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NATIONAL WORKERS' COMPENSATION STANDARDS ACT OF 1978

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON HUMAN RESOURCES

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S. 3060

TO STRENGTHEN STATE WORKERS' COMPENSATION PROGRAMS, AND FOR OTHER PURPOSES

SEPTEMBER 19, 20, AND 22, 1978



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NATIONAL WORKERS' COMPENSATION STANDARDS ACT OF 1978

TUESDAY, SEPTEMBER 19, 1978

U.S. SENATE,
SUBCOMMITTEE ON LABOR
OF THE COMMITTEE ON HUMAN RESOURCES,
Washington, D.C.

The committee met pursuant to notice in room 4232 Dirksen Senate Office Building, at 2:20 p.m., Senator Harrison A. Williams, Jr. (Chairman of the subcommittee) presiding.

Present: Senators Williams, Javits, and Thurmond.

OPENING STATEMENT OF SENATOR WILLIAMS

The CHAIRMAN. Let us come to order and proceed.

This afternoon we open our hearings on S. 3060, the National Workers' Compensation Standards Act of 1978.

The bill which we are considering today has evolved from two earlier bills which Senator Javits and I introduced in previous Congresses. This proposal is, just as these earlier bills were, based on the recommendations of the National Commission of State Workmen's Compensation Laws.

That blue ribbon commission, composed of the Nation's best experts on workers' compensation, filed its report in June of 1972. Their report concluded that State programs did not adequately compensate the victims of industrial injuries and diseases. The commission made a series of recommendations for improving State laws, and recommended that if the States did not sufficiently improve their laws by June of 1975, Federal legislation accomplishing basic reforms would be in order.

In 1977, a task force established by the previous administration also studied State workers' compensation laws, and concluded that the need for Federal minimum standards still exists. The policy group of that task force found that our present system for compensating work-related permanent total disability and death results in "excessive litigation, long delays in payment, high subsequent rates of persons without employment, and little relationship between benefits awarded and the actual wage loss."

These studies starkly portray the large and continuing gap between what must be done to compensate employees and what is being done today. Therefore, in my opinion, the time has come for legislation providing minimum Federal standards which will redress the injustice of inadequate workers' compensation.

The bill before us today provides a method of enforcing Federal standards which neither usurps the resources or prerogative of State agencies nor threatens to make a wholesale substitution of Federal enforcement in place of State enforcement.

Instead, we require that claimants who are seeking workers' compensation must seek it first from State agencies or courts. Thus, the States are given every opportunity to provide benefits in accordance with Federal standards.

A second major innovation in this legislation is a provision which seeks to resolve problems which have arisen from suits against product manufacturers. Under our present system, manufacturers are exposed to enormous product liability claims, and the threat of such judgments has often made it difficult for them to obtain liability insurance at reasonable rates.

Our bill provides that workers' compensation shall be the exclusive remedy for an injured worker against his or her employer. And where compensation benefits are adequate, suits against the manufacturer of the machine or substance which may have resulted in the injury or disease will be minimized.

Where such suits are warranted, however, our bill requires that any award which the worker receives from the manufacturer be reduced by the amount of the compensation which the worker receives from his employer.

Finally, I would like to emphasize the occupational disease provisions of this legislation. It is now time to enact legislation which will fairly compensate the victims of job-related disease. Unfortunately, the workers' compensation laws of the States have been largely inadequate to this task. Therefore, our bill provides for comprehensive coverage of occupational diseases within the compensation system.

Our bill strikes down the so-called artificial barriers to occupational disease compensation, and gives each claimant with a job-related disease an opportunity to demonstrate an entitlement to workers' compensation.

Eliminating these "artificial barriers" is just a starting point. Section 5 of the bill addresses the problem of occupational diseases in a much broader context. It authorizes the Secretary of Labor, together with the Secretary of Health, Education, and Welfare, to develop specific standards dealing with occupational disease compensation. These standards will incorporate the most up-to-date medical knowledge on diagnosis and causation of occupational diseases. These standards will also make provision for fair and efficient compensation for the victims of occupational disease.

There is no more urgent or dramatic problem in our workers' compensation system than the problem of fair compensation for occupational disease. The National Institute for Occupational Safety and Health has identified approximately 21,000 chemicals in industry use as toxic, and we suspect that some 2,400 of these may cause cancer.

It is urgent that our workers' compensation system adequately deal with this growing problem. This need was dramatically pointed out again last week by Secretary of Health, Education, and Welfare Califano in a speech before the AFL–CIO National Conference on Occupational Safety and Health.

Secretary Califano pointed out that the numbers of job-related cancers had been vastly underestimated, and that perhaps one case of cancer in every five is the result of a job-related exposure.

Current studies suggest that there may be as many as 7,300 excess cases of cancer each year among workers exposed to arsenic; as many

as 1,900 excess cancer cases per year among vinyl chloride workers; as many as 12,000 among workers exposed to petroleum distillates, and as many as 67,000 cases of cancer each year among workers exposed to asbestos.

These are truly alarming figures, and they point to the need for a comprehensive revision of our workers' compensation system so that these victims of industrial tragedy may be adequately compensated.

In the early days of this century, our State workers' compensation laws were enacted to provide justice to workers who were injured in our industrial plants and factories. Now we are confronted with the need to adjust these laws to meet the needs of workers who are the victims of diseases resulting from their employment environment.

The need is great, and the time is now.

[The text of S. 3060 follows:]

95TH CONGRESS
2D SESSION

S. 3060

IN THE SENATE OF THE UNITED STATES

MAY 11 (legislative day, APRIL 24), 1978

Mr. WILLIAMS (for himself, Mr. JAVITS, Mr. HATHAWAY, Mr. KENNEDY, Mr. PELL, Mr. RIEGLE, Mr. CASE, Mrs. HUMPHREY, and Mr. MOYNIHAN) introduced the following bill; which was read twice and referred to the Committee on Human Resources

A BILL

To strengthen State workers' compensation programs, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Workers' Compensation Standards Act of 1978".

FINDINGS AND DECLARATION OF PURPOSE

SEC. 2. (a) The Congress finds and declares that—

(1) many thousands of American workers are killed or permanently disabled and millions more are incapacitated from injuries and disease arising out of and in the course of their employment;

(2) injuries, diseases, and deaths arising out of and in the course of employment, constitute a burden upon interstate commerce and have a substantial adverse effect upon the general welfare;

(3) work-related injuries and diseases frequently occur during the worker's most productive years which often results in hardship for dependents and families;

(4) the vast majority of these injured and ill workers, and their families, are dependent on State workers' compensation systems for economic security, medical treatment, rehabilitation, and reemployment assistance when they suffer an injury, disease, or death arising out of and in the course of their employment;

(5) American workers and the national interest are best served by an adequate, prompt, and equitable workers' compensation system;

(6) many existing State workers' compensation laws do not provide an adequate prompt and equitable system of compensation for injuries, diseases, or deaths arising out of and in the course of employment;

(7) the basic national objectives for a comprehensive workers' compensation system include (A) broad coverage of employees and work-related injuries and diseases; (B) substantial protection against interruption

of income; (C) provision of prompt and adequate medical care and rehabilitation services in order to correct work-related injuries and to restore such injured workers to gainful employment; (D) encouragement of safety and health protection; and (E) an effective system for delivery of benefits and services;

(8) the National Commission on State Workmen's Compensation Laws, in its 1972 report, found that existing State workers' compensation laws did not meet minimum standards of adequacy and fairness;

(9) although in recent years there have been improvements in many State workers' compensation laws, to a great extent existing State workers' compensation laws still fail to meet the minimum standards recommended by the National Commission on State Workmen's Compensation Laws; and

(10) the improvements that are necessary to insure that a prompt, adequate, and equitable system of workers' compensation is available to all American workers can and should be achieved without delay, and there is a need for the Federal Government to encourage and assist the States in meeting this responsibility and to establish Federal minimum standards for State workers' compensation programs which assure adequacy, prompt-

ness, and fairness, while at the same time maintaining the primary responsibility and authority for workers' compensation in the States.

(b) It is the purpose of this Act through the exercise of the power of Congress to regulate commerce among the several States and with foreign nations, and to provide for the general welfare, to—

(1) establish minimum standards for workers' compensation programs for employees throughout the Nation;

(2) establish appropriate procedures for providing employees with workers' compensation benefits in accordance with such standards in a State which does not meet such standards;

(3) encourage and provide technical and financial assistance to the States to make improvements in existing workers' compensation systems—

(A) to provide all workers and their families an adequate, prompt, and equitable system of workers' compensation;

(B) to restore disabled workers through medical and vocational rehabilitation services to the fullest possible physical, mental, and economic usefulness; and

(4) accomplish the foregoing objectives in such a

way as to maintain the primary authority and responsibility for workers' compensation in the States.

DEFINITIONS

SEC. 3. For the purposes of this Act—

(1) the term "Secretary" means the Secretary of Labor;

(2) the term "Advisory Commission" means the National Workers' Compensation Advisory Commission established under this Act;

(3) the term "employer" means any person engaged in commerce or an industry affecting commerce, but shall not include the United States, or any State or political subdivision thereof;

(4) the term "person" includes one or more individuals, labor unions, partnerships, associations, firms, insurance funds, mutual companies, corporations, companies, joint-stock companies, trusts, unincorporated organizations, societies, trustees, trustees in bankruptcy, or receivers;

(5) the term "employee" means any individual employed by his or her employer or any individual who is treated as an employee for purposes of the workers' compensation law of any State, except that such term does not include—

(a) any individual who does not receive wages

as defined in section 3121 (a) of the Internal Revenue Code (26 U.S.C. 3121);

(b) any individual employed as an agricultural laborer or in domestic service in or around a private home by any employer who during the current or preceding calendar quarter did not employ one or more individuals as agricultural or domestic on at least fifteen days; or

(c) any individual whose employment is covered by (i) subchapters I and II of chapter 81 of title 5, United States Code, (ii) the Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases", approved April 22, 1908 (35 Stat. 65, 45 U.S.C. 51–60), (iii) the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901–950) and extensions thereof, or (iv) section 20 of the Act entitled "An Act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade, and for other purposes", approved June 26, 1884 (46 U.S.C. 688);

(6) the term "physician" means a person licensed to provide health care services, and includes but is not limited to surgeons, podiatrists, dentists, clinical psy-

chologists, optometrists, chiropractors to the extent specified in the Federal Employees' Compensation Act (5 U.S.C. 8101(2)), and osteopathic practitioners within the scope of their practice as defined by State law, and any other individual licensed to provide health care services reimbursable without referral from a physician under the workers' compensation law of any State;

(7) the term "compensation" means benefits made available under the applicable State workers' compensation law or pursuant to entitlements created by this Act, to the disabled employee or to the survivors of a deceased employee, and shall include, but not be limited to—

(a) "monetary benefits" paid to disabled employees or their survivors;

(b) "medical benefits" including payments for or provision of services of physicians, hospital care, nursing care, ambulance, prosthetic devices, and other related services, drugs, medicines;

(c) "rehabilitation benefits" including payment for or provision of medical and vocational services to reduce disability and to restore the physical, mental, and vocational functioning of an disabled worker;

(8) the term "statewide average weekly wage" means the average weekly earnings of workers on private payrolls within the State, as determined under the Federal Unemployment Tax Act (26 U.S.C. 3304);

(9) the term "State workers' compensation agency" means that agency, court, or official designated in each State as responsible for the administration or enforcement of the workers' compensation program within such State;

(10) the term "State workers' compensation law" means the law or laws of a State which provide compensation for death or disability resulting from injuries (including diseases) arising out of and in the course of employment or other similar test of work relatedness applicable under such law.

STANDARDS FOR WORKERS' COMPENSATION BENEFITS

SEC. 4. The minimum standards for State workers' compensation laws shall be as follows:

(a) All employers and employees as defined in this Act shall be covered, and coverage shall be compulsory, rather than elective.

(b) (1) Monetary benefits payable for total disability or for death shall be not less than 66⅔ per centum of the employee's average weekly wage subject to the following limitations:

(A) During the one-year period commencing January 1, 1981, with respect to disability or death occurring during such year, the maximum weekly benefits payable shall not be less than 100 per centum of the statewide average weekly wage during the first four of the last eight calendar quarters preceding January 1, 1981.

(B) During the one-year period commencing January 1, 1982, with respect to disability or death occurring within such year the maximum weekly benefits payable shall be not less than 150 per centum of the statewide average weekly wage during the first four of the last eight calendar quarters preceding January 1, 1982.

(C) During the one-year period commencing January 1, 1983, and for every year thereafter, the maximum weekly benefits payable with respect to disability or death shall be not less than 200 per centum of the statewide average weekly wage during the first four of the last eight calendar quarters preceding January 1 of the year in which the death or disability occurs.

(D) Minimum weekly monetary benefits for permanent total disability and death during any one-year period shall be at a rate not less than 50 per centum of the statewide average weekly wage during the first four

of the last eight calendar quarters preceding January 1 of such year or the employee's actual weekly wage, whichever is less.

(E) The maximum and minimum weekly benefits provided herein which are in effect on the date of the occurrence of the disability or death shall be applicable for the full period for which benefits are payable with respect to such disability or death except as provided in subsection (f) of this section.

(2) For the purpose of paragraph (1) of this subsection, payment of benefits at the rate of 80 per centum of the spendable earnings of a totally disabled or deceased employee shall be deemed to be not less than $66\frac{2}{3}$ per centum of such employee's average weekly wage if spendable earnings are not less than the employee's gross average weekly wage reduced by an amount determined to reflect amounts which would be withheld from such wage under Federal and State income tax laws and under subchapter A of chapter 21 of the Internal Revenue Code of 1954 (relating to social security taxes) if the amount withheld were determined on the basis of the reasonably anticipated liability of such employee for tax for the taxable year in which such payments are made without regard to any itemized deductions but taking into account the maximum number of personal exemption deductions allowable.

(c) (1) Monetary benefits in the case of death at not less than the rate specified in subsection (b) of this section (including the maximum limits specified therein) shall be payable to the deceased employee's surviving spouse for life or until remarriage, with at least two years' benefits payable upon remarriage, except that if there is one or more surviving child, at least 50 per centum of the benefits payable under this paragraph shall be payable to such surviving children (share and share alike), such benefits to be payable to each child until at least age eighteen (or age twenty-five if the surviving child is a full-time student in an accredited educational institution), or for life if any such surviving child is physically or mentally incapable of self-support at the time of the death of the employee provided the compensation need not continue if such child becomes capable of self-support. If there is no surviving spouse, the amount of benefits payable to any surviving children shall include the amount which would otherwise have been payable to such surviving spouse.

(2) State law may provide an offset of death benefits against the survivor's insurance benefit payable under the Social Security Act, but only to the extent that such death benefits are reduced by no more than 5 per centum of the surviving spouse's share of the survivor's insurance benefits under the Social Security Act for each $10 of the deceased employee's average weekly wage in excess of $100, and

further provided that in no case shall the reduction exceed 50 per centum of the surviving spouse's share of the survivor's insurance benefits under the Social Security Act.

(d) There shall be no time or dollar maximum limitation on the total amount of compensation payable in case of death or total disability.

(e) There shall be no time or dollar maximum limitation on the type or extent of medical benefits determined to be necessary by the State workers' compensation agency in any case.

(f) Notwithstanding any maximum limits established pursuant to subsection (b) or pursuant to State law, monetary benefits being paid for permanent total disability or death, and for temporary total disability lasting more than two years, shall be adjusted at least annually to reflect increases in the statewide average weekly wage provided, that State law may provide a maximum limit on such adjustments but such maximum limitation shall not be less than 6 per centum in any one year.

(g) There shall be no exclusion of any disease and compensation due to disease shall not be denied 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 ap-

pear 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 of 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. In addition, the determination of compensability of any disease covered by a standard promulgated pursuant to section 5 shall be determined in accordance with such standard. Unless contrary to a standard issued pursuant to section 5 of this Act, nothing in this section shall preclude any State from including in its law, rebuttable presumptions concerning the circumstances under which particular diseases may be found to have arisen or not to have arisen out of and in the course of employment.

(h) A disabled employee shall be entitled to prompt rehabilitation services subject to the supervision and approval of the State workers' compensation agency. The State workers' compensation agency shall determine the appropriate rehabilitation services in each case to accomplish to the extent possible the objectives of restoring the physical, mental, and vocational functioning of the disabled employee, and his or her return to employment, consistent with the nature of the disability incurred. The State law may permit a maximum

time limit on rehabilitation of not less than two years. Expenses incident to rehabilitation shall be considered a part of the rehabilitation benefits and shall not be borne by the disabled employee. Rehabilitation benefits are additional benefits and shall not reduce or replace any other available compensation.

(i) At such time as a disabled employee is able to resume work, the employer shall take reasonable steps to reemploy such employee in the same position or occupation such employee held prior to the disability, or if the employee is unable to perform the duties of his or her former position or occupation, to any other available position for which such employee is qualified, unless taking into consideration all the relevant circumstances, requiring such reemployment would constitute an undue hardship on the employer.

(j) Subject to the approval, direction, control and supervision of the State workers' compensation agency, a disabled employee shall be entitled to select a physician for diagnosis and treatment from among all physicians licensed by the State, or from a group or panel of physicians designated previously by the State workers' compensation agency.

(k) Compensation may be denied by reason of an injured worker's refusal to accept medical or rehabilitation service ordered by the State workers' compensation agency, ex-

cept where such refusal is based on a choice, made in good faith, of treatment through prayer or spiritual means.

(l) Whenever employment requires travel between States or between the United States and any other country, an injured or ill employee or the eligible survivors of such employee may claim benefits under the workers' compensation law of a State if the employment was principally localized in that State; or the employee was hired or appointed in that State; or the injury, disease, or death for which benefits are claimed occurred in that State. This section shall not be construed as authorizing recovery of compensation under more than one State's law.

(m) The waiting period for monetary benefits shall be not longer than three days and the period for qualifying for retroactive benefits during such waiting period shall be not longer than fourteen days.

(n) An original claim for compensation for disability or death may be filed within two years after the onset of disability or death. The time for filing a claim or notifying the employer of the injury (or disease) shall not begin to run until the employee has a compensable disability and is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship of the compensable disability to the employment. There shall be no time

limitation on the filing of a claim based on recency of employment, unless the Secretary promulgates a standard under section 5 which includes such a time limit.

(o) (1) No compromise or release of any compensation shall be effective unless approved by the State workers' compensaiton agency, based on a determination by such agency that such compromise or release is in the best interest of the claimant, and will not adversely affect any program of rehabilitation.

(2) No compromise or release of medical or rehabilitation benefits shall be effective unless approved by the State workers' compensation agency, based on the evaluation on a physician designated by that agency that the compromise and release will sufficiently provide for future medical and rehabilitation care necessitated by the employee's injury or disease, and a determination by the agency that such compromise and release is otherwise in the best interest of the employee.

(3) No waiver, release, or similar instrument relating to future coverage or compensation under any State workers' compensation law that is executed prior to the occurrence of any injury or death shall be effective under any circumstances. Any waiver, release or similar instrument which does not comply with the provisions of this paragraph shall be void.

OCCUPATIONAL DISEASE STANDARDS

SEC. 5. (a) The Secretary of Health, Education, and Welfare is authorized and directed to undertake studies of diseases which are or may be employment-related for the purpose of recommending appropriate standards for (i) determining whether particular diseases arise out of and in the course of employment; (ii) establishing criteria for diagnosing diseases; and (iii) establishing criteria for determining whether death or disability is due to such diseases. In determining subjects for and design of studies pursuant to this section, the Secretary of Health, Education, and Welfare shall give priority to the recommendations of the Secretary of Labor and the National Workers' Compensation Advisory Commission established under section 17 of this Act (hereinafter called the "Advisory Commission"). In carrying out the studies required by this section, the Secretary of Health, Education, and Welfare shall consult with the Director of the National Institute of Occupational Safety and Health and such other public and private organizations as are appropriate with respect to diseases that may be employment related. The results of such studies shall be published and distributed to the States, and shall be furnished to the Secretary of Labor.

(b) The Secretary may by rule promulgate, modify, or revoke standards for (i) determining whether diseases

arise out of and the course of employment; (ii) establishing the criteria for diagnosing such diseases; and (iii) establishing criteria for determining whether death or disability is due to such diseases. Such standards may include reasonable rebuttable presumptions wherever appropriate.

(c) (1) Such standards shall be promulgated, modified, or revoked in accordance with section 553 of title 5, United States Code (without regard to any reference in such section to sections 556 and 557 of such title), and in accordance with the provisions of the following paragraphs:

(2) (A) (i) Whenever the Secretary, upon the basis of studies published under subsection (a) or other information or studies submitted to him by an interested person or by a State or on the basis of information developed by the Secretary, determines that a rule should be promulgated to establish a minimum standard with regard to an occupational disease consistent with the purposes of this Act, the Secretary shall prepare a proposed rule, and shall appoint an advisory committee composed of not less than three medical, scientific, or other experts with suitable experience, training, or education related to the subject matter of the proposed rule.

(ii) When the Secretary receives a recommendation from the Secretary of Health, Education, and Welfare pursuant to subsection (a), and determines not to propose

a rule based on that recommendation, the Secretary shall, within sixty days after receipt thereof, publish in the Federal Register his determination not to do so, and his reasons therefor.

(B) The Secretary shall forward the proposed rule to the advisory committee established to consider such rule, and shall provide the committee all pertinent information developed by the Secretary or the Secretary of Health, Education, and Welfare, or otherwise available to the Secretary, including the results of research, demonstrations, and experiments and shall publish notification of such action in the Federal Register. The advisory committee shall submit to the Secretary its report which shall state (i) whether in the advisory committee's opinion the proposed rule is consistent with available scientific and medical knowledge concerning the subject matter of the proposed rule, and (ii) its recommendations for modifications of such rule to make it consistent with available scientific and medical knowledge concerning the subject matter of the proposed rule or to otherwise improve the proposed rule. The advisory committee shall submit its report to the Secretary within one hundred and eighty days from the date of its appointment or within such shorter period as may be prescribed by the Secretary, but in no event may such period be less than ninety days.

(3) The Secretary may publish in the Federal Register,

any proposed rule, in either its original or modified form which has been determined by the advisory committee to be consistent with available scientific and medical knowledge concerning the subject matter of the proposed rule. If on the basis of the advisory committee's report, the Secretary determines that a proposed rule should not be promulgated, the Secretary shall publish his determination to that effect in the Federal Register. In either event, the Secretary shall at the same time, forward a copy of the advisory committee's report to the Advisory Commission.

(4) (A) In the event that the Secretary publishes a proposed rule in the Federal Register, the Secretary shall afford interested person a period of thirty days after any such publication to submit written data or comments on the proposed rule. Such comment period may be extended by the Secretary upon a finding of good cause, which the Secretary shall publish in the Federal Register.

(B) On or before the last day of the period provided for the submission of written data or comments under paragraph (3), any interested person may file with the Secretary written objections to the proposed standard, stating the grounds therefor and requesting a public hearing on such objections. Within sixty days after the last day for filing such objections, the Secretary shall publish in the Federal Register

a notice specifying the standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing. Any hearing under this subsection for the purpose of hearing relevant information shall commence within sixty days after the date of publication of the notice of hearing. Hearings required by this subsection shall be conducted by the Secretary, who may prescribe rules and make rulings concerning procedures in such hearings to avoid unnecessary costs or delay. A verbatim transcript shall be taken of any such hearing and shall be available to the public.

(5) (A) Within one hundred and eighty days after the closing of the record of such hearing, the Secretary shall promulgate and publish in the Federal Register such rule or his determination not to promulgate a rule together with his reasons therefor as he deems appropriate.

(B) In the case of a proposed rule to which objections requesting a public hearing have not been filed, the Secretary, within one hundred and eighty days after the period for filing such objections has expired, shall promulgate and publish in the Federal Register the rule as proposed or in modified form, or his determination not to promulgate a rule together with his reasons therefor.

(C) Any rule promulgated pursuant to this section

shall be based on and shall be consistent with available scientific and medical knowledge concerning the subject matter of the rule.

