).

Others have expressed similar views on the magnitude of the health problem caused by worksite noise.

The noise exposure associated with the work environment is a particularly urgent problem and one of direct concern to the Labor Department. Worksite noise has been identified as a major occupational health hazard that potentially threatens millions of workers with varying degrees of hearing loss. Some sources estimate that somewhere between 6 and 16 million American workers are experiencing noise conditions potentially hazardous to hearing. Others estimate that perhaps half of the machinery used in heavy industry produces noise levels high enough to cause some degree of hearing loss to exposed workers.

Beyond the potential for hearing impairment, we now have some evidence to indicate that prolonged exposure to hazardous levels of noise may cause damaging effects - both physiological and psychological. Studies have focused on such nonauditory effects as gastrointestinal, cardiovascular, and neurological changes. In addition, there are indications that noise exposure may result in psychological problems such as irritability, fatigue, and social conflict.

Id. at 462-63 (statement by Alexander J. Reis).

The cost of compensating employment related hearing loss may be reduced if the payment of benefits for such loss is confined to cases of total, as opposed to partial, loss. *See, e.g.*, PA. STAT. ANN. tit. 77, § 1208(n) (Purdon Supp. 1981-82), excluding partial hearing loss from coverage under the occupational disease statute's catch-all provision.

⁷⁷ See Conard, *Workmen's Compensation: Is It More Efficient Than Employer's Liability?* 38 A.B.A.J. 1011 (1952), in which the author reports on a study of the Illinois Workers' Compensation system. The study found the total operating expenses for the system to be 229.8% of net benefits. *Id.* at 1013.

⁷⁸ TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1980).

trauma doctrine. Disabilities resulting from repeated or cumulative physical trauma are compensable as occupational diseases.⁷⁹

It is possible to go even further than Texas has. For example, the California statute defines "injury" as "any injury or *disease* arising out of employment."⁸⁰ The coverage of this provision is very broad and would include many types of work-related gradually developed disabilities. It would most likely include conditions which are commonly regarded as part of the aging process if employment conditions were a contributing cause.⁸¹ The Michigan act has been amended to provide that "[m]ental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner."⁸²

These provisions have the advantage of setting out with greater clarity the intent of a legislature that some or all gradually developed or "wear-and-tear" disabilities are to be compensable. They have the drawback, however, of potentially assigning all the costs of some disabilities to only one of their causes.⁸³ While at first glance this may seem to be no different from any other situation in which the employer is held to take the employee as he finds him,⁸⁴ the difference is that no one is immune from the aging process.

A second possibility would simply be to set up a system to apportion liability among the causes of the disability, and this approach could be coupled with the first alternative. In this way the employer would be liable for only that portion of the disability which is traceable to work-related

⁷⁹ The Texas courts have interpreted this provision to allow compensation only for those disabilities caused by repetitious physical trauma, and not for those caused by repetitious mental trauma. *Transportation Ins. Co. v. Maksyn*, 580 S.W.2d 334 (Tex. 1979); *Univ. of Tex. System v. Schieffer*, 588 S.W.2d 602 (Ct. App., 1979) (application for writ of error refused, no reversible error). *Contra*, *Turner v. Southern Cal. Edison Co.*, 42 Cal. App. 3d 1036, 117 Cal. Rptr. 358 (1974). The California statute, however, explicitly covers "repetitive mentally or physically traumatic activities extending over a period of time" CAL. LABOR CODE § 3208.1 (West Supp. 1980).

⁸⁰ CAL. LABOR CODE § 3208 (West Supp. 1980) (emphasis added).