(6) The Secretary may require by subpena the attendance of witnesses and the production of evidence in connection with any proceeding initiated under this section. If a person refuses to obey a subpena under this subsection, a United States district court within the jurisdiction of which a proceeding under this subsection is conducted may, upon petition by the Secretary, issue an order requiring compliance with such subpena.

(d) (1) Any standard promulgated under this section shall be effective as a minimum standard for State workers' compensation laws pursuant to section 4 of this Act two years after its final promulgation, and shall govern the determination of compensation due to deaths or disabilities occurring thereafter.

(e) Any person or State adversely affected by a standard promulgated under this section may, at any time prior to the sixtieth day after the promulgation of such standard, file a petition challenging the validity of such standard with the United States Court of Appeals for the District of Columbia Circuit or the circuit wherein such person resides or maintains his principal place of business. A copy of the petition shall be forthwith transmitted by the clerk of the

court to the Secretary. No objection that has not been urged before the Secretary shall be considered by the court, unless the failure or neglect to urge such objection shall be excused for good cause shown. The validity of any standard shall not be subject to challenge on the grounds that the time limitations in this section have been exceeded.

(f) Concurrently with the development of any proposed standard pursuant to this section, the Secretary of Labor shall conduct a study to determine the extent to which there are individuals who are employed or formerly employed who may suffer from the disease covered by the proposed standard, but whose claims would not be covered by such standard because their disability occurred prior to the effective date of the standard, and who as a result may not receive fair and adequate compensation. Any such study shall include an estimate of the number of such individuals, and recommendations with respect to appropriate means of compensating such individuals. The Secretary shall submit his report, together with his recommendations, to the Congress no later than one year after the final promulgation of any standard pursuant to subsection (c) (5) of this section.

STUDY OF COMPENSATION OF PARTIAL DISABILITIES

SEC. 6. (a) The Secretary shall conduct a study of the compensation of partial disabilities arising out of and in the course of employment. In conducting such study, the

Secretary shall compare the efficiency, effectiveness, and adequacy of the means by which the several States compensate partial disabilities arising out of and in the course of employment. In connection with such studies, the Secretary may enter into contractual arrangements with one or more States or political subdivisions thereof, other Federal agencies, or private agencies; and may establish experimental programs to test the efficiency, effectiveness, and adequacy of various means of compensating partial disability arising out of and in the course of employment.

(b) Not later than three years following the date of enactment of this Act, the Secretary shall make a written report to the Congress on his study of the compensation of partial disability. Such report shall contain recommendations for legislation to amend this Act to provide minimum Federal standards for State workers' compensation laws relating to the compensation of partial disabilities due to injury or disease arising out of and in the course of employment.

(c) The Secretary shall consult with the Advisory Commission concerning the study and report required by this section.

CERTIFICATION AND SUPPLEMENTAL COMPENSATION

SEC. 7. (a) On or before the effective date of section 4 of this Act, the Secretary of Labor shall review the workers'

compensation law of each State to determine whether such law meets the applicable standards for State workers' compensation programs contained in section 4 of this Act. If the Secretary determines that State law meets all of the requirements of section 4, the Secretary shall so certify and the State law shall be deemed fully certified during the period covered by such certification.

(b) If the Secretary finds that the law of any State fails to meet one or more of the standards of section 4 of this Act, the Secretary shall certify the State law only to the extent that it meets such standards, and the Secretary shall specify those standards which the State law fails to meet. During any period in which the State law has not been fully certified, any employee shall be entitled to receive from his or her employer, with regard to any injury or disease arising out of and in the course of employment with such employer, compensation in accordance with the provisions of this Act with which the State is not in compliance (hereinafter referred to as "supplemental compensation").

(c) After initial review provided by subsection (a), the Secretary shall annually review the workers' compensation law of each State, including the judicial and administrative interpretations of the law, to determine whether it meets the requirements of section 4 of this Act. Pursuant to such re-

views, the Secretary shall modify the certifications previously issued under subsection (a) as appropriate.

(d) Except with respect to section 4(g) and standards promulgated pursuant to section 5, in certifying a law of a State as meeting the requirements of section 4, State determinations of the status of any individual as an employee or independent contractor, whether death of injury has been suffered, whether an injury or death arose out of and in the course of employment, and the degree of disability, if any, shall be determined solely by State law.

ENFORCEMENT OF SUPPLEMENTAL COMPENSATION

SEC. 8. (a) (1) Any claimant who is aggrieved by an order or award of a State workers' compensation agency, insofar as it fails to award compensation at least equivalent to supplemental compensation may within ninety days after such order or award becomes final file a petition for review of the State workers' compensation agency's order or award, insofar as it fails to award such compensation, with the Benefits Review Board (hereinafter referred to in this section as the "Board") established in section 21 of the Longshoremen's and Harbor Workers' Compensation Act, as amended or as it may be amended from time to time (Act of March 4, 1927) (hereinafter referred to as the "Longshore Act").

(2) For the purpose of this section, the order or award

of a State workers' compensation agency shall become final for the purpose of paragraph (1) on the date on which no appeal or review of such order or award shall be available to any party subject to such order or award or any further appeal or review would be futile.

(b) State law shall govern the determination of the status of any individual as an employee or an independent contractor, and except as may be established by a standard promulgated pursuant to section 5, the determination of whether death or injury (including disease) has been suffered, whether an injury (including disease) or death arose out of and in the course of employment, and the degree of disability, if any.

(c) (1) In review proceedings under this section, the decision of the Board shall be based upon the evidence in the record before the State workers' compensation agency except that the Board, in its discretion, may (i) in any case in which the State workers' compensation agency has refused to assert jurisdiction over the claim, refer the case to the Office of Workers Compensation Programs of the Department of Labor for processing in accordance with the provisions of the Longshore Act, or (ii) in any case where the State agency has refused to assert jurisdiction over the claim or has otherwise precluded the introduction of such evidence permit the parties to submit additional

relevant evidence in a hearing before an administrative law judge in accordance with sections 19 and 21 of the Longshore Act.

(2) Where new evidence is not submitted, the findings of fact by the State workers' compensation agency, insofar as they involve eligibility for supplemental compensation shall be conclusive if supported by substantial evidence on the record as a whole. Findings of fact and conclusions of law in the determination of the State workers' compensation agency on issues covered solely by State law shall be conclusive, and not subject to review in any proceeding under this section.

(3) Where the Board finds that the employer has failed to provide supplemental compensation to which the petitioner is entitled, the petitioner shall be awarded such compensation together with the reasonable costs and expenses of litigation, including reasonable attorney's fees. In an award of supplemental compensation under this section for periodic adjustments to monetary benefits pursuant to section 4 (f), such benefits shall be adjusted to reflect increases in the applicable statewide average weekly wage, but no such adjustment shall exceed 6 per centum for any one year.

(4) Any order issued by the Board shall be enforceable and reviewable in accordance with section 21 of the Longshore Act.

(5) Any award of the Board shall be automatically modified to take into account subsequent orders or awards of the State workers' compensation agencies with respect to issues solely covered by State law. With respect to issues not solely covered by State law, procedures for the modification of Board awards or orders shall be in accordance with section 22 of the Longshore Act, except that references in that section to "the deputy commissioner" shall mean "the Board" and the word "his" in the first sentence of that section shall be read "its" and shall refer to the Board.

(6) Sections 14, 17, 18, 19, 21, 21a, 23, 24, 25, 26, 27, 31, 34, 35, 38, and 39 (a) and (c) of the Longshore Act shall be applicable with respect to claims for supplemental compensation payable under this Act during any period in which the workers' compensation law of that State is not fully certified. The Secretary shall by regulation modify the provisions of section 14 of the Longshore Act to conform the payment of supplemental compensation to the payment schedule of the applicable State's law, and may by regulation modify the applicability of any other of the foregoing provisions as appropriate to carry out the purposes of this Act.

EMPLOYMENT DISCRIMINATION

SEC. 9. No person shall discharge or in any manner discriminate against any employee because such employee

has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by any employee on behalf of himself or others of any right afforded by this Act. Any employer who violates this section shall be liable to a penalty of not less than $100 or more than $1,000, as may be determined by the Secretary. All such penalties shall be paid to the Secretary for deposit in the special fund as described in section 44 of the Longshore Act, and if not paid may be recovered in a civil action brought in the appropriate United States district court. Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages (including fringe benefits) arising out of such discrimination: *Provided,* That if such employee shall cease to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and compensation. The employer alone and not his carrier shall be liable for such penalties and payments. Any provision in an insurance policy undertaking to relieve the employer from liability for such penalties and payments shall be void.

EXCLUSIVITY AND THIRD PARTY LIABILITY

SEC. 10. (a) The compensation to which an employee is entitled under the applicable State workers' compensation

laws and the supplemental compensation, if any, to which he or she may be entitled under this Act, shall constitute the employee's exclusive remedy against the employer, the employer's insurer or any collective-bargaining agent of the employer's employees and any employee, officer, director, or agent of such employer, insurer, or collective-bargaining agent (while acting within the scope of his or her employment) for any illness, injury, or death arising out of and in the course of his or her employment.

(b) (1) Notwithstanding any other provision of this law, or any other law, in any liability action against a third party brought as result of illness, injury or death arising out of and in the course of employment, this section shall govern the rights of the employee (or his or her representative or survivors) and the employer or insurance carrier, the collective bargaining agent, and the third party.

(2) For the purpose of this section, liability actions against third parties shall include but not be limited to all actions brought for or on account of personal injury, disease, physical or mental impairment, disability, or death caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, warning, instruction, marketing, packaging, or labeling of any product. It shall include, but not be limited to, all actions for damages based upon the following theories: strict products liability; negli-

gence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether deliberate, negligent, or innocent; misrepresentation, concealment, or nondisclosure, whether fraudulent, negligent, or innocent.

(3) Any judgment against a third party in a liability action described in this section shall be reduced by an amount equal to the amount paid to the injured employee or his or her survivors as compensation pursuant to any State workers' compensation law and any supplemental compensation paid pursuant to this Act and the present value of all future compensation and supplemental compensation payable.

(4) No employer, or insurer of such employer shall have any lien upon any judgment rendered in any such third party liability action brought as a result of any illness, injury or death arising out of or in the course of employment with such employer, nor any right of subrogation in connection with any such third party liability action.

(5) No third party may maintain any action for indemnity, contribution or other monetary damages against any party immune from suit by the employee by subsection (a) based on the liability of such third party to any employee of such employer as a result of any action described in this Section.

EMPLOYER RESPONSIBILITY FOR ELECTIONS AND INSURANCE

SEC. 11. (a) Every employer shall be responsible for payment of all supplemental compensation which may be payable to its employees under Section 8 of this Act.

(b) Every employer shall secure the payment of supplemental compensation payable under Section 8 of this Act—

(1) by insuring and keeping insured the payment of such supplemental compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund is authorized to insure workers' compensation or supplemental compensation under the laws of the United States or of any State, or by the Secretary, to insure payment of supplemental compensation under this Act; or

(2) by qualifying as a self-insurer under the law of each State with respect to which the employer has not satisfied the requirements of paragraph (1) of this subsection, except that the Secretary may, by regulation, impose additional or alternative conditions on qualification for self-insurance in the event that the Secretary finds that the qualification requirements in a State are insufficient to assure the payment of supplemental compensation provided by this Act.

(c) (1) Any employer not subject to a State workers' compensation law because such law fails to comply with section 4 (a) of this Act shall, where permitted, elect coverage under such law so as to provide coverage under the State law to each individual who is an employee of such employer.

(2) If the Secretary has not certified under section 7 that a State law is in compliance with section 4 (a), employers in the State who are permitted to elect such coverage under the State law but who have not done so, shall be subject to a civil penalty not to exceed $25 per employee for each day of noncompliance in a suit brought by the Secretary.

(d) Each contract of insurance under which workers' compensation benefits are provided to or for the employees of any employer shall be deemed to provide benefits in accordance with the minimum standards contained in section 4 of this Act. The Secretary may by regulation provide for exceptions to or exemptions from this subsection consistent with the purposes of this Act.

(e) Each contract of insurance which provides coverage for comprehensive personal liability, either alone or as part of a homeowner's or tenant's policy, shall be deemed to provide benefits in accordance with the minimum standards contained in section 4 of this Act with respect to domestic

employees to the extent that such employees are entitled to workers' compensation under this Act, unless the employer has otherwise secured payment of such compensation pursuant to this section.

GRANTS TO STATES

SEC. 12. (a) The Secretary is authorized during the fiscal year of enactment of this Act, and the two succeeding fiscal years, to make grants to any State to assist such State—

(1) in identifying needs and responsibilities in the area of workers' compensation,

(2) in developing programs for meeting the requirements of section 4,

(3) developing and publishing a guide to the evaluation of disability,

(4) establishing one or more disability evaluation units to assist in the determination of the degree of disability,

(5) utilizing the services of impartial physicians in the evaluation of impairment and the degree of impaired workers,

(6) establishing systems for the collection of information concerning workers' compensation as provided in section 13 of this Act,

(7) increasing the expertise and enforcement capa-

bilities of personnel engaged in workers' compensation programs, or

(8) otherwise improving the administration and enforcement of State workers' compensation laws consistent with the objectives of this Act.

(b) The Governor of the State shall designate the appropriate State agency for receipt of any grant made by the Secretary under this section.

(c) Any State agency designated by the Governor of the State desiring a grant under this section shall submit an application therefor to the Secretary.

(d) The Secretary shall review the application, and shall approve or reject such application, and, if the application is rejected, shall promptly inform the Governor and the applicant of the reason for the rejection.

(e) The Federal grant shall not exceed 66⅔ per centum of the total cost of the projects described in the application. In the event the Federal share for all States under such subsection is not the same, the difference among the States shall be established on the basis of objective criteria.

(f) There is hereby authorized to be appropriated for the fiscal year of enactment, the sum of seventy-five million dollars, to be available without fiscal year limitation; and for each of the following two fiscal years such sums as are

necessary for the purpose of carrying out the provisions of this section.

STATISTICS

SEC. 13. (a) The Secretary shall develop and maintain a program of collection, compilation, and analysis of workers' compensation data in order to carry out the purposes of this Act.

(b) (1) The Secretary shall, by regulation, require that the following reports be submitted to the State workers' compensation agencies with respect to claims for injuries or illnesses arising out of and in the course of employment except with respect to claims for medical benefits only in each State—

(A) A report by the employer within a reasonable time of the injury or illness which identifies the employer and the employee; states the date, time, and place of the accident or the exposure; gives a brief explanation of the occurrence of the accident or exposure; describes the injury or illness dates of diagnosis and initial treatment, dates of lost time and return to work; identifies physicians and hospitals involved in treatment and the insurance carrier, if any; and provides such additional information required by the Secretary's regulations.

(B) A prompt report by the employer or the em-

ployer's insurance carrier, after the first compensation payment or denial of the claim, which identifies the employee, the employer, the carrier, if any; the dates of injury or illness and diagnosis; the amount of the compensation paid, specifying the date and amount of the first compensation payment; the employee's average weekly wage if less than the applicable maximum; the nature and extent of the disability; the medical payments to date; and, if the case has been closed or the claim denied, the total compensation, and the reason for closing the case or denying the claim.

(C) A prompt report by the employer or the employer's insurance carrier, after the last compensation payment, which identifies the employer, the employee, the carrier, if any; provides pertinent data concerning the compensation specifying monetary, medical, and rehabilitation benefits paid; provides information concerning the nature and duration of the impairment and disability; and states the reason for the termination of benefits and closing of the case. The Secretary may by regulation require the filing of periodic reports with respect to claims continuing two years after the first compensation payment.

(2) In promulgating regulations with respect to reports

required under this section, the Secretary shall consider and evaluate the reporting requirements of the several States with the objective of developing and encouraging the adoption of a uniform data collection and reporting system under this Act.

(3) (A) The Secretary's regulations shall require that all reports required by paragraph (1) of this subsection be filed with the State workers' compensation agencies. The Secretary shall further require, as a condition of any grant made for the purpose of assisting the State to improve their data collection processing, that such agencies shall periodically, but no less frequently than annually, submit to the Secretary a report analyzing workers' compensation cases in such States, based on the data contained in the reports required by the Secretary's regulations issued pursuant to paragraph (1) of this subsection. The analyses of the State workers' compensation agencies shall contain such information as the Secretary shall prescribe by regulation.

(B) With respect to any State which does not agree to collect data and provide analyses of workers' compensation cases as provided in this section, the Secretary's regulations shall require that all reports required by paragraph (1) of this subsection be filed directly with the Secretary.

(c) The Secretary shall annually file with the Congress

and make available to the public, a report and evaluation of workers' compensation information compiled pursuant to this section.

(d) The Secretary may make grants to States as provided in section 12 to assist them in developing programs for the collection and evaluation of data and reports required by regulations of the Secretary issued pursuant to this section.

RESEARCH

SEC. 14. (a) The Secretary is authorized to engage in research and to engage in such pilot projects and demonstration programs as the Secretary shall deem warranted, for the purpose of—

(1) developing recommendations for improving the workers' compensation programs of the several States and the compensation program under this Act;

(2) developing recommendations for means of more economically assuring that workers will have the benefits described in section 4; and

(3) monitoring and promoting academic study of workers' compensation and the development of improvements to the workers compensation program of the several States and the workers' compensation program under this Act.

(b) The Secretary shall conduct a study of the adequacy

of the workers' compensation system for compensating individuals for disability or death due to occupational diseases, including the availability and cost of providing such coverage through traditional insurance or self-insurance. Such study shall also include particular attention to work-related diseases characterized by long latency periods between exposure to toxic substances or other harmful physical agents and the onset of disability or death, including the feasibility and desirability of providing such coverage through reinsurance pools, trust funds, or other means of apportioning liability. The Secretary shall submit his report, together with his recommendations to the Congress no later than two years after enactment of this Act.

(c) In carrying out his functions under this Act, the Secretary, with the consent of any State or political subdivision thereof, accept and use the services, facilities, and employees of the agencies of such State or political subdivision thereof, with or without reimbursement.

AUDITS

SEC. 15 (a) Each recipient of a grant under this Act shall keep such records as the Secretary shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such grant, the total cost of the project or undertaking in connection with which such grant is made or used, and the amount of that portion

of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate the administration of such grants.

(b) The Secretary and the Comptroller General of the United States, or any of their fully authorized representatives shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipients of any grant under this Act which are pertinent to such grant.

ANNUAL REPORT

SEC. 16. Within one hundred and twenty days following the convening of each regular session of each Congress, the Secretary shall prepare and submit to the President for transmittal to the Congress a report upon the subject matter of this Act, the progress toward achievement of the purpose of this Act, and the needs and requirements in the field of workers' compensation.

ADVISORY COMMISSION

SEC. 17. (a) There is hereby established a National Workers' Compensation Advisory Commission (hereafter in this section referred to as the "Advisory Commission") to be composed of nine members appointed by the Secretary from among persons who by reason of training, education or experience are qualified to carry out the functions of the Advisory Commission. Three members shall be appointed

from among representatives of employees; three members shall be appointed from among representatives of employers, one of whom shall be a representative of insurers; and three members shall be representatives of the general public, one of whom shall be a representative of State governments. The Secretary shall designate one of the public members to serve as Chairman or Chairwoman. Five members of the Commission shall constitute a quorum. The terms of office of the members of the Commission shall be three years, except that of the members first appointed, three members shall be appointed for a term of one year, three members shall be appointed for a term of two years, three members shall be appointed for a term of three years.

(b) The Commission shall—

(1) monitor the progress of the States in making improvements in their workers' compensation laws and in meeting the standards provided in section 4;

(2) monitor the administration of the workers' compensation programs in the States;

(3) provide technical and other assistance to the Secretary in improving the implementation of this law and the administration of the workers' compensation program, including recommendations to the Secretary of administrative or legislative action necessary to improve workers' compensation programs.

(c) (1) The Commission or any authorized subcommittee or members thereof, may, for the purpose of carrying out the provisions of this Act, hold such hearings, take such testimony, and sit and act at such times and places as the Commission deems advisable. Any members authorized by the Commission may administer oaths or affirmations to witnesses appearing before the Commission or any subcommittee or members thereof.

(2) Each department, agency, and instrumentality of the executive branch of the Government, including any independent agency, is authorized to furnish to the Commission, upon request made by the Chairman or Chairwoman, such information and assistance as the Commission deems necessary to carry out its function under this section.

(d) Subject to such rules and regulations as may be adopted by the Commission, the Chairman or Chairwoman shall have the power to appoint and fix the compensation of an executive director, and such additional staff personnel as is deemed necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such title, and pro-

cure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code. The Commission is authorized to enter into contracts with Federal or State agencies, private firms, institutions, and individuals for the conduct of surveys, the preparation of reports, and other activities necessary to the discharge of its duties.

(c) Members of the Commission shall receive compensation for each day they are engaged in the performance of their duties as members of the Commission at the daily rate prescribed for GS–18 under section 5332 of title 5, United States Code, and shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties as members of the Commission.

SEPARABILITY

SEC. 18. If any provisions of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

EFFECTIVE DATE

SEC. 19. (a) The provisions of section 4 of this Act shall take effect two years after the date of enactment of this

Act, and shall apply to deaths or disabilities occurring thereafter, except that occupational disease standards promulgated pursuant to section 5 of this Act shall apply to deaths or disabilities occurring after the effective date of each such standard.

(b) Except as otherwise provided, all other provisions of this Act shall take effect immediately upon enactment.

The CHAIRMAN. Senator Javits.

OPENING STATEMENT OF JACOB K. JAVITS

Senator JAVITS. These 3 days of hearings on the National Workers' Compensation Standards Act of 1978 are an important step in the progress of the Senate Human Resources Committee in formulating minimum standards for State workers' compensation systems. S. 3060 is the third bill Chairman Williams and I have authored since 1973, and it reflects many of the views that have been expressed to the committee during extensive hearings on previous versions, S. 2008 in the 93d Congress and S. 2018 in the 94th Congress.

Its enactment is essential to fulfill our Nation's commitment to the safety and health of its working men and women. That commitment will never be complete until those workers are assured that when preventive efforts fail they will be compensated for resulting injuries, illnesses, and deaths through an adequate and equitable system.

It has been 10 years since I first asked the Congress to address the inadequacy of most State workers' compensation laws by establishing a national commission to study those laws and to recommend needed improvements. The Occupational Safety and Health Act of 1970 incorporated this proposal and the National Commission, after a thorough study, concluded that workers' compensations laws "are in general neither adequate nor equitable." Of 84 recommendations for reforming the State laws, 19 were deemed essential. Those standards form the basis for the minimum Federal standards contained in S. 3060.

I regret that despite a flurry of State legislation enacted in the wake of the National Commission's report and the introduction of Federal legislation, not one State has come into compliance with even the 19 essential recommendations. Today the States have reached, in the aggregate, a level of only about 60 percent compliance. Or put another way, of the 19 standards unanimously considered essential by the business, labor, insurance, and State workers' compensation agency representatives on the National Commission, the States have come into compliance with fewer than 12.

To point to just one example, in some States the maximum benefit any worker may receive, no matter how high his or her previous wages may have been, is still under the poverty level. This record, 6 years after the Commission's report, is in my judgment a dismal one and calls for prompt Federal action.

We have a particular responsibility in this legislation to the millions of workers in the United States whose exposure to hazardous substances in the workplace can lead—sometimes 10, 20, or 30 years later—to a disabling or fatal occupational disease. We are just beginning to appreciate the magnitude of the occupational disease problem.

Only last week, a report of the Department of Health, Education, and Welfare stated that occupationally related cancers may be more than 20 percent of all cancer cases. One substance alone, asbestos, is estimated to be responsible for fatal cancers in nearly one-half of the workers heavily exposed to it.

In 1969, the Congress responded to the failure of the State workers' compensation system to provide adequate coverage for victims of

coalworkers' pneumoconiosis by enacting a special "black lung" compensation program. At the same time we have ignored the compensation problems involved in numerous other occupational diseases. I firmly believe that this kind of discrimination will not be ended by enacting more discrete programs, but only by a generic approach through the enactment of authority to establish Federal occupational disease standards to bring about uniform and fair coverage based on the best medical knowledge available.

This is the approach we propose in this bill, which provides that each standard must first be found by an independent committee of medical and scientific experts to be consistent with currently available medical and scientific evidence.

S. 3060 also effectively rebuts the criticism of earlier bills that we are opening the way for complete "federalization" of the workers' compensation system. Under this bill the laws of each State are reviewed to determine whether each minimum standard has been met. To the extent that it does, there will be no Federal involvement whatsoever.

Even where it does not, the Federal Government cannot supplant State administration. Instead, workers in such a State will be entitled to supplemental compensation from their employer in an amount which will bring their compensation up to the Federal minimum standards. And even then, a supplemental compensation claim can be filed only after the worker has exhaused all possible remedies before the State agency and the State courts. This remedy should prove unnecessary in most cases, since the bill also requires that every employer must insure that the benefits subject to the minimum standards are available to their employees, whether or not the State law is in compliance. Further, each insurance contract will be deemed to provide benefits in accordance with these minimum standards.

During the course of these hearings I will be open to further constructive suggestions for improvements and refinements in our approach, and I will urge this committee to give highest priority to consideration of this legislation early in the next Congress.

In the meantime, I hope that the administration will finally come forward with its own views on this vital subject. It has a now longstanding commitment to the enactment of minimum Federal standards, and yet we have still not heard the word of support. I call on the President to join with us in enacting legislation to reform the workers' compensation system so that those workers who are disabled by workplace injuries and illnesses receive the fair and humane treatment to which they are entitled.

The CHAIRMAN. And the time is also now to call our witnesses, whose wisdom we have sought, and whose advice and counsel we must have if we are to confront this great challenge.

I guess everybody has been alerted that there will be a hiatus of about half an hour as the roll is called in the Senate on the natural gas conference report. We will proceed until the bells ring for that rollcall.

I am very pleased that Peter Barth is our very first witness this afternoon on this bill. We welcome him, knowing that his work in the

Department of Economics at the University of Connecticut has been established as the foremost in this field.

Dr. Peter Barth.

It is very nice to see you again, Dr. Barth.

Dr. BARTH. Thank you.

The CHAIRMAN. We welcome you. We are very much indebted to you for coming here today and helping us. Your statement is essential at the beginning of these hearings on this bill.

STATEMENT OF PROF. PETER BARTH, DEPARTMENT OF ECONOMICS, UNIVERSITY OF CONNECTICUT

Professor BARTH. Thank you very much.

My name is Peter Barth and I am an economist by training. I have been a student of workers' compensation issues since 1971, when I was associated with the National Commission on State Workmen's Compensation Laws. The committee will recall that this body, whose members identified themselves as "* * * * [we are] workmen's compensation's best friends * * *," found many problems existing in State laws at that time.

The members of the Commission had substantial involvement in the compensation system, either in a particular State or nationally. They came from many backgrounds, including business, labor, medicine, research, insurance, the trial bar, and State administration.

Their report was a very broad one that contained 84 specific recommendations, and there was essentially no dissent on the positions taken. The sole noteworthy exception to this was on the pivotal matter of the need for Federal minimum standards.

Strikingly, I think, the dissent here from the majority view was largely an issue of timing.

The majority opted to have the Congress wait until mid-1975 before it passed such a standards bill—unless the States could totally reform themselves—while the minority view urged that the Congress press ahead immediately, 1972.

My point is that the key question that the Congress must address now is whether the States have indeed made sufficient progress since the early part of this decade, thereby obviating the need for such legislation. If their progress has been inadequate over these past 6 years, what reasonable hope is there that the States will ever achieve the several laudable goals of workers' compensation?

Having identified my concern, I turn to the elusive matter of evaluating State progress.

I have three observations to make:

First, there has been substantial improvement by many States in their compensation laws, particularly in the first several years after 1972. Many groups are responsible for this good work.

Second, there are several reasons why one might be concerned that this progress has peaked and that some States may even allow their laws to slide backward. That is speculative, of course, on my part, but such regression will not be entirely independent of the manner in which S. 3060 or comparable legislation is handled by the Congress.

Finally, we are left, as always, with having to decide whether the compensation bottle is half empty or half full.

The Congressional Record of May 11, 1978, identifies by each State the compliance or lack of it with the Commission's 19 essential recommendations. While there may be ample room for quarrel about precise measurement of compliance, the data still show the need for very substantial improvement.

I might add that the problem is not simply one of a few small Southern States—indeed, many of these have made very serious efforts to improve their laws. Very populous and customarily progressive States, such as New York, California, and Michigan, do not comply with even two-thirds of the essential recommendations, according to the Congressional Record. Overall, Senator, I see the bottle as half empty and believe that the progress by the States since 1972 is insufficient on the average to obviate the need for the recommended Federal standards.

I believe that some Federal minimum standards are necessary, and the time to begin to implement these is now. The issue at hand is S. 3060.

The bill has some strengths and some weaknesses.

My view is that the former clearly outweigh the latter. By "weaknesses" I am referring to several disparate matters.

First, there are certain pressing areas of need in workers' compensation that are not dealt with at all by S. 3060. For other areas that are hardly touched by the bill such as permanent partial disability, there are no readily identified remedies. Yet, to proceed into this treacherous domain would not serve us well until we better understand the feasible alternatives.

No doubt some witnesses or commentators will argue that until these problem areas can be dealt with by Federal law, consideration of the bill should be suspended or indeed it should be rejected by the Senate. That argument has a hollow ring to it since our ignorance in this area has been known to all for a number of years.

I fear that we may never find answers to some of these issues and to delay in the hope that we will is to say that the Federal Government should never legislate in this area.

Secondly, not all of the specifics in this bill are to my liking, nor as I might have written them. No doubt the committee will be hearing about many of these and others in the days to come. These criticisms will derive either from certain technical shortcomings—for example, language problems—or simply alternative preferences.

This is a very complicated area in which to legislate, and it is considerably easier to find flaws or potential weaknesses than it is to identify practical alternatives. I would urge, respectfully, that critics be asked not simply to identify flaws in this bill, but to identify workable alternatives or to point out why no statutory provisions are needed.

A third line of criticism that I anticipate you will encounter will focus on the costs of implementing S. 3060. Such concerns may extend the line of argument to potentially deleterious effects of S. 3060 on inflation, our balance of payments, employment levels, and the like. Indeed, some elements of S. 3060 will increase costs and need to be understood in that light.

However, many of the costs that will be incurred by employers if S. 3060 becomes law are ones that would otherwise be borne by the

worker, his/her family, the Social Security Administration, or some other part of our society. This view is hardly comforting to employers whose compensation costs may rise, especially those who have a difficult time in the marketplace either shifting forward or shifting backward the burden of such increases.

Our institutions both public and private appear to have become increasingly cost conscious in the past few years. I am told that more than anything else, State legislatures are asking how much it will cost, as workers' compensation amendments are debated. An economist can only be cheered by this preeminent attention to cost. Yet, much of the discussion of the costs of S. 3060 will not relate to the real costs to society—that is, the resources forgone if this becomes law—but, instead, will actually be discussing who will pay the freight for industrial injuries and illnesses.

Having referred to the matter of costs, let me cursorily note that I find S. 3060 remarkably balanced.

In many places, I find the bill could have gone much further than it did in the area of reform. For example, the provisions of section 4(b)(1)(D) and 4(f) exclude those persons with very serious permanent partial disabilities. You might note that this would create very large cost differences by classifying an injury either as partial or total disability even though the fine line between total and partial disability may be imperceptible in many instances.

You might note further that with the State's average weekly wage being—on average—2 years old, and with wage increases of 7 to 9 percent being commonplace, the true maximum will be perhaps 15 percent to 20 percent below the actual statewide average weekly wage by mid-1981. Another very significant indicator of caution—one of a number you can easily find—is the offset provision for survivors' benefits under social security. In short, I see the bill as one that is realistic, containing elements that will contribute to reforming State laws, but that is more modest than some would like.

I turn my attention to those elements that especially concern me and which I suppose may be the most controversial aspects of S. 3060, after the issue of the enforcement mechanism.

These are the problems of occupational disease. Section 4(g) goes a long way toward eliminating some significant problems that exist in some State laws. It seems to me to aim for and achieve a very important balance.

On one side it says that a State law ought not to bar a claim or reject one without even evaluating the facts. This provision—where adopted by States—should eliminate those formal barriers to compensation that cannot be condoned except possibly as administrative convenience.

Yet 4(g) does not throw open the floodgates and render employers and the States defenseless. Indeed, it allows for States to develop and use presumptions regarding the circumstances of the illness—thus a State's legislature can if it wishes indicate predilections—but it gives the worker a chance of meeting the "arising out of and in the course of" test. So long as that essential element remains, there ought not to be a flooding of the system.

Section 5 of the bill is crucial and I hope it will survive the rigors of the congressional process along with the rest of S. 3060. As is the

case with 4(g), the occupational disease standards section is sorely needed but it also shows considerable moderation in providing significant procedural safeguards for all parties.

A critical need that is served by this section is that it will allow for the redistribution of the existing burden of proof in cases of illness or death due to disease. In many instances currently, the burden is simply too substantial for the worker to possibly meet it.

The section also reduces the problem of having 50 separate State legislatures, Governors, and compensation agencies fully maintaining currency in medical and health science matters that affect the protection afforded the State's workers. While the primary responsibility still rests with the State, the occupational disease standards can be directed to areas of greatest need, particularly as science develops new information.

Section 5 allows for interested parties to publicly become involved in the setting of standards. It also provides insurers and employers safeguards so that no dramatic changes in law are thrust upon them—indeed, the process of issuing standards will strike many as painfully slow. Let me note this only because the very long lead times represent a sound compromise, I believe, between protecting worker interests and those of employers and insurers. A possible timetable could go as follows:

A HYPOTHETICAL COTTON DUST STANDARD

1. S. 3060 enacted July 1, 1979.
2. Possible HEW study period ends July 1, 1981.
3. Secretary appoints advisory committee—reports January 1, 1981.
4. Thirty day (can be longer) period for comments February 1, 1981.
5. Sixty days to publish proposal April 1, 1981.
6. Sixty days to hearing June 1, 1981.
7. Hearing period (assume 30 days) July 1, 1981.
8. One hundred and eighty days to publication in Federal Register January 1, 1982.
9. Standard in effect January 1, 1984.

I have called this timetable "A Hypothetical Cotton Dust Standard." I could have called it "A Hypothetical Beryllium Standard Standard," or anything else. It conforms with letter and intent of S. 3060.

I am not sure everyone will understand unless they see a timetable like this, using reasonable assumptions of how the bill might operate under the law. It will take approximately 4½ years between the time that that bill is enacted, assuming that the Secretary of Health, Education and Welfare begins a study immediately on a hypothetical standard and the time for that standard to be implemented.

The calendar described above has some flexibility and may run a bit faster or considerably slower. If there will be one predictable tendency, it is that the more controversial the standard, the greater the delays in reaching some resolution. Obviously, the process can be speeded up but not without sacrificing some element of justice.

For those like me, who are uncomfortable about this pace, especially when the need for a particular rule seems painfully evident, nothing precludes a State from moving expeditiously without the prompting of the Secretary of Labor.

To summarize my position, there remains a need for Federal standards and the Congress, I respectfully suggest, ought to respond to that as quickly as possible. This effort, S. 3060, is not an ideal law but a search for such a statute may accomplish nothing other than further postponement of needed reform.

The bill is a balanced effort and its authors are to be congratulated for demonstrating a very evenhanded approach. I fully support this bill. That does not preclude me, I hope, from supporting reasonably similar alternatives if and when any should appear.

The CHAIRMAN. Thank you very much.

Senator Javits.

Senator JAVITS. Thank you very much, Mr. Chairman.

Mr. Barth, you have been a tremendous help to our country and to its workers in the work that you have done on the National Commission and the work that you have presented in this testimony.

I hope that we will be continually calling on you.

You have dealt only with some part to bring the testimony within reasonable limits, which we appreciate very much, considering how precious time is.

I would like very much to consider you as our adviser and we will refer back to you as individual elements of the bill come more and more under consideration.

This is likely to be the number one workers' issue before us, just like ERISA was in its day. This will be just as important because I believe most of the unfairness is found in worker's compensation. I think it is very significant that the emphasis is going to be upon the national health scene and, of course, the diminution of the total public responsibility which can be effected through worker's compensation becomes a major public policy issue in the days ahead as we consider a national health insurance scheme or a national health scheme generally; so I believe that our bill is now an idea whose time has definitely come and that in the next year we will be occupied with dealing with it in a positive way and that the Congress will act.

Finally, time has overtaken us. It is now a couple of years beyond the time when all of this—even by its most optimistic supporters—was supposed to be realized because the State would act when we gave them leave. They have not acted. It is one of the problems with States rights. It is directly connected with responsibility. When the State fails, then the citizen is entitled to look to the Federal Government and it is entitled to step in where the States have failed.

I believe your conclusion here that the States have failed is a correct one and, therefore, I will do my utmost to push our bill and do my best to see that it becomes law next year. I will address this point to the witnesses—we will have many witnesses. Right now, the burden is on those who are trying to convince us that we should not act, having been given, wittingly or unwittingly, time to act, and to the workers who have been damaged on the job during all these years.

Thank you.

The CHAIRMAN. In your statement you dealt with our approach to the elimination of the artificial barriers in connection with occupa-

tional disease and I wonder if you would amplify it at all? Do you think we adequately deal with these artificial barriers?

Professor BARTH. I think you have gone very far and have made great progress on this point. There is an oversight here, however.

Section 4(n) of the bill indicates that there may not be a time limitation on the filing of a claim based on recency of employment. I think that the bill would be improved; it would be strengthened and it would be consistent with the spirit of the bill to add some notion about the duration of the employment as well.

In a number of States, workers are precluded from filing claims either on the basis that they haven't been employed recently enough or that they haven't been exposed to enough shifts in the presence of a hazard or enough hours or enough days.

In many instances, these simply make no sense in the presence of our medical knowledge, which may establish, in the case of a specific worker, that that extended exposure was not needed in order for the worker to have developed a specific disease.

The CHAIRMAN. That is a barrier that we don't address ourselves to?

Professor BARTH. No.

The CHAIRMAN. All right.

We will work on it. That is well noted and we will deal with that.

I don't know if this is within your area of background and interest, but this third-party question is a thorny one that we have been wrestling with for years. It wasn't part of your National Commission's work and report.

Did you spend time considering this provision contained in the bill this year?

Professor BARTH. Senator, I don't feel myself equipped to comment on that.

The CHAIRMAN. It is more of a lawyer's problem, I guess?

Professor BARTH. Yes; and I would gladly lease it to them, too.

The CHAIRMAN. We have so much faith in you that if you could help us, we would appreciate it.

Professor BARTH. I appreciate that. It is a hornet's nest at best, and I am very uncomfortable dealing with a third-party issue.

The CHAIRMAN. I would rather raise it with an economist because we will get a briefer answer. If we raise it with a lawyer, we will be here forever.

However, I can understand your reluctance to get into that thicket.

We will have much testimony before our hearings are over from people who express a concern that this bill is largely prospective in nature.

Do you think the bill should be amended to provide benefits for those who already have occupational diseases but who may not be eligible for compensation under the present laws of their State?

How would you have us handle that question?

Professor BARTH. I don't want to seem uncooperative, but I really feel that that issue is basically a policy issue and not an analytical one, which is to say it is a very tough choice, a very tough decision to have to make and it involves individual values and the like.

I feel comfortable with the way the bill is. It deals with the problem prospectively. I think there is some minor ambiguity in the bill which needs to be cleared up about that very issue. The issue is prospective in large part, but you will recall that there is a section that is left vague or opens certain questions about what happens in the event that an individual becomes disabled prior to the setting of the standard but dies as a consequence thereof after the standard is set under section 5. It is simply unclear, as the bill is drafted, whether individuals in that case would be covered or not.

I have read the bill a number of times and I think it simply isn't addressed. It is left open. You are going to have to make a judgment on that one. I don't mean to throw back that tough question and say, you have got another one to deal with there. It is not dealt with presently and it needs to be.

There will be hundreds and thousands of people that will be affected by that provision of the law, depending upon which way you go.

The CHAIRMAN. That is helpful, too. That isn't specific, of course.

Professor BARTH. Specifically, I am satisfied with the way the bill is. I am very intimidated by the prospects of making it retroactive.

The CHAIRMAN. Is the problem more than the cost of coverage of those who had a disease arising out of or in the course of employment prior to the effective date?

Professor BARTH. Yes.

Obviously, one of the major problems is the problem of cost, and the second one is the matter of evidence and the manner in which it can be developed. In some instances, based on exposure of decades ago, certain individuals employed in an environment for years come forward with claims presently. The problem of sorting out facts, evidence, fiction, hearsay, and whatever strikes me as an imposing one. Also it does clearly open the door. It opens the door very widely to a very different method of funding compensation benefits because clearly in this case if we would do this retrospectively, some alternative method of providing evidence would have to be developed and, undoubtedly, that would mean opening up the Federal Treasury in some respects, at least initially. That is not a prospect that I think is a cheery one.

The CHAIRMAN. We have precedents in this area. I am referring to the specific law addressed to the coal miners disease, pneumoconiosis, black lung. Some now argue that there are other known diseases that are not now covered or adequately covered under workmen's compensation, and it will be a long time before adequate compensation of these diseases under this bill will be in place. There will be those who will advance specific compensation legislation, as we did with pneumoconiosis for asbestosis or byssinosis. It seems that the approaches we have here in this bill will embrace those diseases and to do it comprehensively and that it is wiser to do it comprehensively than to try to do it law by law and disease by disease.

How do you react to this?

Professor BARTH. Again, I like your terminology, the comprehensive approach that is taken here. I am very concerned about the possibility of many small black lung bills, although many of them might not eventually turn out to be very small in terms of the number of people affected and the costs. What concerns me is a number of things.

No. 1, you started on a list, but that list could be made very, very long and if we feel that the problem is so very pressing to workers exposed to cotton dust, why not workers exposed to a large variety of dusts and metals and other hazards?

We start on a piecemeal basis. We eventually run out of diseases. We undermine all of workers' compensation. Perhaps that should be the longrun goal of this legislation although I don't think it should. But for most parties who would like to see workers' compensation eliminated and replaced by national health insurances and income maintenance laws, the best way to do it is to piecemeal the thing to death. I don't think it is a sensible way to proceed. I don't know where you can stop once you have started.

The CHAIRMAN. There is a bill that deals with the respiratory diseases arising out of exposure to asbestos. This would create a fund, really, to pay the claims for asbestos related diseases, for the diseases arising out of work exposure to asbestos. This bill would pay benefits by a tax imposed upon the asbestos manufacturer and then raise a tax on cigarettes. These taxes would raise half the benefit costs—the Federal Government would pay the other half. The cigarette tie-in is evidently the result of what the doctors and the scientists now believe, that there is a greater risk of lung disease among those exposed to asbestos when the individual is also a cigarette smoker.

As an economist, how does this double-specialized treatment of a particular tax for a particular purpose strike you?

Professor BARTH. Well, I always like the idea of an added tax on cigarettes. It happens to be one of my blind spots. Almost any way that we can increase the price of the cigarettes seems to me to be warranted in an age where society is forced to bear many of the costs associated with cigarette smoking, not simply the individual, but we as a society; so I have no problem with that as a general principle.

The CHAIRMAN. Because of the health injury arising out of cigarette smoking?

Professor BARTH. Yes.

The CHAIRMAN. How about ice cream? Ice cream, liquor and beer could be harmful to your health.

You would waste more money, it seems to me, administrating those special taxes designed to reduce that health risk.

Professor BARTH. I don't think I could ever go home and face my family if I advocated a special tax on ice cream. The issue is cigarette smoking, which has been determined by virtually every study I have seen to be a serious and widespread health hazard in this country. Individuals who become ill or in fact perish as a consequence of that habit—frequently there are costs associated with that habit that are not borne by the individual and his family. They are in the form of forgone product, the individuals not being able to work and becoming wards of our society either through the health——

The CHAIRMAN. This tax would be earmarked for the fund for those who have asbestos is and other asbestos-related diseases?

Professor BARTH. Yes.

The CHAIRMAN. Couldn't we do the same where we find that alcohol combined with something in the work scene is harmful?

It seems to me while in theory it might be defended, administratively it would be a burden.

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Professor BARTH. I don't think I was responsive to your question. Two things: Alcohol, when consumed in even small quantities in combination with certain hazards found on the job can synergistically seriously undermine the health of the individual workers. I wasn't responding to the question about the specific legislation you have in mind.

As a general principle, I think cigarettes are too cheap and I would like to see Federal taxes on cigarettes higher. I don't support the bill that you just described to me, however, because I see it as another piecemeal approach to the problem of occupational disease.

In interviews that I did a couple of years ago with leaders of the Asbestos Workers Union they told me that they felt that their workers have been very well educated to the problems of illness associated with asbestos. Thus, when they became ill with a variety of illnesses, they understand that they generally have an opportunity to file a claim with the State compensation agency. At least in the area of asbestos, they haven't had many serious problems in getting those claims compensated.

I don't see that particularly as a problem area. It is serious, of course, in terms of the number of workers whose health is impaired. I don't think asbestos is the foremost example of what you are talking about. I would look at other areas first.

The CHAIRMAN. We have just had our first summons to vote, and we shall shortly have to recess.

How about the provisions of the bill dealing with statistical reporting? I know this has been a concern of yours and you have stated it to us before.

Have we provided here adequately for the necessary statistics to carry forward the purpose of the bill and the necessary reforms of the compensation system?

Professor BARTH. Senator, I think you have gone in the right direction. I perceive a problem when you indicate in a bill that you will support States up to 3 years. I am concerned that Governors and legislators in the individual States will look at this particular law if we get into the statistics business and say that the Feds will support us only for up to 3 years. After that, we are left footing the bill. That worries me.

If I read the temper of my own State and other States currently, I don't think they will go along so long as the bill says we will support you for only 3 years. I would prefer it to be continuing support because that will encourage all States to meet the spirit of it.

The CHAIRMAN. That is a worthy point. We have seen this in other areas where we started off with 90 percent and worked it down to 50 and out, and it has left the States out on a limb.

Professor BARTH. They have learned the lesson.

The CHAIRMAN. Of course, they knew what was coming, but they still felt left out on a limb.

We will recess now.

Thank you, Dr. Barth.

We will be back as soon as possible after this vote, certainly within the outside—45 minutes, hopefully before that.

[Recess.]

The CHAIRMAN. All right. We are ready to reconvene.

I understand that those who are here from Johns-Manville Corp. would prefer to go on now, which is fine with us.

John A. McKinney, G. Earl Parker, and Paul Kotin.

Gentlemen, we welcome you.

STATEMENT OF JOHN A McKINNEY, PRESIDENT, CHIEF EXECUTIVE OFFICER, THE JOHNS-MANVILLE CORP., ACCOMPANIED BY G. EARL PARKER, VICE PRESIDENT, GENERAL COUNSEL, AND SECRETARY; AND PAUL KOTIN, M.D., SENIOR VICE PRESIDENT, HEALTH, SAFETY AND ENVIRONMENT

Mr. McKINNEY. Thank you, Mr. Chairman.

My name is John A. McKinney. I am president and chief executive officer of the Johns-Manville Corp., headquartered in Denver, Colo. Accompanying me today are Dr. Paul Kotin, senior vice president for health, safety, and environment; G. Earl Parker, vice president, general counsel, and secretary.

I would like to begin by expressing my sincere appreciation for this opportunity to appear before your committee and to participate in and to applaud your attempt to establish a uniform, comprehensive, equitable, and hopefully innovative means of providing compensation for occupational injuries and illnesses.

Since I have a written statement, I wish now to merely illustrate our two major points.

The CHAIRMAN. Fine.

Mr. McKINNEY. One of them has to do with the question which you raised with the previous witness. This has to do with third-party litigation. I personally know a great deal about third-party litigation in the occupational disease field. I know some of the essential things that are required for a total, equitable program for providing compensation.

The system which we have now is inequitable, and the important thing is that it does not do what it is supposed to do, which is to deliver adequate, fair compensation to those who need it.

Now, as you know, my company is a part of the asbestos industry. That industry directly operates in 188 congressional districts and 38 States; so it is a widespread industry.

This industry has undoubtedly had in the last 12 years or so more aggravated problems with respect to workmen's compensation than any other industry. I should like to use this industry as an example to illustrate why we believe bill S. 3060 should be expanded somewhat in scope and modified somewhat in content.