⁸¹ *See, e.g.*, *Lamb v. Workmen's Comp. App. Bd.*, 11 Cal. 3d 274, 520 P.2d 978, 113 Cal. Rptr. 162 (1974). This follows from the generally accepted principle that industry takes an employee as it finds him for purposes of workers' compensation. *Id.* at 282, 520 P.2d at 983, 113 Cal. Rptr. at 167. *Accord*, *Texas Employers' Ins. Ass'n v. Gallegos*, 415 S.W.2d 708, 711 (Ct. App. 1967), where the court stated, "An employee is entitled to compensation for an injury received in the course of his employment, regardless of the fact that he may have been suffering from a disease which contributed to the incapacity from said injury." In *Bituminous Casualty Corp. v. Martin*, it was held that a "pre-existing condition or bodily infirmity must be the sole cause of the present disability or incapacity or it is no defense." 478 S.W.2d 206, 208 (Ct. App. 1972) (application for writ of error refused, no reversible error).

⁸² MICH. COMP. LAWS ANN. § 418.301 (Supp. 1980).

⁸³ *See supra* notes 70-76 and accompanying text.

⁸⁴ *See supra* note 81.

factors. But, this approach has several problems. First of all, while there are presently some statutory provisions which allow apportionment in one situation or another,⁸⁵ the use of such an approach would create the problem of whether the employee should receive compensation for the non-work-related portion of the disability and, if so, from whom? Assume again that an employee is disabled as a result of a gradually developed condition, and the employment is one of the factors causing the condition while excessive smoking, drinking and an otherwise imprudent lifestyle are other causes. Is the employee to be uncompensated for the portion of the disability related to the non-work related factors? If he is to be compensated, who is to do so? Should it be done by tobacco manufacturers, the liquor industry, from general tax revenues, or from the social security system?⁸⁶

In addition, would the *disability* or the *causation* be apportioned? If disability were apportioned, then the employer would be liable for the full amount unless a discreet and discernible portion of the disability could be attributed to another source. However, if causation were apportioned, part of a non-divisible disability could be ascribed on a percentage basis to the employment.⁸⁷ Apportionment of disability might make little difference in the ultimate liability of the employer inasmuch as it would often be difficult to assign a discernible portion of a gradually developed disability to non-work-related causes.

A third approach to the problem would be to reduce or simply deny wage loss benefits to retirees. Thus, the gradually developed disability could be compensated, yet the cost to the employer could be somewhat reduced. The attractiveness of this option is that it allows for compensation of a gradually developed disability, avoids the problems posed by apportion-

⁸⁵ See, e.g., KY. REV. STAT. ANN. § 342.120(5) (Baldwin 1979).

⁸⁶ The Ohio workers' compensation law has an interesting provision dealing with apportionment of claims made by handicapped employees. OHIO REV. CODE ANN. § 4123.343 (Page 1980). This provision allows an employer who hires a handicapped employee, as defined by the statute, to advise the Ohio Industrial Commission of such employment. *Id.* § 4123.343 (C). Should such employee subsequently have a compensable claim, all or part of the benefits may be paid from a statutory surplus fund (see *id.* § 4123.34), financed by the state insurance fund from employer premiums, without being treated as part of the individual employer's experience. *Id.* § 4123.343(D). The provision covers handicaps due to a large number of causes including cardiac disease, arthritis, chronic osteomyelitis and arterio-sclerosis. *Id.* § 4123.343(A). Thus, the employer who hires an individual who is *already impaired* as a result of a disease associated with the aging process or wear and tear may receive some protection against being burdened with the entire cost of a subsequent injury, disability or death. Note that a provision such as this might seem only fair to employers required by law not to discriminate on the basis of age or handicap. See *Id.* § 4112.02.