I should like to say emphatically and sincerely that a bill with the changes I will suggest would serve as a vehicle for joining industry, government, and labor in a long overdue solution to equitable compensation for work-place injury and occupational disease and would deserve the wholehearted support of both labor and industry.

If these changes have any appeal to you in principle, I offer the services of our extensive and, I believe, competent staff to aid in compiling backup data and the like and even in drafting.

As a prelude to my comments about third-party litigation, I would like to tell you what is a typical example of the workman who becomes

involved in third-party litigation against asbestos producers or producers of asbestos-contained products.

Typically, this person would have begun work in a shipyard, not as a Government employee, in about 1941 or 1942, and he would have been handling asbestos-containing products. In some instances, he would have been tearing out insulation from old ships, which was virtually pure asbestos. This typical person was at the time he went to work a heavy to moderate smoker of cigarettes.

Now, it is important to understand what was the medical knowledge of industry and Government at that time about the dangers of asbestos exposure to the workers. From British data in the early 1930's, it was known that in a fraction of asbestos factory workers, not this typical person we are talking about, fiber accumulated in the lungs and caused a disease known as asbestosis. Asbestosis, properly treated, has been described by some in the medical profession as not a life-shortening disease. Cancer at that time had not been identified as an asbestos-related disease. No one knew why some people contracted asbestosis and others didn't. From studies in the middle to late 1930's by the U.S. Public Health Service, it was concluded that there was, indeed, a safe level of exposure.

The standard which was set as a result of these studies, however, proved later to be inadequate and, in any event, it was not enforced in the shipyard.

By 1964, it had become clear that there was a hazard to insulation workers, that is to people not working in factories where asbestos-containing products were fabricated and not working in mines where asbestos fibers were produced.

Later, we learned that cigarette-smoking asbestos workers were dying of lung cancer at 92 times the rate of the public at large; while asbestos workers who did not smoke had no significant excess of lung cancer.

You will hear some recent comments to the effect that nonsmoking asbestos workers have a higher incidence of lung cancer than the public at large; but when you hear that, ask for the data. There have been only eight cases of lung cancer among nonsmoking asbestos workers in 10 years, as compared with hundreds and hundreds in the other category.

So the worker of my example, the typical one, died of lung cancer say in 1970. The first exposure was about 1940 or 1941. That is about 30 years after the exposure which caused the disease.

In the typical case, the worker's widow would have received workmen's compensation benefits under State law. She would have thought the award was inadequate, and I think we would all agree.

In this typical case, a lawyer encouraged her to file suit against the suppliers of the asbestos or asbestos-containing products used by her husband in his work. She would have alleged that the supplier was negligent and at fault in not warning of the possible dangers of the product before 1964.

In this typical example, the widow would then have gone to trial, would have gone through arduous weeks and months of trial. On average, such persons would win their cases about 50 percent of the time. When they win, a large portion of what they win goes to the lawyers who represented them.

Why do they win only 50 percent of the time?

Because the issue in the trial was fault or blame and it is fault or blame for the exposures of 30 years ago. Even where there is the obvi- out human desire on the part of the juries to see that the people are compensated, juries honestly find there simply is no easy answer to the question of fault.

In cases that are won, I am convinced that the juries are doing the human thing of providing some compensation for a person who otherwise would have had inadequate compensation, but they do not believe that anybody is really to blame or at fault for what has happened. That basically has been recognized in the background of bill S. 3060.

I think it has been inherently recognized that you must have a no-fault system. In asbestos, for example, a number of parties were involved but, 20 or 30 years ago, they did not and could not know what subsequently would happen. The Government was in the best position to know and to control the environment in the shipyard, but it did not. If you wish to hear a personal experience in this regard, you should contact Congressman Mendel Davis, from South Carolina, whose father worked in a shipyard with asbestos as he himself did and took dust counts.

The tobacco industry did not know that but for smoking, there was virtually no probability of the worker contracting lung cancer. The employer and the supplier and the union did not know any more than the Government did. None were at fault, but I think the important thing to understand is that all were involved and if we are going to have a fair and equitable and comprehensive system of compensating those who have been injured, we must understand and recognize that those who were involved and can contribute to the compensation should.

While none were at fault, all that I mentioned were involved. It is not possible fairly and equitably to find the one cause or to assess blame to a single entity in the typical case that we see in the third-party litigation.

So the first problem that I have with S. 3060 is that it places the entire burden of compensation on the employer but, at the same time, does not prohibit third-party cases and exempts parties who were equally or more involved. We believe the bill should be amended to make compensation under the bill the exclusive remedy and prohibit third-party cases.

Next, we think the Government should pay a substantial portion of the compensation.

Third, we think that employers, suppliers of disease-promoting products to the work place such as those containing asbestos and suppliers of agents contributing to disease in the workplace, such as tobacco, and there are others as you mentioned, all should, where appropriate, pay a fair share and, in fact, I think that is the only way that you can have a compensation bill which—addressing myself to the question which you asked the previous witness—the only way you can have a bill which society can afford.

While I have talked about asbestos, we can identify a number of other industries in which the situation already has been or will be virtually the same. And by that I mean that there are other agents which are used by the worker or the worker is exposed to which affect, in con-

nection with his exposure in the workplace, his health. I urge you, for benefit of labor and industry and most of the people deserving fair compensation, to consider these changes which I have just enumerated.

At Johns-Manville, we are acutely aware of health hazards associated with asbestos. Most of us who have been with the company a long time, like myself, have been exposed to asbestos back at the time before we knew that we were being overexposed. Most of the people who have been overexposed are my fellow employees. One of the reasons that I am very much opposed to third-party litigation is that my fellow employees do not have any opportunity for a third-party claim, whereas, employees of our customers do.

I take pride in Johns-Manville's leading role in supporting the medical and scientific research on asbestos and our affirmative action to control exposure and to educate and caution as the knowledge of the hazards has become available.

Just as Johns-Manville has been at the leading edge in controlling asbestos exposure, we want to be at the leading edge in developing a fair and effective statutory means of compensating for occupational disease. That has been the reason for our involvement in one of the bills to which you referred earlier, and that is the reason why we applaud the efforts of this committee.

A comprehensive exclusive bill of the type which we have suggested would meet these criteria: Quick, certain, and equitable compensation would be provided, which is the main objective to be obtained; dollars presently expended in product liability and legal costs would become available to compensate injured parties, and that is a significant number of dollars.

Inconsistencies attributable to variations in State laws and the whims of juries would be eliminated. We have had cases where it was admitted on the record that the parties had asbestosis. We have had identical fact situations in different courts and in one case the plaintiff is given an award and in the other case, nothing.

If we had the comprehensive bill, the product liability crisis would be at least partially put to rest. Burdens on the State and Federal judicial system would be eased. Industry, labor and Government would all participate in an equitable fashion and we would then not be running a system as we are today in which the primary effect of it is to promote the welfare of the legal profession, and I say that as a lawyer.

I would again like to offer to the committee the help of our staff, which is an extensive staff. We have been deeply involved with this problem for over a decade.

We will now be happy to answer any questions which you might have, Mr. Chairman.

The CHAIRMAN. I can see that you have given a great deal of attention and thought to your testimony before coming here. I have been going through all the material that you have presented. I haven't digested it all; I have to confess.

Mr. MCKINNEY. I understand.

The CHAIRMAN. But we will have sufficient time before we finally get to our markup to thoroughly understand all the points that you

have made here and, obviously, it comes from a complete background of understanding of diseases associated with asbestos. We appreciate all of the thought that went into this.

I know that our third-party provisions in S. 3060 has one beginning virtue—its simplicity.

Mr. McKINNEY. Yes.

The CHAIRMAN. There are, it seems to me, some more profound and more complex questions that we might not have addressed in this simple approach that we begin with.

We started, of course, by addressing one of the more basic problems of the third-party litigation—the inequities, the economic loss, really, in terms of the time of litigation and all of its complexities. We wanted to get a return to the beneficiary as simply as we could without all the complexities of third-party litigation.

We don't really associate, in each situation, liability as we think of it, in terms of the agents contributing to the end result which is the illness. You do that.

Mr. McKINNEY. Yes.

The CHAIRMAN. And you spread the recovery resource over those agents which have had a part in the end result?

Mr. McKINNEY. Yes.

The CHAIRMAN. And it is certainly something that appears to me to warrant more thorough consideration.

You started, Mr. McKinney, with an offer that your people would be available to consult further on this and I think we should and we will.

Mr. McKINNEY. Thank you.

The CHAIRMAN. In terms of the taxation aspects, you were here when I made the observation that I see some complexities in this earmarked tax, its collection, and its application and distribution?

Mr. McKINNEY. Yes.

The CHAIRMAN. While the approach you propose appears to be sound in this area where the synergistic effect has been scientifically established, I am troubled by the fact that there are doubtless, numerous, similar situations where one exposure combined with another produces an occupational disease. We could have, as a result, burgeoning complex tax and funding mechanisms to pay for benefits.

Mr. McKINNEY. Certainly, there will be more of them. I don't know that they will be as dramatic and clear cut as they are with asbestos, but there are a few others which our group has already identified where we think this will be a problem.

That is why it makes some sense to have a comprehensive bill where the principles are stated and things which fall into that category can be included within the scope of the bill.

One of the other things about asbestos which may not be the same for any other product is that asbestos-related diseases are identifiable. This is not so true, for example, with black lung disease. It is not necessary with respect to asbestos to make the presumptions that you have to make in certain other areas where, if you have worked there a certain period of time, it is presumed you have the disease. That is not so with asbestos. It is fairly clearcut.

Again, I was using asbestos only as an example. Obviously, our views came from there, but we think they have a broader application than

just asbestos. We did along with the asbestos workers' union get a bill introduced which was addressed only to asbestos, but we were doing this simply because we were getting no aid anywhere. The asbestos third-party litigation situation was reaching crisis proportions for all of us involved and, at the same time, was not delivering fair compensation to the victims.

So I think it would be well for the people on our staff who have much greater detailed knowledge of this than I do to make themselves available to your staff for further discussions.

The CHAIRMAN. Now, as far as the compensation coverage and the compensation claims, you have said that the principal payment under your proposal would come from the Government?

Mr. MCKINNEY. For asbestos, I think it certainly should.

The CHAIRMAN. You are just limiting it to this one situation?

Mr. MCKINNEY. And I think in other situations where the Government has similar involvement to what it had with asbestos, that is, where the Government, through the Public Health Service early on did make a study which later—I am not being critical of the Public Health Service—but later on, they turned out to be wrong over and over in these health areas.

They not only made that study and set standards which turned out to be wrong, but for the majority of the people who today would have a third-party claim, legally could make a third-party claim in the asbestos field, I think the Government controlled the environment in which they worked. They were either Government employees in the shipyard or they were employees such as most of the asbestos workers are insulation contractors who installed insulation in shipyards and other Government installations, and so on.

It was particularly this group of people that I don't think from the data in the 1930's anyone would have anticipated that there would have been the three forms, and we have mentioned only one of them here, but the three forms of asbestos-related disease.

I think it was particularly in that group that would not have been expected. Nevertheless, it was the Government who controlled the environment and it was the Government who made the first comprehensive study and made an attempt to set standards. I am not saying that they are to blame or at fault, but they were certainly as involved, and there is no reason to say that the industry or the union or the medical profession or others should have known more about it than the Government did.

The CHAIRMAN. Well, would this system be even-looking now prospectively, only useful for the old cases?

Mr. MCKINNEY. I think it would be useful for both. We feel that all persons—and I haven't said it in the oral testimony; but in the written testimony, I have said that I feel that we have had several cases where families of workmen have contracted asbestos-related diseases because the fiber was brought home on the workmen's clothing and members of the family contracted disease from it. I think those people should be compensated also.

I think anyone who can be identified particularly as having an asbestos-related disease should be eligible for the compensation. I feel that way about asbestos particularly because it is so clearcut whether you

have the disease or not; so you are not open to the problems that you might have with other diseases of people making claims just because they lived in the neighborhood. We feel that it would apply to past cases as well as to the future.

We have reason to believe that the number of cases in the future will, after a time, diminish and then disappear. We believe that because we have a plant which is an asbestos cement pipe plant in California. It makes the same products as the plant in New Jersey with which you are familiar. The plant in New Jersey happens to be the one where we have the highest incidence of disease. The plant in California has been in operation for 21 years.

For persons who have only worked at that plant whose only exposure to asbestos has been in that plant, there is no evidence so far—and I may state this incorrectly; and if I do, Dr. Kotin will correct me—there is no evidence of any pulmonary changes which would indicate any asbestos-related disease. There is one case of asbestos-related disease in a worker in that plant. We think that came from a prior exposure to asbestos before the person came to work at Johns-Manville. That is being looked into.

In any event, we take the history in the other plants and take into account that the dust levels in that California plant were higher when this started up than is the present OSHA standard of 2 fibers per cc. In 21 years, in a worker population that large, some asbestos-related disease should have begun to show up if the exposures were too high. This gives us confidence that the present OSHA standard of two fibers per cc is safe and that if implemented by the kinds of educational programs which we have done and by proper work practices so that the standard can be adhered to, eventually asbestos-related diseases will virtually disappear.

It is the experience in that plant that gives us that confidence today.

Now, again, it is something we have to follow very carefully and we have to see what happens after 30 years and 35 years. At the present time, we are quite confident that the 2 fibers per cc standard is safe and asbestos-related diseases should disappear just as the disease of silicosis virtually disappeared after dust control was initiated back in the 1930's.

Did I say anything that was incorrect?

Dr. KOTIN. No.

The CHAIRMAN. He nodded assent as you were talking here.

You have given us an awful lot to digest. We will be thinking about it. We would like to call on you again. We know that Johns-Manville has been most attentive to understanding the hazards in your workplace, to monitoring, to following up, and it is very encouraging to hear about the progress you have reached with your relatively new plant in California. We are encouraged and we will get back to you.

Thank you very much.

Mr. MCKINNEY. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. McKinney follows:]

TESTIMONY OF JOHN A. MCKINNEY
S.3060 COMMITTEE ON HUMAN RESOURCES
SEPTEMBER 19, 1978

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE:

MY NAME IS JOHN A. MCKINNEY; I AM PRESIDENT AND CHIEF EXECUTIVE OFFICER OF THE JOHNS-MANVILLE CORPORATION, HEADQUARTERED IN DENVER, COLORADO. ACCOMPANYING ME TODAY ARE: DR. PAUL KOTIN, SR. VICE PRESIDENT FOR HEALTH, SAFETY AND ENVIRONMENT DEPARTMENT; G. EARL PARKER, VICE PRESIDENT, GENERAL COUNSEL AND SECRETARY

I'D LIKE TO BEGIN BY EXPRESSING MY SINCERE APPRECIATION FOR THIS OPPORTUNITY TO APPEAR BEFORE YOUR COMMITTEE AND TO PARTICIPATE IN YOUR DEVELOPMENT OF LEGISLATION TO ESTABLISH A UNIFORM, COMPREHENSIVE, EQUITABLE, AND HOPEFULLY INNOVATIVE MEANS OF PROVIDING COMPENSATION FOR OCCUPATIONAL INJURIES AND ILLNESSES.

BECAUSE OF JOHNS-MANVILLE'S LONG HISTORY OF COMMITMENT TO THE RESOLUTION OF ASBESTOS-RELATED OCCUPATIONAL DISEASE PROBLEMS, AND MY OWN PERSONAL CONCERN FOR THE MANY PROBLEMS ATTENDANT TO THE ISSUE OF OCCUPATIONAL DISEASE AND THE COMPENSATION OF VICTIMS I WANT TO DIRECT AND LIMIT MY REMARKS THIS AFTERNOON TO THAT SUBJECT.

COMPREHENSIVE, EQUITABLE, AND UNIFORM COMPENSATION FOR OCCUPATIONAL DISEASE IS A WORTHY AND PROPER SOCIAL GOAL. ON THIS THERE CAN BE NO DEBATE. THE PROBLEM FACING ALL OF US TODAY IS THAT NO FAIR MECHANISM EXISTS TO SATISFY OUR GOAL. RATHER, WE WORK A VIRTUAL HODGEPODGE OF WORKERS' COMPENSATION STATUTES AND PRODUCT LIABILITY LAWSUITS. OUR JOINT CHALLANGE IS TO DEVELOP AN EFFECTIVE DELIVERY SYSTEM FOR BENEFITS WHICH WILL BE FAIR TO ALL CONCERNED AND INVOLVED PARTIES.

THAT THE BILL BEFORE THIS COMMITTEE HAS RECOGNIZED THE INEQUITIES AND INADEQUACIES OF EXISTING WORKERS' COMPENSATION AND PRODUCTS LIABILITY LAWSUITS AS A PROPER SOLUTION TO OCCUPATIONAL INJURIES AND ILLNESS IS VIVIDLY APPARENT. IN PARTICULAR I REFER TO SECTIONS 5 AND 10 OF THE BILL DEALING WITH OCCUPATIONAL DISEASE STANDARDS AND EXCLUSIVITY AND THIRD-PARTY LIABILITY RESPECTIVELY. THESE ARE CONSTRUCTIVE STEPS AND ARE TO BE APPLAUDED. HOWEVER, I WANT TO URGE THAT IF A TRUE AND FAIR RESOLUTION OF THE PROBLEMS FACING US IS TO BE REALIZED THIS LEGISLATION MUST GO FURTHER AND BECOME AN ALL-INCLUSIVE REMEDY.

BEFORE DISCUSSING THIS RECOMMENDATION AND THE REASONS FOR IT IN SOME DETAIL I WOULD LIKE TO MAKE A FEW BRIEF OBSERVATIONS ABOUT THE BILL (S.3060):

1. A GROSS INEQUITY EXISTS IN SEC. 10 OF THE BILL IN THE EXEMPTION OF LABOR UNIONS AND THE EMPLOYER'S INSURER FROM SUIT WHILE RETAINING CAUSES OF ACTION AGAINST MANUFACTURERS WHO SUPPLY PRODUCTS TO THE WORKPLACE. LABOR UNIONS HAVE CLAIMED AND ARE INCREASINGLY CLAIMING A RESPONSIBILITY FOR ASSURING WORKPLACE SAFETY. INSURANCE COMPANIES CLAIM AND ARE COMPENSATED FOR SAFETY AND HEALTH EXPERTISE. ACCORDINGLY, BOTH ARE INTEGRAL PARTIES IN ANY OCCUPATIONAL INJURY OR ILLNESS CLAIM. IN FACT, IN LITIGATION CONCERNING ASBESTOS BOTH LABOR UNIONS AND EMPLOYER INSURERS HAVE BEEN NAMED AS DEFENDANTS.

2. SIMILARLY, AN INEQUITY EXISTS IN PARAGRAPH (5) OF SEC. 10 WHEREBY THE MANUFACTURER WHO FINDS HIMSELF AS A DEFENDANT IN A CASE ARISING OUT OF AN OCCUPATIONAL INJURY OR ILLNESS CANNOT SEEK CONTRIBUTION OR INDEMNITY FROM THE EMPLOYER, THE EMPLOYER'S INSURER OR THE INVOLVED LABOR UNION. I SAY THIS IN SPITE OF THE PROVISION FOR CREDIT AGAINST ANY JUDGMENT IN THE AMOUNT OF WORKERS' COMPENSATION PAID. AGAIN THIS SIMPLY FAILS TO RECOGNIZE THE RESPONSIBILITIES OF ALL PARTIES INVOLVED IN THE ISSUE OF OCCUPATIONAL ILLNESS OR DISEASE.

3. COMMENTS ATTENDING THE INTRODUCTION OF THIS BILL HAVE CLEARLY RECOGNIZED THE PRODUCT LIABILITY PROBLEMS WHICH HAVE ARISEN FROM OCCUPATIONAL INJURIES AND ILLNESSES, AND THE NEED FOR THEIR RESOLUTION. THIS BILL AS PRESENTLY CONSTITUTED WILL NOT RESOLVE THESE PROBLEMS.

BOTH THE COMMENTS AND THE SUBSTANCE OF THE BILL RECOGNIZE THE UNDESIRABILITY OF PRODUCT LIABILITY LAWSUITS AS A MEANS FOR COMPENSATING INJURED WORKERS. I DO NOT THINK I TAKE ANY UNDUE LIBERTIES IN STATING THAT THESE COMMENTS IDENTIFY OCCUPATIONALLY RELATED PRODUCTS LIABILITY CASES AS AN UNDESIRABLE END. I MUST, HOWEVER, TAKE EXCEPTION TO ANY CONCLUSION THAT MERELY INCREASING WORKERS' COMPENSATION BENEFITS WILL HAVE THE SALUTARY EFFECT OF MAKING THE PRODUCTS LIABILITY CASE A RARE CREATURE. MY EXPERIENCE AS A LAWYER INVOLVED IN OCCUPATIONAL PRODUCTS LIABILITY CASES TELLS ME THIS IS JUST WISHFUL THINKING. SO LONG AS CONTINGENT FEE ARRANGEMENTS CONTINUE INCREASED COMPENSATION BENEFITS ALONE WILL NOT MATERIALLY DIMINISH THE NUMBER OR MAGNITUDE OF OCCUPATIONAL PRODUCT LIABILITY LAWSUITS. THE NONPRODUCTIVE ECONOMIC DRAIN OF THIS LITIGATION WILL CONTINUE.

4. FINALLY, THE PRESENT BILL FAILS TO RECOGNIZE MEMBERS OF THE FAMILY OF A WORKER AS INDIVIDUALS WHO MAY, IN EFFECT, SUFFER FROM OCCUPATIONAL DISEASE, AND WHO DESERVE COMPENSATION. A SAD FACT IS THAT IN THE PAST EXPOSURES TO POSSIBLY HARMFUL SUBSTANCES HAVE BEEN BROUGHT INTO THE HOME BY WORKERS' CLOTHING AND EQUIPMENT. FORTUNATELY, TO MY KNOWLEDGE THE NUMBER OF FAMILY CASES IS SMALL, BUT NONETHELESS THIS GROUP MERITS YOUR ATTENTION TO PROVIDE COVERAGE.

I WOULD NOW LIKE TO TALK ABOUT SOME PARTICULAR PROBLEMS I SEE WITH RESPECT TO OCCUPATIONAL DISEASE COMPENSATION, AND MY RECOMMENDATION THAT THIS LEGISLATION BE BROADENED TO INCLUDE ALL INVOLVED PARTIES IN AN EXCLUSIVE SOLUTION OF THE PROBLEM.

AS YOU ARE AWARE, AT THE PRESENT TIME OCCUPATIONAL DISEASE CLAIMS ARE DEALT WITH IN TWO ARENAS.

FIRST, THE WORKERS' COMPENSATION CLAIM BROUGHT IN ANY OF THE SEVERAL STATES WITH THE ATTENDANT DIVERSITY IN DEGREES OF COMPENSABILITY, PROCEDURES, AND BENEFITS.

SECOND, THE PRODUCTS LIABILITY LAWSUIT OR SO-CALLED

THIRD-PARTY CLAIM WHEREIN THE WORKER IN ADDITION TO HIS WORKER'S COMPENSATION CLAIM BRINGS A LAWSUIT AGAINST A SUPPLIER OF A PRODUCT TO THE WORKPLACE.

WITH PARTICULAR REFERENCE TO OCCUPATIONAL DISEASE CLAIMS THE PRODUCT LIABILITY LAWSUIT IS AN INADEQUATE, INEFFICIENT, HAPHAZARD, AND UNFAIR MEANS OF ATTEMPTING TO COMPENSATE WORKERS WITH OCCUPATIONAL DISEASE. WHILE MY PERSONAL EXPERIENCE HAS BEEN PRIMARILY WITH ASBESTOS-RELATED HEALTH PROBLEMS, OCCUPATIONAL DISEASE IS UNIVERSAL AND CERTAINLY NOT LIMITED TO ASBESTOS. YOU ARE ALL FAMILIAR WITH HUNDREDS OF OCCUPATIONAL DISEASES LISTED IN FEDERAL PUBLICATIONS. THOSE DISEASES RECENTLY ENUMERATED BY SECRETARY CALIFANO IN HIS PRESENTATION TO THE AMERICAN FEDERATION OF LABOR ON SEPTEMBER 11, 1978 RELATED TO PESTICIDES, VINYL CHLORIDE, BENZINE, ASBESTOS, AND COAL TARS ARE BUT A FEW OF A LARGE AND EVERGROWING NUMBER.(1)(2)

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1. ATTACHED IS A DRAFT SUMMARY OF A RELEASE OF SECRETARY CALIFANO.

2. ATTACHED FOR STAFF REFERENCE IS, "VALUE OF LONG-TERM TESTING FOR THE IMPLEMENTATION OF PRIMARY PREVENTION", L. TOMATIS, ORIGINS OF HUMAN CANCER, 1339-1357: WHICH LISTS IN TABULAR FORM CHEMICALS CARCINOGENIC TO MAN, EXPERIMENTALLY CARCINOGENIC, AND ANNUAL PRODUCTION.

ALL OCCUPATIONAL DISEASE SITUATIONS HAVE WORKERS' COMPENSATION AND PRODUCTS LIABILITY IMPLICATIONS. MY COMMENTS AND SUGGESTIONS RELATE TO ALL.

THE PRODUCT LIABILITY LAWSUIT IS AN INADEQUATE, INEFFICIENT, HAPHAZARD, AND UNFAIR TOOL FOR MANY REASONS.

FIRST, IS THE NATURE OF AND FACTORS INVOLVED IN OCCUPATIONAL DISEASE;

SECOND, IS THE ISSUE OF FAULT OR CULPABILITY, AND THE APPLICATION OF VARYING STATE LAWS.

THIRD, IS THE QUESTION OF DELIVERY OF NET COMPENSATION TO THE VICTIM.

THE VERY NATURE OF OCCUPATIONAL DISEASES HIGHLIGHTS THE FUTILITY OF A PRODUCT LIABILITY APPROACH AND THE NECESSITY OF SOCIAL, LEGISLATIVE SOLUTION.

CHRONIC OCCUPATIONAL DISEASES HAVE SEVERAL DISTINCTIVE CHARACTERISTICS:

1. OUR KNOWLEDGE OF A HAZARD POTENTIAL ASSOCIATED WITH VARIOUS OCCUPATIONAL EXPOSURES OF DECADES AGO WAS, AT BEST, RUDIMENTARY COMPARED WITH OUR PRESENT MEDICAL AND SCIENTIFIC SOPHISTICATION.

2. THE EXPOSURES RESULTING IN TODAY'S DISEASE OCCURRED AT TIMES WHEN GOVERNMENTAL AND PUBLIC HEALTH EXPOSURE STANDARDS AND ENFORCEMENT PROCEDURES WERE VIRTUALLY UNKNOWN. WHERE CRITERIA AND GUIDELINES DID EXIST THEY HAVE NOW PROVEN TO BE INADEQUATE.

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3. THERE ARE LONG TIME INTERVALS BETWEEN ONSET OF EXPOSURE AND EVIDENCE OF SPECIFIC DISEASES ATTRIBUTABLE TO THE WORKPLACE WITH THE RESULT THAT CAUSAL RELATIONSHIPS MAY REMAIN HIDDEN FOR DECADES.

4. THERE ARE MULTIPLE FACTORS IN THE CAUSATION OF ALL CLASSES OF OCCUPATIONAL DISEASE. THESE MAY INCLUDE:

   (A) PRIOR OR OTHER OCCUPATIONAL EXPOSURES.

   (B) THE INFLUENCE OTHER AGENTS SUCH AS TOBACCO SMOKE, ALCOHOL, AND DIET. ESPECIALLY NOTABLE IN THIS REGARD IS CIGARETTE SMOKING; ABSENT WHICH SOME OCCUPATIONAL DISEASES AND CANCERS INCLUDING LUNG CANCER AMONG ASBESTOS WORKERS WOULD VIRTUALLY CEASE TO EXIST.

   (C) FACTORS SUCH AS HEREDITY, GENETICS, AND DIFFERING PHYSIOLOGICAL REACTIONS TO AGENTS.

   (D) THE EFFECTS OF AIR POLLUTION AND URBANIZATION.

WHILE ALL THESE FACTORS MAY LEAD TO A BETTER UNDERSTANDING OF RELATIONSHIPS, THEY CONCURRENTLY RENDER IT IMPOSSIBLE TO ISOLATE "A CAUSE". AS STATED BY SECRETARY CALIFANO IN HIS AFL-CIO SPEECH:

> "MOST CANCERS HAVE MULTIPLE CAUSES: IT IS AN ERROR TO ATTEMPT TO ASSIGN EACH CANCER TO AN EXCLUSIVE SINGLE CAUSE."

AS YOU MIGHT WELL CONCLUDE THE FACTORS PECULIAR TO OCCUPATIONAL DISEASE, WHICH I HAVE OUTLINED, MAKE SATISFACTORY RESOLUTION OF THE ISSUES INVOLVED IMPOSSIBLE IN A LAWSUIT.

THE LAWSUIT REQUIRES THE EQUATING OF AN OCCUPATIONAL DISEASE WITH FAULT OR CULPABILITY. OUR FEEBLE METHODS OF SUPPORTING OR REBUTTING SUCH AN EQUATION ARE REDUCED TO SECOND GUESSING AND MONDAY-MORNING QUARTERBACKING - WHAT SHOULD SOMEONE HAVE KNOWN? WHAT SHOULD SOMEONE HAVE DONE?

I MUST EMPHASIZE THAT THIS EXERCISE INVOLVES NOT JUST THE PLAINTIFF AND A MANUFACTURER, BUT THE EMPLOYER, INSURERS, GOVERNMENT, AND LABOR UNIONS AS WELL.

THESE EFFORTS HAVE LED TO UNEVEN RESULTS IN CASES INVOLVING ASBESTOS, WITH PLAINTIFFS AND DEFENDANTS EACH PREVAILING IN ABOUT AN EQUAL NUMBER OF CASES. PUT ANOTHER

WAY, IN ABOUT ONE-HALF THE ASBESTOS CASES TRIED THE WORKER OR THE WORKER'S FAMILY RECEIVED NOTHING. SIMILARLY, SETTLEMENTS HAVE BEEN WIDELY DIVERGENT.(3)

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3. TO ASSIST THE COMMITTEE WE ARE SUBMITTING INFORMATION ILLUSTRATING THE TRIAL AND SETTLEMENT EXPERIENCE IN ASBESTOS LITIGATION.

THESE UNEVEN RESULTS SHOULD COME AS NO SURPRISE BECAUSE OCCUPATIONAL DISEASE SIMPLY CANNOT LEND ITSELF TO A FAULT DETERMINATION ON THE PART OF ONE PARTY OR SEGMENT OF SOCIETY.

IF OUR MUTUAL GOAL IS, TO DELIVER, BY FAIR AND EQUITABLE MEANS, COMPENSATION FOR OCCUPATIONAL DISEASE, THEN THE PRODUCT LIABILITY LAWSUIT IS A MONUMENTAL FAILURE. OF THE TOTAL DOLLARS EXPENDED IN THE LITIGATION PROCESS PRECIOUS FEW FIND THEIR WAY TO THE INJURED PARTY.

PRESENT COSTS OF LITIGATION ARE IMMENSE AND ESCALATING. A STUDY CONDUCTED BY THE INSURANCE SERVICES OFFICE FOR THE WHITE HOUSE INTERAGENCY TASK FORCE ON PRODUCT LIABILITY DISCLOSED THAT PLAINTIFFS' ATTORNEYS TAKE APPROXIMATELY THIRTY-FIVE CENTS OF EVERY DOLLAR RECOVERED FOR FEES, EXCLUSIVE OF OTHER EXPENSES. ON THE DEFENSE SIDE THE STUDY DISCLOSED THAT FOR EVERY DOLLAR PAID ON A CLAIM, INSURANCE CARRIERS

SPEND FORTY-TWO CENTS ON DEFENSE COSTS INCLUDING ATTORNEYS' FEES.(4)

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4. SIMILAR STATISTICS RESULTED FROM A MICHIGAN STUDY WHICH INDICATED THAT THE TOTAL EXPENSES OF THE DAMAGE SUIT SYSTEM INCLUDING CLAIMANTS COSTS, LAWYERS FEES, INSURANCE AND COURT COSTS EQUALED 120% OF THE NET BENEFITS THAT GO TO VICTIMS; WITH THE RESULT BEING THAT THE NET AMOUNT RECEIVED BY CLAIMANTS IS LESS THAN ONE-HALF OF THAT RETAINED BY LAWYERS, INSURANCE COMPANIES, EXPERT WITNESSES, INVESTIGATORS, AND COURTS.

AS AN EXAMPLE LET US ASSUME A TRIAL RESULTING IN A $100,000 JUDGMENT IN FAVOR OF THE PLAINTIFF.

FIRST THE PLAINTIFF'S LAWYER WOULD TAKE $35,000 FOR LEGAL FEES LEAVING THE PLAINTIFF WITH $65,000. NEXT WOULD BE DEDUCTED OTHER EXPENSES SUCH AS EXPERT WITNESS FEES AND THE LIKE WHICH IN AN OCCUPATIONAL DISEASE CASE WOULD BE CONSERVATIVELY $5,000. THE PLAINTIFF'S NET IS NOW DOWN TO $60,000. FINALLY, IF THERE WERE A WORKER'S COMPENSATION LIEN THIS ALSO WOULD HAVE TO BE PAID BY THE PLAINTIFF. ONE CAN READILY SEE THAT TYPICALLY LESS THAN HALF OF THE RECOVERY GOES TO THE PLAINTIFF.

THE TOTAL DEFENSE COSTS ON OUR $100,000 LAWSUIT WOULD BE ABOUT $42,000. IN ADDITION, THERE ARE NON-ITEMIZED ADMINISTRATIVE COSTS OF THE COURT SYSTEM.

AGAIN USING OUR EXAMPLE, A SUM IN EXCESS OF $142,000 HAS BEEN EXPENDED TO DELIVER A SUM PROBABLY LESS THAN $50,000 TO THE VICTIM. AND, ALL OF THIS HAS TAKEN SOME 2 TO 3 YEARS TO ACCOMPLISH ACCOMPANIED BY UNCERTAINTY ON BOTH SIDES AS TO THE AMOUNT OF RECOVERY, IF ANY.

BY ANY STANDARD OR CRITERIA THIS IS NEITHER AN EFFICIENT NOR FAIR MEANS OF MARSHALLING DOLLARS TO COMPENSATE FOR OCCUPATIONAL DISEASE, AND REPRESENTS A NONPRODUCTIVE ECONOMIC DRAIN.

I HAVE SPENT PERHAPS AN UNDUE AMOUNT OF TIME ON THE PRODUCT LIABILITY ASPECT OF OCCUPATIONAL DISEASE, BUT IT IS ESSENTIAL TO UNDERSTAND PRESENT INADEQUACIES IN ORDER TO APPRECIATE THE NECESSITY OF ALTERNATE SOLUTIONS IF WE ARE DEAL FAIRLY WITH EVERYONE INVOLVED - THE INDIVIDUAL AND SOCIETY.

I PREFACED MY REMARKS THIS AFTERNOON BY NOTING THAT THE OPPORTUNITY EXISTED FOR INNOVATIVE ACTION. THIS ACTION SHOULD TAKE THE FORM OF MAKING WORKERS' COMPENSATION A COMPREHENSIVE, EQUITABLE, EVEN-HANDED, AND EXCLUSIVE REMEDY FOR OCCUPATIONAL DISEASES

THIS CONCEPT IS NOT REVOLUNTIONARY. THE ORIGINS OF WORKERS' COMPENSATION LIE IN THE RECOGNITION THAT INJURED WORKERS SHOULD AND MUST, SURELY AND FAIRLY, BE COMPENSATED. LONG AGO WORKERS' COMPENSATION ACCEPTED THE RATIONALE THAT TORT OR DAMAGE LAWSUITS WERE NOT A PROPER OR ADEQUATE MEANS OF DEALING WITH OCCUPATIONAL INJURIES AND DISEASES.

THIS BASIC RATIONALE EXISTS TODAY WITH RESPECT TO OCCUPATIONAL DISEASES. WE ARE FACED WITH A PROBLEM - OCCUPATIONAL DISEASE CLAIMS AND COMPENSATION - THAT CANNOT BE FAIRLY OR ADEQUATELY RESOLVED WITH TRADITIONAL STRUCTURES AND DISCIPLINES.

FOR MANY YEARS MEMBERS OF THE ACADEMIC COMMUNITY HAVE EXPRESSED THE NEED FOR A NECESSARY CHANGE FROM A FAULT - LITIGATION SYSTEM TO A VARIETY OF STATUTORY COMPENSATION PROGRAMS. THIS TOGETHER WITH A GROWING CONCERN FOR PRODUCTS LIABILITY RESULTED IN THE COMPREHENSIVE REVIEW AND STUDY BY THE WHITE HOUSE INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY. THIS IN TURN LED TO AN OPTIONS PAPER ON PRODUCT LIABILITY AND ACCIDENT COMPENSATION ISSUES PUBLISHED BY THE DEPARTMENT OF COMMERCE IN APRIL OF THIS YEAR.

NOTABLE AMONG THE OPTIONS PRESENTED BY THE DEPARTMENT OF COMMERCE WAS AN APPROACH TO WORKPLACE INJURIES,

> "A MAJOR ALTERNATIVE APPROACH IS TO ABANDON THE TORT-LITIGATION SYSTEM AND DEVELOP A NO-FAULT COMPENSATION SYSTEM IN THE AREA OF PRODUCT LIABILITY. AS THE DISCUSSION BELOW WILL SHOW, THIS ALTERNATIVE IS MORE READILY ACHIEVABLE WITH RESPECT TO WORKPLACE INJURIES THAN CONSUMER INJURIES."

QUOTING FURTHER:

> "AFTER WEIGHING MANY CONSIDERATIONS, THE TASK FORCE CONCLUDED THAT THE DEVELOPMENT OF WORKERS' COMPENSATION AS A SOLE SOURCE FOR RECOVERY IN

PRODUCT-RELATED WORKPLACE ACCIDENTS SHOULD BE CAREFULLY CONSIDERED IN ANY MORE GENERAL WORKERS' COMPENSATION LEGISLATIVE REFORM."

BASED UPON THESE FINDINGS AND OPTIONS THE DEPARTMENT OF COMMERCE RECOMMENDED LEGISLATION PROVIDING FEDERAL STANDARDS FOR WORKERS' COMPENSATION TO INCLUDE A PROVISION THAT WOULD RENDER WORKERS' COMPENSATION A SOLE SOURCE OF MONETARY RECOVERY FOR WORKPLACE INJURIES.(5)

IMPLEMENTATION OF SUCH A LEGISLATIVE ALTERNATIVE MUST RECOGNIZE THE MANY PARTIES INVOLVED AND CONCERNED WITH THE PROBLEM AND THEREFORE DEMAND THE PARTICIPATION OF THESE PARTIES IN ITS SOLUTION. AS I INDICATED EARLIER THE OCCUPATIONAL DISEASE PROBLEM IS NOT LIMITED TO THE CLAIMANT AND THE MANUFACTURER WHICH FINDS ITSELF A DEFENDANT IN A LAWSUIT. LABOR UNIONS, GOVERNMENT, INSURANCE COMPANIES, AND EMPLOYERS ARE NECESSARILY INVOLVED. IN FACT, ALL OF THESE ENTITIES ARE NOW PARTIES IN CURRENT OCCUPATIONAL DISEASE LITIGATION.

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5. THE TEXT OF THIS RECOMMENDATION CAN BE FOUND ON PAGE 14624, FEDERAL REGISTER, VOL. 43, NO. 67 - THURSDAY, APRIL 6, 1978.

IN PARTICULAR, THE FEDERAL GOVERNMENT AS A REGULATOR, USER, AND EMPLOYER MUST BE A FULL PARTNER IN THE ISSUES AT HAND. THERE IS NO ESCAPING THE FACT THAT THE FEDERAL GOVERNMENT WITH ITS GENERAL WELFARE AND PUBLIC HEALTH RESPONSIBILITIES IS INTIMATELY INVOLVED IN OCCUPATIONAL DISEASE PROBLEMS IN THIS COUNTRY; A FACT WHICH HAS BEEN RECOGNIZED BY GOVERNMENT LAWYERS.

THERE ARE SEVERAL METHODS FOR EXPANDING THE PRESENT BILL TO PROVIDE WORKERS' COMPENSATION AS A COMPREHENSIVE, EQUITABLE, UNIFORM, AND EXCLUSIVE REMEDY FOR OCCUPATIONAL DISEASE OR EVEN, AS HAS BEEN SUGGESTED, FOR ALL PRODUCT RELATED CLAIMS ARISING IN THE WORKPLACE. IMPLEMENTATION OF THESE METHODS WOULD OF NECESSITY INCLUDE PROVISIONS FOR THE PARTICIPATION OF ALL INVOLVED PARTIES. WHILE TIME DOES NOT PERMIT DETAILED DISCUSSION, OPTIONS WHICH SHOULD BE CONSIDERED ARE:

1. THE CREATION OF A SO-CALLED SECOND INJURY FUND, WHICH COULD BE EITHER OPTIONAL OR MANDATORY.

2. POST ACCIDENT OR ILLNESS ARBITRATION TO PROVIDE A MEANS WHEREBY MANUFACTURERS, GOVERNMENT, LABOR, AND OTHERS MIGHT BE CALLED UPON TO CONTRIBUTE TO THE WORKERS' COMPENSATION AWARD. THIS METHOD HAS BEEN RECOMMENDED BY THE DEPARTMENT OF COMMERCE.

3. A FUND MIGHT BE ESTABLISHED IN THE SEVERAL STATES TO BE APPLIED TO OCCUPATIONAL DISEASE OR PRODUCT RELATED CLAIMS. THIS COULD BE ACCOMPLISHED IN CONJUNCTION WITH SEC. 12 OF THE BILL PROVIDING FOR GRANTS TO THE STATES.

THE RESOURCES OF JOHNS-MANVILLE ARE AVAILABLE TO THE COMMITTEE TO PURSUE ANY OF THESE OR OTHER POSSIBLE OPTIONS.

AT JOHNS-MANVILLE WE ARE ACUTELY AWARE OF HEALTH HAZARDS ASSOCIATED WITH ASBESTOS. I TAKE PRIDE IN JOHNS-MANVILLE'S LEADING ROLE IN SUPPORTING MEDICAL AND SCIENTIFIC RESEARCH ON ASBESTOS, AND OUR AFFIRMATIVE ACTION TO CONTROL EXPOSURES, AND TO EDUCATE AND CAUTION AS KNOWLEDGE OF HAZARDS HAS BECOME AVAILABLE. JUST AS JOHNS-MANVILLE HAS BEEN AT THE LEADING-EDGE IN CONTROLLING ASBESTOS EXPOSURES, WE WANT TO BE AT THE LEADING-EDGE IN DEVELOPING A FAIR AND EFFECTIVE STATUTORY MEANS OF COMPENSATING FOR OCCUPATIONAL DISEASE.

A COMPREHENSIVE, EXCLUSIVE BILL AS I HAVE SUGGESTED WOULD MEET THESE CRITERIA:

QUICK, CERTAIN, AND EQUITABLE COMPENSATION WOULD BE PROVIDED.

DOLLARS PRESENTLY EXPENDED IN PRODUCT LIABILITY LEGAL COSTS WOULD BECOME AVAILABLE TO COMPENSATE INJURED PARTIES.

INCONSISTENCIES ATTRIBUTABLE TO VARIATIONS IN STATE LAW AND THE WHIMS OF JURIES WOULD BE ELIMINATED.

THE PRODUCT LIABILITY CRISIS WOULD BE AT LEAST PARTIALLY PUT TO REST.

BURDENS ON THE STATE AND FEDERAL JUDICIAL SYSTEMS WOULD BE EASED.

INDUSTRY, LABOR, AND GOVERNMENT WOULD ALL PARTICIPATE IN AN EQUITABLE FASHION.

ALMOST THIRTY YEARS AGO MR. JUSTICE FRANKFURTER ISSUED A CALL FOR LEGISLATION TO EFFECTIVELY MEET THE SOCIAL OBLIGATIONS WHICH UNDERLIE THE INCIDENCE OF OCCUPATIONAL DISEASE.(6) AN ANSWER TO THAT CALL IS LONG OVERDUE.

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6. URIE V. THOMPSON, 337 U.S. 163, 69 S.CT. 1018 (1949).

FOOTNOTE #1

DRAFT SUMMARY

ESTIMATES OF THE FRACTION OF CANCER INCIDENCE IN THE UNITED STATES ATTRIBUTABLE TO OCCUPATIONAL FACTORS

NATIONAL CANCER INSTITUTE

AND

NATIONAL INSTITUTE OF
ENVIRONMENTAL HEALTH
SCIENCES

Not for use before 3:30 p.m. EDT September 11, 1978.

This statement will address the question: "What fraction of the cancer incidence in the United States is attributable in whole or part to occupational exposure to carcinogens in the workplace?" The conventional estimates have been that this fraction is quite small, and figures of between one percent and five percent are often quoted. However, as we will show below, these estimates were admittedly speculative and were incomplete or deficient in several respects. If the full consequences of occupational exposures in the present and the recent past are taken into account, estimates of at least 20 percent appear much more reasonable and may even be conservative.

Basis of the Estimation that 20 Percent of Cancer Deaths will be Associated with Occupational Exposure to Chemicals

I. Asbestos as a Well-Studied Example

The consequences of occupational exposure to asbestos in the United States have only been fully recognized in the past year. According to estimates made by the U.S. Department of Health, Education, and Welfare, between eight and eleven million workers have been exposed to asbestos in the U.S. since the beginning of World War II. Of that total, approximately 1.5 to 2.5 million are presently employed, while the remainder -- between 6.5 and 8.5 million workers -- were formerly employed in environments with significant asbestos exposure, including 4.5 million who worked in shipyards during World War II. Of these workers, approximately four million are believed to have had heavy exposure to asbestos. Based on epidemiological studies of workers, it is estimated that 20-25 percent of heavily exposed workers die of lung cancer, 7-10 percent of pleural or peritoneal mesothelioma, and 8-9 percent of gastrointestinal cancers. These figures are probably underestimates of lifetime risks, because relatively few workers have yet been followed to the end of their normal lifespan. The total fraction of heavily exposed workers likely to die of these cancers is probably between 35-44 percent.

Of the four million heavily exposed workers, approximately 1.6 million are thus expected to die of asbestos-related cancers. Assuming that the excess risk to the 4-7 million less heavily exposed workers is one-quarter of that to the heavily exposed workers, the total number of cancers associated with asbestos in the less-heavily exposed group would be expected to be about 0.55 million, raising the total to about 2.15 million. Since most of these cancers will be manifested in the next 30-35 years, the expected average number of cancers attributable to asbestos per year in that period will average about 67,000. Such numbers would represent about 17 percent of all cancers detected annually in the United States.

II. Other Less Well Studied Examples

Arsenic

Number of workers potentially exposed: about 1,500,000.
Risk ratios*: 3-8 for lung cancer.
Estimated number of excess cancers per year: 2,100 - 7,300.

Benzene

Number of workers potentially exposed: about 2,000,00
Risk ratios: 2-3 to 7 for leukemia.
Estimated number of excess cancers per year: 240 - 1,400.

Coal Tar Pitch Volatiles and Coke Oven Emissions

Number of workers potentially exposed: about 60,000.
Risk ratios: 2-6 for cancer of the lung, larynx, skin, and scrotum.
Estimated number of excess cancers per year: 160-800.

* Risk Ratio:

The ratio of cancers to the number expected in a normal population. A risk ratio of two means a doubling of the

Vinyl Chloride

Number of workers potentially exposed: about 2,260,000
Risk ratios: 200,4 and 1.9 respectively for hemangiosarcoma, brain and lung cancer.
Estimated number of excess cancers: 1,940.

A total of 13 percent of the cancers occurring in a year will be associated with these four substances.

III. Substances for which excess cancer incidence has been recorded but for which estimates of the number of workers exposed may be less accurate.

Chromium

Number of workers potentially exposed: about 1,500,000
Risk ratios: 3-40 for nasal cavity and sinus, lung and larynx.

Estimated number of excess cancers per year: 2,400-46,000.