⁸⁷ See *Bstandig v. Workers' Comp. App. Bd.*, 68 Cal. App.3d 988, 997-98, 137 Cal. Rptr. 713, 718 (1977), dealing with the distinction between apportionment of *disability* and of *causation*.

ment, and minimizes the amount of compensation paid to the claimant who has voluntarily withdrawn from the labor market. Both Florida and Michigan have provisions dealing with the payment of wage replacement benefits to older persons. The Florida provision states very simply that an injured employee's right to wage-loss benefits terminates at age sixty-five.⁸⁸ The Michigan provision is less severe, allowing for a reduction of weekly benefit payments by five percent per year for each year following the employee's sixty-fifth birthday. Thus, the maximum reduction under the Michigan statute is fifty percent at age seventy-five.⁸⁹

The problem with both of these provisions is that they are not limited in the application to claimants who have voluntarily withdrawn from the labor market or retired. This potentially results in harsh and unfair treatment of the older but non-retired employee.⁹⁰

With each of these first three approaches, a problem as to proof of causation would still exist. The employee as claimant generally assumes the risk of non-persuasion in any workers' compensation case. This means that if the employee is unable to establish that the risks of the employment proximately contributed to the disability, he will be denied compensation. As a result, the potential for numerous extended and costly contests on the question of liability exists, and these, in fact, do occur regularly.

In addition, medical evidence is sometimes less than adequate to truly resolve questions of causation. "The new scientific awareness of the 'multiple-factor etiology' concept of disease directly contradicts the law's current assumption that the occupational causation of diseases can be scientifically detected in an acceptable number of cases. In short, the law asks of medicine something it cannot deliver."⁹¹

⁸⁸ FLA. STAT. ANN. § 440.15(3)(b)(3)(d) (West 1981). This provision does not affect the claimant's right to medical benefits. It has been suggested that this provision will, as it becomes "known to the public (particularly Florida's large senior citizen population) cause indignation and political pressure for (its) elimination." Sessums, *Workers' Compensation—An Uncertain Future*, 54 FLA. B. J. 63 (1980).

⁸⁹ MICH. COMP. LAWS ANN., § 418.357(1) (Supp. 1980). The reduction does not apply, however, to individuals sixty-five years of age or older who are not eligible for federal social security benefits. *Id.* § 418.357(2).

⁹⁰ This possibility may have been increased by the recent amendment of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1976), which raised the protected age from sixty-five years of age to, in most cases, seventy years of age. *Id.* § 631 (Supp. III 1979). Since this amendment effectively eliminated the "sixty-five year and out" rule of many employers, one can speculate that more employees may be working beyond the age of sixty-five.

⁹¹ Comment, *The Dark Side of Workers' Compensation: Burdens and Benefits in Occupational Disease Coverage*, 2 INDUS. REL. L.J. 596, 628 (1978). The author of this article suggests that:

The relative obscurity of workers' compensation law has masked its failure to adequately protect victims of occupational diseases. Because of inherent flaws in the process by which the law determines the link between a worker's condition and his

A fourth alternative would be to alleviate the burden of causation placed on employees by shifting that burden to the employer. Both Florida and New York's workers' compensation laws essentially do this by the use of a statutory presumption that a claim is compensable in the absence of substantial evidence to the contrary.⁹² The use of presumptions, however, is not without its own problems. Where medical evidence indicates that there is in fact or appears to be a causal link between a disability and exposure to a particular type of employment environment or activity, it may be fair to presume that the employment is the probable cause of the disability. In situations, however, when there is no medical evidence linking a particular disability to any risks or activities associated with the employment, the result is to unfairly—and perhaps unwisely—place the burden or costs on the employer and his product.⁹³

In sum, none of the alternatives which have been discussed is without drawbacks.

CONCLUSION

At this point, the complexities and dilemmas which characterize the question of the compensability of gradually developed work-related disabilities should be apparent. Several conclusions can perhaps be drawn.

or her employment, probably the majority of workers with occupational diseases are excluded from coverage.

Id. at 597. The author states that "[t]he consequences of employing a strict medical standard of probability is to confer on employers the benefits of medical caution, while burdening disabled workers with the costs of medical uncertainty." *Id.* at 630.