Iron Oxide

Number of workers potentially exposed: about 1,600,000
Risk ratios: 2-5 for lung and larynx.
Estimated number of excess cancers per year: 1,300-5,000.

Nickel

Number of workers potentially exposed: about 1,370,000
Risk ratio: 5-10 for lung.
Estimated number of excess cancers per year: 3,800-5,000.

Petroleum Distillates

Number of workers potentially exposed about 3,000,000.
Risk ratios: 2-6 for lung and larynx.
Estimated number of excess cancers per year: 2,400-12,000.

A total of 3-18 percent of the cancers occurring in a year will be associated with these four substances.

IV. Totals.
That the total excess incidence would be from 21 to 38 percent We choose to use the figure 20 percent in order to be conservative.

Summary and Conclusions

1. The oft-quoted estimates that only 1 percent to 5 percent of total cancers in the United States are attributable to occupational factors have not been scientifically documented.

2. Most cancers have multiple causes: it is an error to attempt to assign each cancer to an exclusive single cause.

3. Because cancer incidence is strongly dependent on age and upon duration of exposure, most cancers resulting from exposure to carcinogens will occur late in life- many epidemiological studies detect only a small fraction of early-developing cancers.

4. Past exposure to asbestos is expected to result in over 2 million premature cancer deaths in the next three decades: this corresponds to roughly 17 percent of the total cancer incidence expected in that period.

5. Reasonable projections of the future consequences of past exposure to established carcinogens suggests that at least 8 other substances may contribute substantially to cancer incidence comparable in their total effect to asbestos

6. The projections suggest that occupationally-related cancers may comprise 20 percent or more of total cancer incidence in forth-coming decades. (This does not include cancers attributable to ionizing radiation.)

7. Although exposure to some of the more important occupational carcinogens has been reduced in recent years, there are still many unregulated carcinogens in the U.S. workplaces; a number of occupations are characterized by excess cancer risks which cannot yet be attributed to specific agents.

8. There is no sound reason to assume that the future consequences of present-day exposure to carcinogens in the workplace will be less than those of exposure in the recent past.

9 Patterns and trends in total cancer incidence (and mortality) in the U.S. are consistent with the hypothesis that occupationally-related cancers comprise a substantial and increasing fraction of total cancer incidence.

APPENDIX

In addition, the following table lists occupational groups in which an excess cancer incidence has been reported without identification of an etiologic agent. When these are fully studied, the overall excess incidence may be assessed.

OCCUPATIONAL GROUPS IN WHICH EXCESS CANCER INCIDENCE HAS BEEN REPORTED WITHOUT IDENTIFICATION OF A SPECIFIC ETIOLOGIC AGENT

Occupational Groups	Cancer Site(s)	Percent Excess Reported
Coal Miners	Stomach	40
Chemists	Pancreas,	64
	lymphomas	70
Foundry Workers	Lung	50-150
Textile Workers	Mouth and pharynx	77
Printing Pressmen (newspaper)	Mouth and pharynx	125
Metal Miners	Lung	200
Coke by-product Workers	Large intestine,	181
	pancreas	312
Cadmium Production Workers	Lung,	135
	prostate	248
Lead Workers	Lung	30
Rubber Industry		
Processing	Stomach,	82
	leukemia	142
Tire Building	Bladder,	85
	Brain	90
Tire Curing	Lung	61
Woodworkers	Nasal cavity and sinuses	-
Leather and Shoe Workers	Nasal cavity and sinuses,	5,000
	bladder	150

The Value of Long-term Testing for the Implementation of Primary Prevention

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The last International Cancer Congress, held in Florence in 1974, resulted in a certain upgrading of the responsibility of environmental factors in causing cancer in man; this may be one reason for the increase in the estimate of the percentage of cancers due to environmental factors to approximately 90%. The satisfaction of the environmentalists should not last too long, however, since the importance of this probably inflated percentage is being rapidly undermined by a new concept; namely, that it is up to the individual to fight against cancer. The philosophy behind this concept is that it is high time that the individual wake up, shake off his torpor, and realize that he cannot always place the blame for what is happening on others, that authorities cannot always take care of him and his health. It is time to take care of oneself, take care of one's own environment, to lead a dry, parsimonious life with only a little beef and a minimum of smoke and alcohol, and thus to live in a nitid and honest way. The only valid prevention can be undertaken at the level of the individual, and everyone must undertake his own. It is possible to arrive at the absurd and to accuse the individual, by definition anomalous, and to absolve the environment itself, which has only been *made* noxious by the emission into it of toxic substances. As one can see, it does not take too long to reduce disease to a sin—if not a capital sin, at least a genetic one.

On the surface, the proposal described above certainly would appear to be a good one, especially since it implies an anticancer campaign which costs very little. Governments would receive less money from taxes on alcohol and tobacco, but, in compensation, they would have no expense. On the other hand, workers in many industries would continue to be exposed to high risks, and pollution of our waters, air, and food would continue to increase.

As with other oversimplifications, there are portions of truth which deserve to be rescued. It is a fact that cigarette smoking is at the origin of a great number of pulmonary cancers; esophageal cancer is more frequent in people who drink a lot and smoke; and a diet rich in beef has been correlated

with an incidence of intestinal tumors higher than that observed in vegetarians. (In this context, the attention being paid to the possible role of excess beef in the diet in a world in which millions of people do not have enough food to keep themselves alive is just one of the paradoxes of our time, to say the least.) It is true that all of us must learn to take care of ourselves, but it is even more important that individuals, and through individuals the collective population, participate in the management of health, something that today one cannot do. It is also true that cancer existed before the industrial era began and before pollution from car exhaust gases and heating fumes existed. What *is* new, however, and it is apparent in our era, is the greater number of cancers now recognized to be caused by working conditions and by pollution due to certain manufacturing procedures and the excessive use of a variety of chemicals. It would be very difficult, and perhaps impossible at present, to establish what percentage of cancer cases can be ascribed to occupational causes or to causes related to the pollution of our environment. Much more important than the precise percentage, however, is that, in these two instances, an intervention is possible.

The Predictive Value of Experimental Data

Three conditions are necessary for the implementation of primary cancer prevention: (1) Cancer is caused, at least in part, by exogenous factors; (2) such factors can be identified; and (3) once identified, they can be eliminated. If we look at some of the situations in which environmental factors have been shown to cause human cancer, e.g., occupational and iatrogenic cancer and lung cancer caused by cigarette smoking, we see that exogenous factors which cause cancer in man *can* be identified. Where the chemical(s) specifically responsible has not been identified, as in cigarette smoke, prevention can still be implemented. As Doll (1975) states, the identification of an agent that can produce tumors in animals is not always a prerequisite for implementing prevention as this can be done on the basis of observations in man. It is equally true, however, that, in most circumstances, waiting for human evidence of carcinogenicity means accepting a continuation of human experimentation until overwhelming evidence of a blatant cancer hazard imposes the adoption of measures.

Primary prevention means avoiding exposure to recognized carcinogens or carcinogenic mixtures and to chemicals for which experimental evidence of carcinogenicity exists; in most cases, this would imply a cessation of the production and use of these chemicals. Primary prevention also means the screening and testing of chemicals that either are already in the environment or are on a waiting list for large-scale production.

The question I will try to answer is: Has animal experimentation ever contributed to the prevention of human cancer?

To discuss in detail and to illustrate the value of long-term testing today might seem like describing the advantages of riding a bicycle and having to pedal for a week to reach a place that one could reach by plane in an hour. A pathologist conducting long-term carcinogenicity tests in rodents may suddenly, with some justification perhaps, find himself classified as a paleopath-

ologist. I will give a few examples, however, to illustrate that animal experimentation has indeed contributed to primary prevention and that much more could have been done if the sacred monster of absolute objectivity had not so often played the role of the devil's advocate.

The first case is that of diethylstilbestrol (DES), which was shown to produce tumors in animals in the early 1940's, these results being confirmed in several animal species in the 1950's. Thus sufficient information on its carcinogenicity already existed in the 1950's when it became a relatively popular drug in human medicine.

Another example is 4-aminobiphenyl, which was manufactured in the United States from 1935 to 1955. In 1952, Walpole et al. published results which showed it to be carcinogenic in rats, results which Walpole et al. confirmed in dogs in 1954. The manufacture of 4-aminobiphenyl was never begun in the United Kingdom because of the experimental evidence of carcinogenicity provided by these two experiments and the forecast made by Walpole that this compound would produce urinary bladder cancer in man (Walpole and Williams 1958). The first report of bladder cancer in humans exposed to 4-aminobiphenyl appeared in 1955 (Melick et al. 1955; Koss et al. 1955) and was confirmed a few years later by Koss et al. (1969) and Melick et al. (1971). It is perhaps interesting to mention that in the study by Melick et al. (1971), it is stated that for several people the length of exposure was less than 2 years (the minimum length of exposure that produced tumors was 133 days), that most of the workers in whom the tumors were found were in their 30's and 40's, and that the absolute incidence of bladder tumors among the exposed workers was over 18%.

A third example is vinyl chloride, the acute and chronic toxicity of which in man and animals has been known for some time. The results of an experimental study showing its carcinogenicity in rats were presented at the Tenth International Cancer Congress in Houston in 1970 and were published in detail a year later (Viola 1970; Viola et al. 1971). The first report of the occurrence of angiosarcomas of the liver in workers heavily exposed to vinyl chloride was published in 1974 (Creech and Johnson 1974), and it was only after this publication that measures were taken to reduce the exposure of workers to vinyl chloride. Evidence of carcinogenicity of vinyl chloride in animals was in the meantime confirmed by Maltoni and Lefemine (1974).

Two other examples can be used to illustrate this sort of seesawing which occurs between human evidence and experimental evidence. The first observation of a positive correlation between exposure to aromatic amines and the occurrence of urinary bladder tumors in man goes back to the end of the last century and the beginning of this century. The lack of success in producing urinary bladder tumors with aromatic amines in experimental animals was used as an argument against the causal relationship indicated by the case reports, although the ILO in 1921 officially recognized that β-naphthylamine and benzidine were, on epidemiologic evidence, causes of bladder cancer in man (ILO 1921). In 1937 and 1938, Hueper and his collaborators published data on the production of bladder cancer in dogs with β-naphthylamine, but again this was not enough to promote preventive measures. An exhaustive investigation by Case et al. (1954) produced such an overwhelming account of the

carcinogenicity of β-naphthylamine and benzidine in exposed workers that official measures were finally taken in the United Kingdom, although only after a lapse of 12 years. Following the action of the United Kingdom, a few other countries also undertook preventive measures.

The other example is bis (chloromethyl) ether (BCME). In 1962, a company which manufactured BCME noted an unusual clustering of lung cancer cases among workers involved in its production (Weiss and Boucot 1975; Weiss 1976). Results of long-term tests showing its carcinogenicity in rodents appeared in 1968 and were confirmed in 1969 (Van Duuren 1968, 1969; Gargus et al. 1969). All three experiments were carried out in mice or rats, the chemical being either applied to the skin or injected subcutaneously. This experimental evidence was not considered to be convincing until, in 1971, Laskin et al. reported the occurrence of lung and nasal cavity tumors in rats exposed to BCME by inhalation. More attention was paid to this study, allegedly because the route of administration was similar to that in human occupational exposure. As a consequence, measures to reduce workers' exposure to BCME were discussed (Lemen et al. 1976). In 1973, two retrospective epidemiologic investigations indicated that there was indeed a causal relationship between occupational exposure to BCME and the occurrence of lung cancer in man (Figueroa et al. 1973; Thiess et al. 1973).

Yet another example is acetylaminofluorene, which, when it was ready to be produced on a large scale as an insecticide, was withdrawn because one experiment had shown its carcinogenicity in rats (Wilson et al. 1941). We are not in a position to quantitate the benefits obtained from this experimental study, nor to decide if any human lives were actually saved by preventing this chemical from entering our environment. There seems to be a consensus, however, acclaiming this opportunity of having prevented its widespread use, which would seem to indicate that in certain instances animal experiments are acceptable in predicting a similar human risk.

Other examples similar to the acetylaminofluorene case may exist, considering that over the past 15 years a large number of food additives, pesticides, and herbicides have been evaluated with regard to their toxicity, and in many cases the experimental evidence of carcinogenicity was sufficient to recommend a zero tolerance in food. With regard to food additives or chemical residues present in food, the extrapolation of experimental data to man is considered to be valid. Such an extrapolation is considered invalid and unscientific, however, when applied to the hazards present in the industrial environment.

The most recent case concerns the polychlorinated biphenyls (PCBs). Experimental evidence of the carcinogenicity of Aroclor 1254 and Kanechlor 500 was provided in 1972 (Kimbrough et al. 1972) and confirmed in 1973 (Kimura and Baba 1973) and in 1974 (Kimbrough and Linder 1974). Several other PCBs were shown to produce hyperplastic nodules of the liver. A recent preliminary report indicates that Aroclor 1254 may be causally related to the occurrence of melanomas, and possibly to that of pancreatic tumors, in workers occupationally exposed to it (Bahn et al. 1976).

It is evident from these examples that there is a good positive correlation between observations in humans and experimental results, and, in several instances, the evidence of carcinogenicity provided by an experiment pre-

ceded observation in humans and could have been used to predict the similar effect in man.

The IARC Monographs Program

The International Agency for Research on Cancer (IARC), following a request to provide information on environmental carcinogens, initiated in 1971 a program for the evaluation of the carcinogenic risk of chemicals to man (Agthe and Wilbourn 1974; Agthe and Tomatis 1976; Tomatis 1976). This program involves the preparation of monographs on specific chemicals. To date, 12 monograph volumes have been published, dealing with a total of 296 chemicals. Of these 296, 21 were shown to be associated with the occurrence of cancer in man (Table 1)—for 14, exposure was solely or mainly occupational, and for 5 it was medicinal. This means, obviously, that it is easier to identify a causal relationship between exposure and the occurrence of cancer in situations where the exposure is highest. For 145 of the 296 chemicals, the experimental evidence of carcinogenicity in at least one animal species was considered to be adequate (Table 2). For about 20 of these chemicals, production figures are well over 500,000 kg/year, and for some production is on the order of 10^7 kg/year (Table 3). When no human case reports or epidemiologic studies were available, no "objective" evaluation of the possible carcinogenic risk to man could be made.

As stated previously, we think that experimental evidence of carcinoge-

Table 1
Chemicals Carcinogenic to Man

Aflatoxin
4-Aminobiphenyl
Arsenic
Asbestos (crocidolite, amosite, crysotile)
Auramine (manufacture of)
Benzene
Benzidine
Bis (chloromethyl) ether
Cadmium oxide
Chloramphenicol?
Cyclophosphamide
Chrome (chromate-producing industries)
Hematite (mining)
Melphalan
Mustard gas
2-Naphthylamine
Nickel (nickel refining)
N,N-bis (2-chloromethyl) 2-naphthylamine
Stilbestrol
Vinyl chloride
Soot and tars

Table 2
Chemicals for Which Adequate Experimental Evidence of Carcinogenicity Exists

Compound	*Exposure*			*General environmental*
	unknown	*occupational*	*medicinal*	
Acetamide		+		+
Actinomycins		+	+	
Para-aminoazobenzene		+		+
Ortho-aminoazotoluene		+		+
2-Amino-5-(5-nitro-2-furyl)-1,3,4-thiadiazole		+	+	
Amitrole		+		+
Aramite		+		
Azaserine		+	+?	
Aziridine		+		
2-(1-Aziridinyl)ethanol		+		
Aziridyl benzoquinone		+	+	
Benz(c)acridine		+		+
Benz(a)anthracene		+		+
Benzo(b)fluoranthene		+		+
Benzo(j)fluoranthene		+		+
Benzo(a)pyrene		+		+
Benzo(e)pyrene		+		+
Benzyl chloride		+		
Beryl ore		+		
Beryllium		+		
Beryllium oxide		+		
Beryllium phosphate		+		
Beryllium sulfate		+		
BHC (technical grades)		+		
Bis (1-aziridinyl) morpholinophosphine sulfide		+	+	
Bis (chloroethyl) ether		+		+
β-Butyrolactone	+			
Cadmium chloride		+		
Calcium chromate		+		
Carbon tetrachloride		+		+
Chlorambucil		+	+	
Chlorobenzilate		+		
Chrysene		+		+
Chrysoidine		+		+
Citrus red no. 2		+		+
Coumarin		+		+
Cycasin				+
Cyclochlorotine				+
Para-dimethylaminoazobenzene		+		+
Daunomycin		+	+	
DDD		+	+	+
DDE		+		+
DDT		+		+
Diallate		+		+
Diazomethane		+		
Dibenz(a,h)acridine		+		+

Table 2 (*continued*)

Compound	*Exposure*			*General environmental*
	unknown	*occupational*	*medicinal*	
Dibenz(a,j)acridine		+		+
Dibenz(a,h)anthracene		+		+
Dibenz(c,g)carbazole				+
Dibenzo(a,e)pyrene				+
Dibenzo(a,h)pyrene				+
Dibenzo(a,i)pyrene				+
Dibutyl nitrosamine	+			
3,3′-Dichlorobenzidine		+		
Dieldrin		+		+
1,2-Diethylhydrazine		+		
Diethyl nitrosamine				+
Diethyl sulfate		+		
Diepoxybutane		+		
Dihydrosafrole		+		+
3,3′-Dimethoxybenzidine		+		
trans-2[(Dimethylamino)-methylimino]-5-[2-(5-nitro-2-furyl)-vinyl]-1,3,4-oxadiazole	+			
3,3′-Dimethylbenzidine		+		
Dimethyl carbamoyl chloride		+		
1,1-Dimethylhydrazine		+		
1,2-Dimethylhydrazine		+?		
Dimethyl nitrosamine				+
Dimethyl sulfate		+		
1,4-Dioxane		+		+?
Estradiol-17β		+	+	
Estradiol mustard		+	+	
Estrone		+	+	
Ethinyl estradiol		+	+	
Ethylene sulfide		+?		+?
Ethylmethanesulfonate	+			
Ethylenethiourea		+		+
Epichlorohydrin		+		+?
1-Epoxyethyl-3,4-epoxycyclohexane		+		
3,4-Epoxy-6-methylcyclohexylmethyl-3,4-epoxy-6-methyl carboxylate		+?		
Evans blue		+		
2-(2-Formylhydrazino)-4-(5-nitro-2-furyl)thiazole	+			
Glycidaldehyde		+		+?
Griseofulvin		+	+	
Hydrazine		+		
Indeno(1,2,3-cd)pyrene		+		+
Isatidine				+
Isonicotinic acid hydrazide		+	+	
Isosafrole		+		+
Lasiocarpine				+
Lead acetate		+		+
Lead phosphate		+		

Table 2 (*continued*)

Compound	Exposure			
	unknown	*occupational*	*medicinal*	*General environmental*
Lead subacetate		+		
Lindane		+		+
Luteoskyrin				+
Mannomustine (dihydrochloride)		+	+	
Mestranol		+	+	
2-Methylaziridine		+		
Methylazoxymethanol acetate				+?
4,4′-Methylene bis (2-chloroaniline)		+		
4,4′-Methylene bis (2-methylaniline)		+		
Methylmethanesulfonate			+	
N-Methyl-*N*′-nitro-*N*-nitrosoguanidine		+		
Mirex		+		+
Mitomycin C		+	+	
Monocrotaline				+
5-(Morpholinomethyl)-3-(5-nitro-furfurylidene)amino-2-oxazolidinone		+	+	
Nickel subsulfide		+?		+
Nickel carbamyl		+		+?
4-Nitrobiphenyl		+		
1-([5-Nitrofurfurylidene]amino)-2-imidazolidinone		+	+	
N-(4-[5-nitro-2-furyl]-2-thiazolyl)-acetamide		+	+	
Nitrogen mustard (hydrochloride)		+	+	
Nitrogen mustard *N*-oxide (hydrochloride)		+	+	
Nitrosoethylurea		+		
Nitrosomethylurea			+?	
N-nitroso-*N*-methylurethane	+			
Oil orange SS		+		+
Phenicarbazide		?	?	
Phenoxybenzamine (hydrochloride)		+	+	
Polychlorinated biphenyls		+		+
Ponceau 3R		+		+
Ponceau MX		+		+
Potassium bis (2-hydroxyethyl)-dithiocarbamate		?		
1,3-Propane sultone		+		
β-Propiolactone		+		
N-propyl carbamate		+		
Propylene oxide		+		+?
Retrorsine				+
Safrole		+		+
Semicarbazide (HCl)		?		
Sterigmatocystin				+
Streptozotocin		+	+	
Sudan I		+		+
Tannic acid		+	+	+
Thioacetamide		+		

Table 2 (*continued*)

Compound	*Exposure*			*General environmental*
	unknown	*occupational*	*medicinal*	
Thiourea		+	+	+
Trichloroethylene		+		+
Triethylene glycol diglycidyl ether		+	+	
Tris (aziridinyl)-*p*-benzoquinone		+	+	
Tris (1-aziridinyl) phosphine sulfide		+	+	
2,4,6-Tris (1-aziridinyl)-*s*-triazine		+	+	
Trypan blue		+	+	+
Uracil mustard		+	+	
Urethane		+	+	+

nicity provides sufficient warning to stimulate the adoption of some elementary preventive measures, such as reduction of exposures. It is thus difficult to justify the scarcity of epidemiologic studies, particularly since for most of these chemicals human exposure is documented and since in a large number of cases men are exposed because of their occupations, thus implying relatively high levels of exposure.

There is general dissatisfaction about long-term testing. If one adds the time needed to obtain animals of the right age, the time required for the

Table 3
Chemicals Carcinogenic in Experimental Animals Produced in Quantities Greater Than 500 Tons per Year

Amitrole
BHC
Chlorobenzilate
DDT
Dieldrin
Aziridine
Benzyl chloride
Beryllium
CCl_4
o-Dianisidine
1,1-Dimethylhydrazine
Ethylenethiourea
Hydrazine
Lead salts
4,4′-Methylene bis (2-chloroaniline) (MOCA)
PCBs
β-propiolactone
Propylene oxide
Trichloroethylene

preparation and reading of the microscope slides, and the time occupied by a few unavoidable intercurrent difficulties, results from a long-term test cannot be expected to be available before 2½ to 3 years (Tomatis 1974). It is certainly a long time to wait for an answer which in some cases is incomplete. One must add, also, that these tests are not only time-consuming but costly.

The IARC recently conducted a worldwide survey of facilities for long-term carcinogenicity testing and also of which chemicals are presently being submitted to long-term testing. It was learned from replies to a questionnaire sent out in 1975 that 89 institutes in 19 countries were testing a total of 828 chemicals. Since the majority of commercial or industry-owned laboratories did not supply comprehensive information, the data refer mainly to noncommercial laboratories. Of the 828 chemicals under test, only 511 have never been tested before; for the remaining 317, experimental evidence of carcinogenicity was already adequate. Several of the 511 chemicals which had not been tested previously are presently under test in more than one laboratory. Although it is a worthwhile practice for chemicals to be tested in two laboratories, or perhaps three, with the present scarcity of testing facilities it seems wasteful that the same chemical is being tested in as many as eight or ten laboratories. In fact, one of the goals of the survey is to facilitate coordination of testing by improving communication among scientists and thereby avoid unnecessary duplication. The survey is published in an Information Bulletin (IARC 1976), which is distributed free of charge to all scientists who have provided information, or who have expressed interest in the project, or to any interested party upon request.

If we consider the total cost of such long-term tests, at an average of $100,000 per test the cost of testing the 511 chemicals presently being investigated is on the order of $51 million. This is a lot of money. But if one considers that this is spread, albeit unevenly, over 19 countries, it is not an impossible financial burden. That long-term testing is not always a severe financial burden is illustrated by the following examples involving four very important chemicals. Propylene oxide has been tested in only 24 rats; until last year, only one long-term experiment, using a total of 28 mice, which gave negative results, had been carried out on trichloroethylene (NCI has included this compound in its testing program, and first results, now available, indicate that it is carcinogenic); only one experiment has so far been carried out on ethylene oxide, with negative results; two experiments, one using 22 rats and the other 60 mice, have been carried out on benzyl chloride. In total, therefore, 48 rats and 118 mice were used to test the possible carcinogenicity of four chemicals having a combined production of over several million kilograms annually. Although this indicates that the long-term testing of these chemicals has not been too expensive, it also points to the fact that either there are no clear priorities for testing or there is no great faith in long-term testing.

Quantitative and Qualitative Validity of Experimental Results

If the cost of the present effort to define the possible carcinogenicity of environmental chemicals through long-term testing, although high, is not ex-

cessive, then the next question to be asked should be what is the validity of the results obtained? The difficulties in assessing the significance of experimental results for predicting similar hazards in man are both qualitative and quantitative. These can be expressed as follows: (1) Are chemicals which are carcinogenic to experimental animals also carcinogenic to man? (2) Do experimental animals (rodents, in particular) and man have similar susceptibilities to the carcinogenic effects of chemicals, or are rodents incomparably more susceptible than man? A partial answer usually given to the first question reverses the terms of the question: most of the chemicals that are carcinogenic to man are carcinogenic to at least one, and in many cases to more than one, animal species. Another partial answer is that experimental evidence of the carcinogenicity of certain environmental chemicals has in several cases preceded human observation and could have predicted it, which would have allowed the taking of timely preventive measures. A number of examples of just such situations were given above.

The question of the quantitative validity of experimental results is perhaps even more difficult to answer. Examples of the numerous criticisms of animal experimental procedures are that: (1) the model used is too sensitive, (2) the doses are too high, and (3) the route of administration does not correspond to the route by which man is exposed. Although it is relatively easy to obtain a high incidence of tumors in rodents, this is not true for man; from this it is inferred that humans are probably much less susceptible than animals.

There are two possible approaches to long-term testing, namely, to mimic the human situation or to maximize the sensitivity of the experimental model. The first approach is based on the use of dose levels close to those to which man is believed to be exposed, given by a route of administration similar to that in human exposure. The second approach makes use of maximum tolerated doses; the route of administration does not necessarily correspond to that of human exposure, and testing is sometimes initiated at the most sensitive age of the animals. Perhaps one of the main reasons given for underestimating or disregarding animal experiments is that results are often obtained by the second approach. Maximizing the sensitivity of a model is justified in two ways: (1) The dose must be high to compensate for the limited number of animals used, and (2) the first goal of the test is to indicate whether or not the chemical is carcinogenic and thus is a qualitative goal.

The induction of liver tumors in mice is often cited as an example of an exaggeratedly sensitive model for experimental carcinogenesis. Recently we made a survey on a number of chemicals of the correlation between their capacities to induce parenchymal liver tumors in mice and their capacities to induce tumors at any site in rats or hamsters (Tomatis et al. 1973). This study showed that (1) there was a positive correlation, and (2) the induction of liver tumors in mice by a chemical does not indicate that the liver is the target organ in the other two rodent species. Six of the 58 chemicals considered in this survey are recognized or suspected human carcinogens; all six were tested in rats, and five of them were carcinogenic; four of the six were tested in hamsters, and all four were found to be carcinogenic.

We all agree that the mouse should be discarded as a testing tool if a better experimental model can be found. At present, however, it seems that it is no

worse qualified than any other species for detecting the carcinogenicity of environmental chemicals and for predicting a possible human hazard.

Subcutaneous (s.c.) injection is often quoted as an example of an unreliable route of administration, particularly in rats. There are several good arguments to uphold the claim that the induction of local sarcomas following s.c. injection cannot be considered an index of the carcinogenic activity of the compound under test (Grasso and Golberg 1966; Gangolli et al. 1967). We carried out a survey on a number of chemicals tested by the s.c. route in rodents to see if there was a correlation between their capacities to induce local and/or distant tumors in one species and their capacities to induce tumors by another route in another species.

Of the 222 chemicals (excluding metals) considered in the first 11 volumes of the IARC Monographs (IARC 1972–1976), 114 had been tested by the s.c. route. Twelve of these had been tested by the s.c. route only and 102 by the s.c. and other routes. Of the 12 tested by the s.c. route only, one was negative (glycidyl stearate) and 11 positive. Of these, seven (dibenzo[h,rst]-pentaphene, dibenzo[a,l]pyrene, 2-[1-aziridinyl]ethanol, patulin, glycidyl oleate, propylene oxide, ethylene oxide) produced local tumors only, three (estradiol, progesterone, testosterone) produced distant tumors only, and one (tannins) produced local and distant tumors. Seven of these 12 chemicals were tested only in the mouse, three only in the rat, one in both species, and one in the rat, the mouse, and the hamster.

Of the 102 chemicals which had been tested by the s.c. as well as by other routes, 69 were found carcinogenic when the chemical was given s.c. or by another route, and for 18 chemicals the tests were negative or inconclusive regardless of whether the chemical was given s.c. or by another route.

Nine chemicals, tested by several routes of administration, were found positive only when administered s.c. Of these, one (*o*-tolidine) produced only distant tumors, and the other eight (magenta, orange I, scarlet red, yellow OB, native carrageenans, parasorbic acid, penicillic acid, benzyl chloride) produced only local tumors. Seven of these nine chemicals were tested s.c. only in the rat, one in the rabbit and the rat, and one in the mouse and the rat. It must be noted that for only two chemicals (yellow OB and benzyl chloride) were the tests carried out by a route other than s.c. considered adequate negative tests. For the other seven, the tests, although negative, were considered inadequate or inconclusive.

Six chemicals were negative when tested by the s.c. route and positive when tested by another route of administration. Of these, three (diazomethane, aramite, thiourea) were tested s.c. only in the mouse, one (mestranol) only in the rat, and two (para-aminoazobenzene and sudan II) in the mouse and the rat. Only the s.c. test with mestranol in the rat could be judged as an adequate negative test; the others, although negative, were considered inadequate.

In conclusion, the administration of a chemical by the s.c. route produced what one could call false negative results for six (5.6%) of the 102 chemicals tested and, if we accept all the criticisms of this route of administration, false positive results for nine (8.7%) of the 102 chemicals tested. Even so, it appears that the s.c. route of administration is not much worse than any other route.

Incidences of cancer in man can be high enough to be comparable to those induced in experimental animals, and this is exemplified by several occupational carcinogens: the incidences of bladder cancer in workers exposed to benzidine and 2-naphthylamine rose to 90% when exposure lasted for more than 5 years (Williams 1958).

An attempt was made recently to compare the cancer incidences induced in man and in experimental animals as a function of age using data for a few carcinogens for which human exposure and induced cancer incidences can be approximately calculated. The chemicals considered were aflatoxin, benzidine, vinyl chloride, cigarette smoke, chlornaphazine, and diethylstilbestrol. Good correlations were found between observed human and experimental incidences for benzidine, chlornaphazine, and cigarette smoke. For aflatoxin, the incidence predicted on the basis of the experimental results was ten times greater than that estimated from human observations, for DES 50 times higher, and for vinyl chloride 500 times higher. The authors concluded that "it appears reasonable to assume that the lifetime cancer incidences induced by chronic exposure in man can be approximated by the lifetime incidence of similar exposures in laboratory animals at the same total dose per body weight" (NAS 1975).

It is encouraging, however, that man is not more susceptible than mice to carcinogenicity, at least from irradiation. In fact, from observations of the effects on mice and man of ionizing radiation from atomic explosions, the frequency of cancers occurring in comparable fractions of life-spans increased to approximately the same extent at comparable levels of exposure to irradiation (Jones and Grendon 1975).

Another important issue on which observations in man and results obtained in experimental animals agree is that different etiologic factors can have an additive effect. The best-known example in man is probably that of asbestos and cigarette smoking. A pertinent example in animals is that of fast-neutron irradiation and carbon tetrachloride. Carbon tetrachloride alone produces tumors only after extended exposure and at a relatively high dose. However, when a single injection of carbon tetrachloride is given after irradiation, the incidence of liver tumors is increased considerably (Cole and Nowell 1964). This illustrates the possibility of making an erroneous evaluation of the relative potency of a chemical. If potency is ranked on the basis of two criteria, i.e., the total efficient dose and its capacity to induce tumors following a single administration, then carbon tetrachloride can be ranked as a carcinogen of low potency. There is at least one situation, however, in which this same chemical can contribute to the induction of tumors when given at a low dose and just once. These observations should be kept in mind when assessments are being made.

Another criticism of experimental results is the possibility of producing false positive results, which, for example, could prevent the use of an extremely useful compound. The case most often quoted is that of isoniazid. An a posteriori judgment would probably be in favor of keeping this substance on the market in view of its success in curing TB, although its use for preventing TB in children would raise controversy even among its strongest supporters. The points I would like to make are: (1) Isoniazid has not been

withdrawn from use, and one should not indulge too much in considering hypothetical damage to mankind which never materialized. (2) We do not know whether an equally good or better drug would have been developed if isoniazid had been withdrawn from use. (3) We should consider very carefully the possibility of accepting some false positive results obtained through animal experimentation. The obtaining of false negative results, or dealing with positive animal results as if they were false positive for man, should also represent sources of preoccupation. The prevailing preoccupation is that of warning scientists not to extrapolate unduly from experimental data to man, the emphasis being, of course, on the fallacy of interpreting toxicity data obtained in experimental animals as automatically representing a danger to man. Very little emphasis, if any, is put on the mistakes made in the opposite direction, i.e., mistakes made when results obtained in animals were not taken as indicative of a possible danger to man.

Animal experimentation tends also to be discredited as a result of the clamorous way in which certain chemicals have been banned, e.g., the use of cyclamates as sweeteners. There was probably some justification for preventing or regulating the consumption of cyclamates, but the way in which the sentence was pronounced was incorrect. This criticism is of a misuse of experimental results and does not reflect on the experimental evidence itself.

In terms of cancer prevention, the validity and limitations of long-term experimentation depend on the use made of the results. It is clear that, at present, there is no general consensus on the validity of using experimental results to predict human hazards. There is little logic, however, in replacing the diffuse discontent and distrust of long-term bioassays with an acritical enthusiasm for the much-needed short-term tests, as if the latter offers a key for making unfailing predictions. There is little logic in championing the advantages of short-term tests when in many instances their efficiency is measured by their capacity to match the results obtained in long-term bioassays, as if we had forgotten that the results obtained in long-term tests are often not held as final evidence.

There is no doubt that mutagenicity tests have opened the way to a better and more extensive control of our environment and that they represent one of the most important scientific and technical achievements of recent years. Their use implies that we will be able to check the possible hazard to man of many more chemicals than has ever been possible before (Ames et al. 1973; McCann et al. 1975; Bartsch et al. 1976). To implement a better and more extensive surveillance of our environment, it is, of course, necessary that health authorities, regulatory agencies, industries, and last, but not least, scientists be prepared to change the attitude they have held until now both toward the value that experimental results may have in predicting hazards for man and the social commitment this carries. I hope that the present euphoria will not become an expression of a persistent chameleonism, supporting the convenience of a change in order to keep the situation basically unchanged, as for instance, the enacting of an antitrust law which did not prevent the creation of the multinational corporations. What is badly needed is an agreement on the validity of experimental results, be these obtained through long-term or short-term tests.

Legislation on Primary Prevention

Although there is little doubt that prevention will never be implemented without participation from each individual concerned and that it cannot be solely imposed, it is also clear that there is little a worker can do if he is exposed, in most cases unknowingly, to a hazardous chemical. No personal cancer plan can help him. One of the purposes of carrying out tests predictive of a carcinogenic risk in man is to provide regulatory agencies or health authorities with sufficient information to issue adequate rules. It seemed worthwhile, therefore, to verify how useful our efforts have been in providing the basis for legislation. Recently we carried out a survey on legislation relating to the prevention of cancer in 14 industrialized countries (Montesano and Tomatis 1976), namely, Australia, Belgium, Federal Republic of Germany, France, German Democratic Republic, Ireland, Italy, Japan, The Netherlands, Sweden, Switzerland, the United Kingdom, the United States, and the Union of Soviet Socialist Republics. It seemed appropriate to focus attention on occupational exposures since it is usually in the working environment that the concentration and exposure levels of a carcinogen are the highest and one could reasonably expect that maximum precaution is taken where the hazard is greatest. We considered two types of legislation in particular: (1) legislation dealing specifically with chemical carcinogens in the working environment, and (2) legislation related to compensation for occupational cancers.

What was obvious immediately were the discrepancies among legislation in the different countries, the deficiencies, and the generally long time lag between the discovery of the carcinogenicity of a chemical and the implementation of legislative measures. More specifically, the following conclusions could be drawn: (1) In only a limited number of the 14 countries considered is there legislation which specifically prohibits the manufacture of chemicals shown to be carcinogenic to man or known to represent a possible cancer hazard to man. The legislation does not cover the same chemicals in each country; in addition, in only 4 of the 14 countries considered are both the importation and the manufacture of chemical carcinogens prohibited. (2) Some chemicals for which the carcinogenicity in man has been proved are still produced in large quantities and are not included in the list of regulated substances. (3) The criteria followed for selecting as possible human hazards chemicals for which only experimental evidence of carcinogenicity exists are inconsistent and overly exclusive. (4) For some of the chemicals for which a possible human hazard is recognized, the allowed concentrations appear exceedingly high. (5) Most of the 14 countries recognized a limited right to compensation, indicating that the criteria of primary prevention are not yet widely accepted.

Examples of some of the incongruities are the inclusion in the list of prohibited or controlled substances of chemicals which are no longer, or have never been, used and produced, such as, respectively, 4-aminobiphenyl and acetylaminofluorene, whereas other chemicals which have been associated with the occurrence of cancer in man are left out and are still produced on a large scale, for example, benzene and chromates.

The discrepancies and deficiencies in legislation relating to the prevention of

occupational cancer indicate that, at present, while there is no consensus on the extrapolation from experimental data to man, there is also no consensus on the extrapolation from one human population group to another.

SUMMARY

Three conditions are necessary for the implementation of primary cancer prevention: (1) that the cancer is caused, at least in part, by exogenous factors; (2) that such factors can be identified; and (3) that once identified, they can be eliminated. Environmental factors causally related to the occurrence of cancer in man have indeed been identified, for example, in the cases of occupational and iatrogenic cancers and lung cancer related to cigarette smoking. Although the precise identification of an agent that can produce tumors is not always a prerequisite for implementing prevention, since this can sometimes be done on the basis of observations in man, in many circumstances to wait for human evidence of carcinogenicity of chemicals for which experimental evidence of carcinogenicity already exists implies the unjustified continuation of human experimentation.

The examples of diethylstilbestrol, 4-aminobiphenyl, vinyl chloride, β-naphthylamine, bis (chloromethyl) ether, and polychlorinated biphenyls are given to illustrate that experimental evidence is in some cases preceded and in others quickly confirmed by human observations. Experimental evidence thus provides sufficient warning to stimulate the adoption of preventive measures.

The IARC program on the evaluation of the carcinogenic risk of chemicals to man is discussed briefly. Twelve monographs dealing with 296 environmental chemicals have been prepared. For 21 of these chemicals, the association with the occurrence of cancer in man has been ascertained or strongly suspected; for 14 of these chemicals, exposure was solely or mainly occupational, and for 5 it was medicinal. For 144 of the 296 chemicals, the experimental evidence of carcinogenicity in at least one animal species was considered adequate, and for the majority of them there was evidence from human exposure.

Several criticisms have been raised as to the significance of results obtained in long-term testing as well as the procedures used. As examples, the induction of liver tumors in the mouse and the use of the subcutaneous route of administration are discussed. From the available information, it appears that the induction of liver tumors in the mouse is an acceptable index of carcinogenicity and that the subcutaneous route of administration produces, in most cases, results which are qualitatively similar to those obtained when a chemical under test is given through other routes of administration.

As a verification of the usefulness of experimental and epidemiologic studies in providing the basis for the implementation of adequate preventive measures, legislation relating to the prevention of occupational cancer in 14 industrialized countries is reviewed briefly. It is clear that legislation varies considerably from country to country and generally is deficient, and that much more attention is given to a limited right to compensation than to the enforcement of primary prevention.

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DISPOSITION OF CASES

YEAR	CASES DISMISSED OR DECIDED FOR DEFENDANT	NO.	LOW	MEAN	HIGH
1974	1	3	$11,500	$30,234	$ 79,436
1975	1	14	$10,000	$55,318	$109,500
1976	4	14	$11,000	$58,810	$250,000
1977	11	40	$18,000	$57,525	$250,000
1978	12	139	$ 100	$28,141*	$275,000

* The mean figure for 1978 to date is deceivingly low for the reason that many of the settlements are partial settlements involving only some of the defendants involved in the respective cases.

Asbestos Health Litigation - New Cases Per Month

	1982	1981	1980	1979	1978	1977	1976
January					38	8	5
February					27	11	14
March					44	55	10
April					58	32	10
May					41	18	6
June					70	22	6
July					153	23	11
August					75	28	17
September					24*	24	8
October						55	26
November						35	38
December						51	8
Total					535 YTD	362	159

*As of 9/15/78

At the present time Johns-Manville is a defendant in 950 lawsuits involving in excess of 1,600 individual plaintiffs.

The CHAIRMAN. The Carolina Brown Lung Association, Ms. Essie Briggs.

I see that Mr. Ben Bowen has taken the place of Candace Carraway.

Mr. Bowen, you are equally as competent as Ms. Candace Carraway?

STATEMENT OF ESSIE BRIGGS ON BEHALF OF THE CAROLINA BROWN LUNG ASSOCIATION; ACCOMPANIED BY C. BEN BOWEN, ATTORNEY

Mr. BOWEN. Well, I have been involved in it for 20 years.

For the past three governors, I have been on the Governor of South Carolina's Committee for the Study and Improvement of the Workmen's Compensation Act. So I feel that I am well qualified to substitute.

The CHAIRMAN. I see.

Are you with the Carolina Brown Lung Association?

Mr. BOWEN. No, not other than as an independent supporter; because I approve of the work that they are doing. No one paid my way here. I paid my own way.

I am a plaintiff's lawyer in Greenville, S.C., and I have been for 20 years. I am a former employee of the textile industry. I was a loom fixer for 7 years. My parents worked a total of 104 years in the textile industry; so I know what it is all about.

The CHAIRMAN. Excellent. I am glad I asked the question. You certainly are very qualified.

Of course, we are very pleased that Senator Strom Thurmond is joining us here. His interest in our hearing is most appropriate.

Senator THURMOND. Mr. Chairman, I have a matter coming up on the floor in just a minute. Mr. Bowen is one of the ablest lawyers in South Carolina. He represents claimants in damage suits and claimants in workmen's compensation cases. He has done a fine job representing the working people of our State. I want to commend him for the splendid job he has done. I want to say, Mr. Bowen, that we are delighted to have you here in Washington today.

Mr. BOWEN. Thank you.

Senator THURMOND. Mr. Chairman, as far as the brown lung people are concerned, Senator Hollings and I introduced a bill last year dealing exclusively with brown lung. I was hoping that we could arrange a hearing before now. I request now that the chairman arrange a hearing on this bill. I hope it can be done this year. If it can't, then we will introduce it next year and the hearing could be held then.

I understand there is another bill before your committee today, and I think it would be inadvisable to try to mix brown lung in with a lot of other things. The people who suffer from brown lung have a distinct disease. Byssinosis has been clearly established as an actual and distinct illness. There is no question that byssinosis is caused by cotton dust. The scientists have also clearly established that.

It is my hope that the committee will see fit to have hearings on the Thurmond-Hollings bill because this bill is much broader. The Senate might pass this bill and it might not.

I feel the Senate should not hesitate to pass the brown lung bill. We would appreciate it very much if you would consider holding a

hearing on the brown lung question. Senator Hollings and I would like to be here when you hold the hearing.

Again, if no hearing this year is possible, we will introduce the bill again next year.

I want to welcome the representatives from the Carolina Brown Lung Association. We are glad to have you here. We are anxious to help you. We hope that the hearing on the bill that Senator Hollings and I introduced dealing particularly with brown lung can be arranged as soon as possible.

The CHAIRMAN. We appreciate your statement.

Senator THURMOND. Thank you.

The CHAIRMAN. We have cooperated fully in the past and we will continue to cooperate in the future. I know Senator Hollings had a hearing prior to the development of this specific bill in South Carolina. While I wasn't there, I know that Mr. Bowen was one of the key witnesses.

Senator THURMOND. He made a good witness.

The CHAIRMAN. On this subject matter, I will stay with you.

Senator THURMOND. Thank you.

We appreciate those assurances that you will stick with us on the brown lung question for the benefit of the people who have contracted this disease.

The CHAIRMAN. Ms. Briggs, we are very pleased that you are here. We appreciate the effort that you have made to come to us and give us your statement on the problems and the disease associated with cotton dust; and we are glad to hear from you as the spokesperson for the Carolina Brown Lung Association.

Is this both Carolinas?

Ms. BRIGGS. Yes, both Carolinas.

The CHAIRMAN. We will be very pleased to hear your statement.

Ms. BRIGGS. Thank you.

I am pleased to be back in Washington with you, and I hope that this time we will make some real progress toward solving the problems of people like myself who suffer from brown lung disease.

Our Carolina Brown Lung Association was formed 3 years ago to organize, educate and help people suffering with brown lung, or byssinosis, as the doctors call it. Today, we have chapters throughout the Carolinas and we have a lot of miles of experience and struggle behind us. We think we can speak with a great deal of knowledge to this committee and we are most interested and concerned about the work you are doing here.

There are many thousands waiting, waiting for some relief. The States of North and South Carolina, the textile manufacturers and their insurance carriers, have placed gigantic roadblocks in the way of those sick workers who must have help because their very job is the reason for their sickness and there seems to be no help.

To help these people, we need affirmative and speedy action by the Congress. Our association likes the idea of national workers compensation standards and we have some advice about what should be part of such a law.

No. 1, the law should provide broad coverage in occupational disease cases.

In South Carolina, we are faced with a senseless 7-year exposure requirement that applies only in byssinosis cases despite medical evidence that shows that people can get byssinosis in less than 5 years. This indicates partiality and misunderstanding of occupational diseases.

In North Carolina, the Workers' Compensation Act excludes victims with pulmonary disease who retired before 1963. These people are no less sick than those who retired after 1963 and certainly face greater problems because there seems to be no hope of compensation.

In Georgia, where organizing is just beginning, we have found that brown lung victims face a statute of limitations problem that excluded many South Carolinians from compensation until this year. Here is the old story of the victim being responsible for medical self-diagnosis. In Georgia, the statute begins running not at the time of diagnosis, but at the time of retirement.

No. 2, there has been no such thing as job protection for brown lung victims. This has meant that many sick workers have had to stay on the job until they actually dropped and had to be carried out of the mill.

Once they find out what is wrong with them, which often isn't easy, they are faced with a confusing and complicated compensation system where the average case can take 2½ to 3 years to complete.

I filed my own case 3 years ago and, while I was awarded earlier this year, I have never seen a penny yet, and don't know when or if I will.

No. 3, rehabilitation should be the obligation of the employer. But in South Carolina the statute provides no rehabilitation services at all. Services of this sort are especially vital to the partially disabled who may have many working years ahead.

No. 4, the workers' compensation systems in North and South Carolina do not encourage safety because there are no provisions for job protection. A worker who is afraid for his job will not complain about conditions or file a complaint.

We also feel that in South Carolina the system does not encourage safety because employers have not been made to pay compensation for byssinosis. When the mills are forced to pay, they will realize that it is cheaper to clean up.

We know they will raise a fuss about the economics and inflationary impact of cleaning up. We have heard them whining about the cotton dust standard recently imposed by OSHA. But your actions and legislation must take into account the cost of injury and disease to the victim, the human cost.

And while I am mentioning the cotton dust standard, let me take a moment to express our anger over recent Senate action to give $200,000 for another study of byssinosis.

It is quite clear that this is another attempt by the textile industry to stall OSHA regulation. They have used their muscle and some dirty politics to tack this on to the 1979 agricultural appropriations bill.

The Senate probably should not be involved in this and, in fact, this committee should have been given the opportunity to study such a move. We hope that you gentlemen will use your influence to see that this measure is rejected in the joint Senate-House committee. We cannot have an effective Labor Department if they are not allowed to do their job.