⁹² FLA. STAT. ANN. § 440.26 (West 1981); N.Y. WORK. COMP. LAW, § 21 (McKinney 1965). These provisions do not dispense with the necessity of proving that the claimant is in fact disabled. *Cf.* PA. STAT. ANN. tit. 77, § 1401(F) (Purdon Supp. 1980), which provides:

If it be shown that the employe, at or immediately before the date of disability, was employed in any occupation or industry in which the occupational disease is a hazard, it shall be presumed that the employe's occupational disease arose out of and in the course of his employment but this presumption shall not be conclusive.

The occupational disease claimant is not entitled to the benefit of this presumption until it has been established that he was exposed to the hazard of the disease in his employment. *Chilcote v. Leidy*, 207 Pa. Super. Ct. 345, 217 A.2d 764 (1966); *Webster v. Grove City College*, 198 Pa. Super. Ct. 475, 181 A.2d 924 (1962).

⁹³ It has been noted that:

Nonspecific diseases such as stress-induced heart disease or emotional disorders can be dealt with by shifting the burden of proof of causal relationship from the employee to the employer

There are, of course, many diseases which would pose very difficult choices in the development of compensability standards. Many industrial cancers are at best suspected to be of occupational origin, and research into the neurological consequences of certain industrial chemicals and exposure to new industrial chemicals are probably undiscoverable at the present time. In many of these "suspect" cases, simply shifting the burden of proof of occupational origin to the employer could result in an unjust or unwise allocation of the cost of disease to an employer.

Solomons, *Workers' Compensation For Occupational Disease Victims: Federal Standards and Threshold Problems*, 41 ALB. L. REV. 195, 224-25 (1977).

First, there is probably widespread agreement that a disabled individual should be assured reasonable medical, financial, and rehabilitative support.

Inherent in any civilized society is the tenet that such a society should provide its disabled members with sufficient financial support for the necessities of life. Ethically and morally, it matters little whether the disability is industrially acquired or not. If this doctrine is accepted, the same impairment and the same disability should receive the same compensation. Were this so, the loss of a leg or an eye or the presence of a certain degree of respiratory impairment should result in the same compensation no matter how the disease or injury originated.⁹⁴

The real question is who should pay for a general disability program.⁹⁵

Second, instead of a rational and efficient system of compensating work-related gradually developed disabilities, one must conclude that we have at present an irrational and inefficient system which results either in extreme unfairness to the employee on the one hand, or the placing of unfair and inappropriate burdens and costs on the employer on the other hand.

Third, if employers are to be made to bear the costs of gradually developed disabilities which are solely or in large part due to non-work-related causes, then it should be admitted that the workers' compensation system

⁹⁴ Morgan, *On Disability, Demagoguery, and Dialectic*, 14 FORUM 473, 483 (1979).

⁹⁵ The Social Security Act, 42 U.S.C. §§ 301-1396 (1976), provides, *inter alia*, disability benefits to workers. These benefits are "by reason of any medically determinable physical or mental impairment" regardless of whether it is work-related. *Id.* § 423(d)(1). Social Security disability benefits may be reduced in the case of an individual entitled to benefits under a workers' compensation law of a state or of the federal government. *Id.* § 424a; 20 C.F.R. § 404.408 (1980).

The Social Security disability benefit program does not, however, meet the social need for a general disability program. Its inadequacies in this respect stem from several sources. First is the requirement of having worked long enough to attain "insured status". See 42 U.S.C. § 423(c)(1) (1976) for the requisites of insured status. State workers' compensation laws, in contrast, usually provide protection immediately upon one's entering into covered employment.

Secondly, Social Security disability benefits are only paid for total disability. No benefits are payable for partial disability. In addition, the requirements for establishing a compensable total disability are quite stringent. The term "disability" is defined as "inability to engage in any substantial gainful activity by reason of . . . impairment which can be expected to result in death or which has lasted or can be expected to last a continuous period of not less than 12 months." *Id.* § 423(d)(1)(A). Further, one may be determined to qualify as disabled only if his impairment is

of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

Id. § 423(d)(2)(A).

The federal courts have, by and large, been equally demanding of claimants seeking Social Security disability benefits. See, e.g., *Timmerman v. Weinberger*, 510 F.2d 439 (8th Cir., 1975); *Sorenson v. Weinberger*, 514 F.2d 1112 (9th Cir., 1975).

provides a convenient and expedient method of providing a fringe benefit—a general disability insurance coverage—to employees. It has been suggested that:

The workmen's compensation system presently provides the greatest potential for private enterprise to respond to the growing demands of society for greater economic security and medical care in regard to disabling injuries and sickness. This is so because workmen's compensation is presently the only comprehensive nonfault system set up to provide for wage loss and medical and vocational rehabilitation arising out of disability. It is now limited to occupational origins, but the principle is just as applicable to all types of disability regardless of source or cause.⁹⁶

Once there is a frank admission that we are, in fact, dealing with the problem of whether a new fringe benefit should be included in every contract of employment, we can move on to the full and fair discussion of the issues involved with adequate opportunities for all interested parties to provide input. A number of problems that currently exist could be solved through the use of a comprehensive federal disability program. The first is the "regrettable but easily understood tendency for industry to move to those states where Workmen's Compensation laws are less liberal."⁹⁷ This problem would be solved inasmuch as a uniform federal disability program would eliminate variations from state to state and, hence, the incentive to move.⁹⁸

In addition, a comprehensive federal disability system should be substantially more efficient than the present method of compensating disabilities. Many long and wasteful lawsuits on the issue of whether the disability was work-related could be avoided, and attention could be focused on the question of whether the claimant was, in fact, disabled—without regard to cause. It is hoped that a higher percentage of each dollar spent on the system would then be paid out in benefits instead of litigation or administrative costs.⁹⁹

⁹⁶ Henderson, *Should Workmen's Compensation Be Extended to Nonoccupational Injuries?*, 48 TEX. L. REV. 117, 148 (1969).

⁹⁷ Morgan, *supra* note 94, at 482.

⁹⁸ Another solution to the problem of business relocations would be the passage of legislation which would restrict a business' ability to relocate. *See, e.g.*, the proposed National Employment Priorities Act of 1979, S. 1608, 96th Cong., 1st Sess. (1979), which would require, *inter alia*, advance notice and the payment of benefits to employees in the case of major relocations. This is but one of a number of bills of this nature which have been proposed at both the federal and state levels. These bills pose problems of their own, however. *See* Arnold, *Existing And Proposed Regulation Of Business Dislocations*, 57 U. OF DET. J. OF URB. L. 209 (1980).

⁹⁹ Morgan, *supra* note 94, at 484, argues that such a system would "make certain that the disability awards remained with the disabled persons rather than finding their way to the pockets of the third party. . . . It is time we had an equitable system that benefited the disabled worker rather than the medical and legal professions." He touches, perhaps unintentionally, on one potential roadblock in the way of adoption of a unified system—the vested interest of many lawyers, if not also doctors, in the preservation of the present system.

Finally, it should be possible to finance such a disability program in a fair manner. Presumably, the desire would be to share the costs among employers and employees. This would ensure that the employer assume a reasonable share of the financial responsibility, while not inequitably placing the entire cost of a new social program on employers.¹⁰⁰

¹⁰⁰ Henderson, *supra* note 96, at 153, proposes that:

The employer should be required to pay for only that share of the premium that is based on injuries related to the employment, however that might be defined for rating purposes, and the employee should pay the balance. Any additional premium for coverage of dependents should also be paid for by the employee. While the employer could only be made to pay such portion of the premium that relates to occupational injuries or sickness, it should be left open for the employer to assume more of the cost if he so desired—as fringe benefits, as an inducement for employment, or as the result of collective bargaining.

Morgan, *supra* note 94, at 483, also proposes a uniform system of general disability insurance with joint financing by employer and employee. He states that “[s]uch a system should be administered and financed in a fashion similar to social security.”