My fifth point is that our experience in the Carolinas is that even the most clear-cut cases of byssinosis take years to complete. The industrial commissions in both States have allowed the companies to stall these cases in hopes that we would just lose interest or die. Redtape can choke just as surely as brown lung. In both North and South Carolina, we have seen many Brown Lung Association members die before their cases could be completed.

The original idea behind workers' compensation systems, as I understand it, was to replace slow and cumbersome court proceedings with a simple and speedy hearings procedure. In fact, the industrial commission hearings are just as slow and complicated as going to court. What we need is a system that reduces the need for attorneys.

In North Carolina, less than 5 percent of regular workers' compensation cases are contested and require a lawyer. But 90 percent of the brown lung claims filed are contested.

Now, I would like to say a word about presumptive diagnosis.

We feel that this is a simple device that could solve many of the problems I have discussed. It would answer problems of delay, excessive litigation, the need for a lawyer, and restrictive coverage.

This method is already accepted in many occupational disease laws on both the State and Federal levels. In brown lung cases, workers who meet objective standards for exposure to cotton dust and lung capacity could have their cases resolved in a speedy and fair procedure.

Senators, we believe that national workers' compensation standards should be the law. Experience has taught us the misery of a bad State system. Experience has also taught us that the States cannot be trusted to do the job well.

But we realize that you gentlemen have your work cut out for you in trying to get such a bill passed, and we need some relief for brown lung victims right now.

You have before you in this committee S. 2449, which was introduced last January 27 by Senators Hollings and Thurmond of South Carolina. We have some ideas about how this bill could be made better, but we feel it needs consideration by this committee on its own.

We know things take time. The Congress has a great responsibility to make certain that a piece of legislation is the nearly best solution to the problem. But as I have often said, time is one thing we don't have. We urge you to make a commitment to consider S. 2449 as a separate piece of legislation and to move as swiftly as possible to get it to the floor of the Congress.

Now, I have with me Mr. Ben Bowen, who is not the staff attorney for the Carolina Brown Lung Association, but who is an attorney from Greenville, S.C., who will try to answer any questions that you may have.

Thank you.

[The prepared statement of Mrs. Briggs follows:]

STATEMENT OF

MRS. ESSIE BRIGGS

OF THE

CAROLINA BROWN LUNG ASSOCIATION

TO THE

SENATE LABOR SUBCOMMITTEE

SEPTEMBER 19, 1978

Good afternoon Senators. I am pleased to be back in Washington with you and I hope that this time we will make some real progress toward solving the problems of people like myself who suffer from brown lung disease. For those Senators who may still be unfamiliar with brown lung, let me give you a brief run down on this disease which experts believe afflicts some 35,000 people in the Carolinas alone.

Byssinosis, or brown lung disease, was first recognized as a health hazard to cotton textile workers in a medical journal in Italy in the late 1700's. By 1913, England had recognized the disease and it was made compensible under English law in 1941. In the 1960's, several major studies were conducted in the United States but it was not until two years ago that the American Textile Manufacturers accepted the existance of byssinosis and, even today, they are fighting against decent compensation for victims of brown lung.

Our Carolina Brown Lung Association was formed three years ago to organize, educate and help people suffering with brown lung. Today we have chapters throughout the Carolinas and we continue our struggle to locate and aid victims of byssinosis, change and reform our states' compensation laws, work for help from the federal government and fight to see that the mills are cleaned up and made safe so that others do not have to suffer as we have.

This is why we are very interested in the work of this committee. There are many thousands waiting, waiting for some relief. The states' of North and South Carolina, the textile manufacturers and their insurance carriers have placed gigantic obstacles in the way of those sick and injured workers who must have help because their jobs have been the very cause of their sickness. Imagine, if you will, thousands of people in the Carolinas sitting at home this very moment eating pills, spraying their lungs with medications, breathing through machines, wheezing, coughing, often unable to walk accross a room without losing their breath and feeling forgotten and useless. To help these people, we need effective and speedy action by the Congress. We have studied the bill that Mr. Williams and Mr. Javitts have written and we like the idea of national workers compensation standards. And we have a few ideas about what should be part of such a law based on our experiances.

1. The law should provide broad coverage in occupational disease cases. In South Carolina, we are faced with an arbitrary seven year exposure requirement that applies only in byssinosis cases despite medical evidence that shows that people can get byssinosis in less that five years. This indicates prejudice and misunderstanding of occupational disease.

In North Carolina, the Workers Compensation Act excludes victims with pulmonary disease who retired before 1963. These people are no less sick than those who retired after 1963 and certainly face greater problems because there seems to be no hope for compensation.

In Georgia, where organizing is just beginning, we have found that brown lung victims face the old statute of limitations problem that excluded many people in South Carolina until this year. Here is the old story of the victim bearing the responsibility for medical self diagnosis. The Georgia statute begins running not at the time of diagnosis, but at the time of retirement.

2. There has been no such thing as job protection for brown lung victims. This has meant that many sick workers have had to stay on the job until they actually dropped and had to be carried out of the mill. Once they find out what is wrong with them, which often isn't easy, they file for workers compensation only to face a complicated and confusing system where the average case can take 2½ to 3 years to complete. I filed my own case three years ago and while I was awarded earlier this year I haven't seen a penny yet and don't know when or if I will.

3. Rehabilitation should be the obligation of the employer. But in South Carolina the statute provides no rehabilitation services at all. We are not deadbeats or lazy. Textile workers are hard working people and if our job makes us sick we should have the opportunity to be restored to gainful employment. This is especially vital for the partially disabled who may have many working years ahead.

4. The workers compensation systems in North and South Carolina do not encourage safety because there are no provisions for job protection. A worker who is afraid for his job will not complain about conditions or file a complaint.

We also feel that in South Carolina the system does not encourage safety because employers have not been made to pay compensation for byssinosis. When the mills are forced to pay they will realize that it is cheaper to clean up. We know they will make a fuss about the economics and inflationary impact of safety. We heard them whining about the cotton dust standard recently imposed by OSHA. But your legislation must take into account the cost of injury and disease to the victim, the human cost which isn't necessarily measured in dollars and cents.

5. Our experiance in the Carolinas is that even the most clear cut cases of byssinosis takes years to complete. The Industrial Commissions in both states have allowed the companies to stall these cases hoping we would just lose interest or die. Red tape can choke just as surely as brown lung. In both North and South Carolina we have seen many Brown Lung Association members die before their cases could be completed.

The original idea behind workers compensation systems, as I understand it, was to replace slow and cumbersome court proceedings with a simple and speedy hearings proceedure. In fact, the Industrial Commission hearings are just as slow and complicated as going to court. What we need is a system that reduces the need to litigate cases and reduces the involvement of attorneys. In North Carolina, less than 5% of regular workers compensation cases are contested and require an attorney. But 90% of the brown lung claims filed are contested.

And let me say a word here about presumptive diagnosis. We feel that this is a simple device that could solve many of the problems I have discussed. It would answer problems of delay, excessive litigation, the need for a lawyer and restrictive coverage. This method is already accepted in many occupational disease laws on both the state and federal levels. In brown lung cases, workers who meet objective standards for exposure to cotton dust and lung capacity could have their cases resolved in a speedy and fair proceedure.

Our Carolina Brown Lung Association feels that national workers compensation standards should be the law. Experience has shown us the misery of a bad state system. Experience has also taught us that the states can not be trusted to provide fairly for all injury and disease cases. And while we like the idea of national standards we realize that you gentlemen have your work cut out for you in getting such a bill passed. While we are confident that your proposal will be the law of the future, we need some relief for brown lung victims right now. You have before you in this committee S-2449 which was introduced last January 27th by Senators Hollings and Thurmond of South Carolina. We have some differences with the bill but we feel it needs study by this committee on its own. We know things take time, the Congress has a great responsibility to be certain that a piece of legislation is the nearly best solution to the problem. But, as I have often said, time is one thing we don't have. We urge you to make a committment to consider S-2449 as a seperate piece of legislation and to move as swiftly as possible to get it to the floor of the Congress. We will do whatever we can to cooperate and assist you. Hope is about all we have left, hope, dignity and the knowledge that we worked hard all of our lives. The end result of our years of labor has been a terrible sickness and we believe you want to find a solution to the problems that this brown lung has caused us. We believe Senators Hollings and Thurmond and the several gentlemen on the other side of Congress who have introduced brown lung legislation acted in the best interest of the people they represent by trying to find a solution to the brown lung nightmare. Please take their move very seriously. I thank you for you time.

The State

Washington, Piedmont, Pee Dee and West Carolina Bureaus

Section B • Columbia, S.C., Friday, Sept. 15, 1978 Page One

CBLA Delegation Will Testify At Senate Hearing

A Columbia delegation of the Carolina Brown Lung Association will testify at a U.S. Senate committee hearing next Tuesday on behalf of comprehensive federal standards for state workman's compensation programs.

The delegation led by Essie Briggs of West Columbia will call for quick passage of legislation by Congress to help victims of brown lung disease or bysinossis.

"We're going to Washington because the state of South Carolina just doesn't seem willing to do what it ought to do to help us," Mrs. Briggs said. "Until the mills pay those of us who got hurt working, they'll never do what they can to prevent brown lung."

The CBLA will be joining Sen. Ernest F. Hollings, D-S.C., testifying before the Senate Human Resources Committee on legislation co-authored by Sens. Harrison Williams of New Jersey and Jacob Javits of New York.

The CBLA charges that most of the victims of brown lung disease, linked to cotton dust, have been unable to win compensation under existing workman's compensation laws in North Carolina and South Carolina.

The organization estimates there are 35,000 victims of the disease in the two states.

Despite some small success in getting their problem recognized, the CBLA charges that state compensation systems "have totally failed to provide compensation benefits for job-related diseases like brown lung.

"Many members of the Brown Lung Association have died in the last three years waiting for their claims to be heard and decided," the organization said in a statement.

The Williams-Javits bill attempts to provide sweeping reform of all state compensation systems, dealing with both injuries and illness of the workplace. It would not impose federal administration of the compensation system, however.

"We think that the Williams-Javits bill would be fine," Mrs. Briggs said, "but it tries to cover everything, and it doesn't say anything about brown lung. It may take years to get that bill passed and we need help now."

Recent changes in South Carolina's workman's compensation act were designed to help brown lung victims and others to get financial assistance for occupational diseases and injuries.

MAJOR EVENTS IN THE FIGHT FOR RECOGNITION OF BYSSINOSIS
AS AN IMPORTANT INDUSTRIAL DISEASE

1913 - Cotton dust is recognized in Britain as hazardous to cotton mill workers.

1941 - Byssinossis is made compensable under workman's compensation.

1947 - USPHS Bull. No. 297 ("A Review of the Literature"): "In the U.S. . . . the problem of serious dust disease among cotton workers is hardly known to exist . . ."

1961 - McKerrow, Schilling, "A Pilot Enquiry into Byssinosis in Two Cotton Mills in the U.S.," JAMA: "some byssinosis was present in the 2 American mills . . ."

1964 - Dr. Arend Bouhuys received grant from USPHS to study cotton mill workers; unable to gain entry into mills in Georgia.

1964 - The American Conference of Governmental Industrial Hygienists adopted 1 milligram per cubic meter of air as a threshold limit value for cotton dust. (Based on British studies published in 1960.) Note that states were slow to adopt amendments to TLV's & none actually enforced them.

1967 - Dr. Harry Heimann: "an adequate search for the possible occurrence of 'byssinosis as a clinical entity' has not been made in the United States . . . the level of 1 milligram per cubic meter of air . . . must be considered as a tentative allowable concentration, since it fails to consider the particle sizes . . . reduction of the airborne dusts to these lower air levels is feasible with current engineering knowledge p. 7: . . . particles that measure below 7 micra can be expected to be the main offenders

1968 - C.C. Johnson, Jr., administrator of USPHS Consumer Prot. & Env. Health Service: "recent studies have shown a high incidence of byssinosis among textile workers . . . in the United States . . . In one mill, employing 500 people . . . 30 percent of those in the carding room (were) affected. In the Atlanta Penitentiary mill, 26 percent of those in the carding and spinning rooms were victims of the disease." (based on Dr. Bouhuys' studies)

1969 - Dr. Bouhuys published results of studies in two commercial cotton mills and Atlanta Penitentiary mill: 29% of carding and spinning rooms of Atlanta mill had byssinosis; 25% of carders and 12% of spinners in other mills suffered from this disease.

- Mrs. Juanita Fetherlin, South Carolina Department of Labor Director of Safety says of Byssinosis, "This is a medical problem and it's causes and treatment should be a matter of public record and of public knowledge."

- North Carolina State Board of Health Monthly Report (September 1969) reported byssinosis "to be a significant occupational health problem among cotton textile workers in North Carolina" on the basis of surveys of 1,000 workers which "disclosed an incidence of clinical symptoms of byssinosis in . . . 18-28 percent of card room employees" Noted importance of respirable dust

- Ralph Nader wrote Secretary of HEW citing Dr. Bouhuys' findings and estimated that "over 100,000 persons are suffering from byssinosis in this country." Urged a study of byssinosis incidence in the nation and application of available knowledge to the task of preventing harmful exposure, e.g. through enforcement of Walsh-Healey Public Contracts Act. (Regulation issued in May 1969 had set 1 milligram of dust per cubic meter of air as standard for cotton dust)

- Secretary Finch responded on September 19: "It is clear that Byssinosis is a serious occupational disease that has been too long ignored in the United States . . . I strongly agree that effective action must be taken to curb this occupational hazard . . ."

- Dr. Isadore Buff, Black Lung authority from Charleston, W. Va. tells South Carolina newsmen, " Byssinosis and Black Lung are similar and neither will register on an X-ray. The difference is that coal dust attacks the blood vessels of the lung, and the air spaces, while cotton dust attacks the bronchii."

- TWUA urged the textile industry association (American Textile Manufacturers Institute) to participate in a jointly sponsored investigation of independent scientists to define the nature and extent of the hazard and to develop the means of prevention. ATMI rejected this proposal and hired Industrial Hygiene Foundation, Inc. to study "to determine whether or not there are respiratory factors which are peculiar to working conditions in the textile industry."

1970 - Medical tests of TWUA convention delegates by Environmental Sciences Laboratory, Mount Sinai School of Medicine, revealed 23% incidence of respiratory symptoms among people with occupational exposure to cotton.

- Harrison A. Williams, Democratic Congressman from New Jersey states that ". . . some 100,000 American textile workers are suffering from the Brown Lung disease," during congressional subcommittee hearings on Occupational Health held in Greenville, S.C.

- State Representative Troy L. Hyatt from Columbia says, "There is no longer any doubt about the existance of Byssinosis in South Carolina."

- Department of HEW reported that PHS plans "to initiate studies to find answers to the following questions:

"1. How many people have their health affected by cotton dust?
"2. How many people have permanent health damage from cotton dust?
"3. How do the lungs of deceased former cotton workers differ from those of other deceased workers?
"4. Do cotton workers die at a younger age or from different causes than other workers?
"5. What is the cotton dust level below which no health effects occur?
"6. What in the cotton dust causes the illness?" .

- National Conference on Cotton Dust and Health sponsored by PHS recommended dust control measures to reduce concentration of 1 mg./M^3 of respirable dust (15 micrometers) . . . this limit will probably be reduced to 0.5 mg. as documentation of the disease improves . . . Routine air sampling programs should be instituted in all mills"

- The South Carolina Legislature establishes a joint study committee to investigate Brown Lung. A cotton mill supervisor tells touring legislators, "I don't think the problem is all that serious."

- Bureau of Labor Standards, U.S. Department of Labor, reported that it had not started taking air samples for enforcement of cotton dust standard established under Walsh-Healey Act in May 1969 because of failure to develop effective techniques.

- Congress enacted Occupational Safety and Health Act.

1971 - Industrial Health Foundation (formerly Industrial Hygiene Foundation) issued "draft of interim report" after 16-month study of cotton textile plants; found "weak correlation" between decline in amount of air workers were able to expire following a day's work, and the quantity of dust in the air in the plants examined. This led to hypothesis "that an enzyme or a combination of enzymes found in dust from raw cotton . . . is the specific causitive agent in byssinosis."

- Occupational Safety and Health Administration, U.S. Department of Labor, reported that "very few of the coarse (cotton) goods mills" studied "are currently meeting" the standard of 1 milligram of total cotton dust per cubic meter. Nevertheless, the Administration rejected TWUA's request that cotton textiles be designated a target industry in the Department's enforcement program under the Occupational Safety and Health Act (No sense of urgency evident)

- The British Occupational Hygiene Society recommended a standard of dust (excluding lint) of 0.5 milligram per cubic meter. The ACGIH maintained the TLV of 1 milligram but took note of Bouhuys' findings of 17-28% byssinosis incidence "at cotton dust levels averaging close to the recommended limit." It concluded that "a ceiling limit of 1 mg./M^3 of raw cotton dust (containing bract) that permits no excursions above this limit would seem more appropriate. The question of exactly what dust sample best characterizes the exposure . . . is still under investigation."

1972 - OSHA announced Target Health Hazard Program to give special priority to 5 "hazardous workplace substances." Cotton dust was among the 5, involving "more than 800,000 employees in cotton processing operations . . . prolonged exposure to heavy air concentrations can cause a disabling lung disease . . ."

- TWUA became party to a contest of an OSHA citation before the Review Commission by Gurney Industries, Inc., Prattville, Ala. The company claimed that citation for violation of cotton dust standard was invalid and that abatement was infeasible. Union protested classification of violation as "non-serious" and offered proof of feasibility of engineering control. Contest was withdrawn by company in 1973 with a settlement agreement requiring the company to abate the condition by March 1, 1976.

- The special committee of the South Carolina legislature investigating Byssinosis considered legislation to specifically compensate workers with more than five years in the mill who have respiratory symptoms. The committee adjourns however at the end of the session without reporting any legislation to the floor.

Byssinosis (cont'd) -4-

- NIOSH convened a meeting of consultants in June to review a draft criteria document to provide the basis for revising the cotton dust standard. The recommended concentration limit was 0.2 mg/M3 of fly-free, respirable dust. Analysis of 1970-71 surveys of textile workers in North Carolina by Dr. J.A. Merchant and associates revealed an expected prevalence of byssinosis among workers in cotton preparation and yarn areas of 12.7% at 0.2 mg/M3. The TWUA consultant, as well as two academic experts (Drs. Bouhuys and Peters), recommended a limit of 0.1 mg/M3, which would yield an expected byssinosis incidence of 6.5% in the critical areas.

- Burlington Industries, Inc. and the American Textile Manufacturers Institute submitted applications for variance from the cotton dust standard, claiming that technology was not available to meet the standard. TWUA requested a hearing on the Burlington application and offered proof that the standard is technically feasible. The company thereupon withdrew its application. The association's application was denied in 1973 on the ground that it failed to meet the Act's requirement of demonstrating the "unavailability of control equipment, etc."

- The ACGIH noted an intended change in the threshold limit value for cotton dust to 0.2 mg/M3 lint free dust as measured by vertical elutriator (i.e., respirable dust).

1973 - Efforts by Burlington in conjunction with a group from Duke-N.C. State Health Department to remove biologically active dust from cotton by pre-steaming were abandoned when it appeared that the effect of steaming was to lower dust levels in early processes but increase them in subsequent processes.

- Dr. Merchant et al published the findings of the Duke-N.C. State Health Department surveys of textile workers which showed "strikingly linear" dose-response associations between respirable dust level and byssinosis prevalence. They concluded "that a reasonably safe level of lint free cotton dust is 0.1 mg/M3" (Journal of Occupational Medicine, Vol. 15, No. 3, March 1973, p. 230).

- The American Textile Manufacturers Institute prepared a "Work Practices Standard for Raw Cotton Dust," and offered it to OSHA as a "practical interim measure," pending the availability of feasible engineering controls. The proposed standard relied primarily on the use of respirators and medical surveillance, with affected employees to be transferred to less dusty areas. TWUA attacked the proposal for being based on the unsupportable premise that engineering controls are not feasible. A report by NIOSH to the effect that currently available technology is capable of meeting the standard was presented to OSHA as part of the union's brief for rejection of the proposed standard. The union pointed out that respirator use cannot be relied on for continuous protection because of discomfort and extra fatigue involved, and that medical surveillance can only serve as a check on the efficacy of a control program.

- A mobile medical team from Yale, under the direction of Dr. Bouhuys, conducts byssinosis examinations of cotton mill workers in Columbia, S.C. The results supplemented a mortality study conducted in 1972 by a Mt. Sinai Hospital (New York) medical team.

1974 - Promised textile dust standards are delayed by OSHA for further study to define respirable and non-respirable dust.

1975 - The Southern Institute for Occupational Health launches a drive to form a Brown Lung Association in South Carolina to aid disabled mill workers.

Byssinosis (cont'd) -5-

1975- First Brown Lung Association meetings.

1976- First Bistate meeting of the Carolina Brown Lung Association.

1977- C.B.L.A. members testify before OSHA on the proposed cotton dust standard.

1977- Serious legislation is proposed in the U.S. House to aid brown lung victims.

1977- First C.B.L.A. case awarded in North Carolina.

1978- Legislation to aid brown lung victims is introduced in the U.S. Senate.

1978- Fist C.B.L.A. cases is awarded in South Carolina.

1978- OSHA finally promulgates a federal cotton dust standard.

1978- C.B.L.A. has more than a dozen chapters in the Carolinas.

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Epidemiology of Chronic Lung Disease in a Cotton Mill Community *

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Abstract. We recorded respiratory symptoms and maximum expiratory flow-volume curves in 645 white male and female cotton textile workers, aged 45 years and older, with an average of 35 years employment in carding, spinning, yarn preparing, weaving and other jobs in cotton textile mills. We included retired as well as active workers, to avoid the biases inherent in studies of active workers only. We compared the data on the textile workers with those of 662 female and 498 male white residents of three communities without cotton textile mills (controls), considering sex, age and smoking habits. Textile workers of both sexes, irrespective of age, had significant excesses of chronic cough, wheezing, dyspnea and other symptoms, in comparison with the controls. Work in textile mills was the prime variable affecting symptom prevalence, with smoking as an additional significant variable for all symptoms except dyspnea. The lung-function data confirmed that textile workers were at much greater risk of chronic lung disease, with loss of function, than the controls, in all smoking categories. There was evidence that chronic lung disease often led to premature retirement among the male textile workers. The excess risk of lung-function loss occurred among workers in yarn preparing and weaving, as well as in carding and spinning, but not among workers employed in clothrooms and in other dust-free jobs. At least 35,000 men and women in the U.S. may suffer from disabling lung-function loss, owing to chronic lung disease, as a result of their work in cotton textile mills. Adequate programs of prevention and control of chronic lung disease, a late stage of byssinosis, as well as of the earlier acute manifestations of byssinosis, are urgently needed.

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Key words: Byssinosis - Cotton dust - Occupational lung diseases - Community surveys - Lung function - Dust exposure

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Chronic lung disease in textile workers resembles chronic airway obstruction, a common disease in the general population. Mortality statistics probably underestimate deaths from chronic lung disease [27], and death and disease rates in the U. S. are usually not linked to specific risk jobs. Therefore, the prevalence of airway obstruction among textile workers, and the excess prevalence due to cotton dust exposure, must be assessed in relation to a comparable control population.

The population at risk includes workers who have left the mills as well as those still active. Among retired workers, cases of disabling lung disease due to cotton dust exposure were described in the U. S. in 1967 [9]. Among hemp workers, retired men were more frequently affected by disabling chronic lung disease than active workers [8]. Hence, studies of only active workers may underestimate disease prevalence. Also, among active workers, dust exposure during work may affect lung function and symptoms, whereas among retired workers, only chronic effects of dust exposure would be observed.

As controls, one needs sufficiently large groups of persons who are similar to the textile workers, but who lack exposure to cotton dust. Populations in communities without cotton textile mills are exposed to common risk factors in chronic airway obstruction, including cigarette smoking and other environmental exposures. A comparison of the prevalences of respiratory symptoms and of lung function loss between these community groups and groups of textile workers, taking into account such factors as sex, race, age, and smoking habits, should allow detection of any added risk of chronic lung disease associated with work in cotton textile mills. We have performed such a comparative study and report the results in this paper.

METHODS

All surveys were carried out with a mobile laboratory equipped for computerized recording of respiratory histories, personal data and maximum expiratory flow-volume (MEFV) curves [11]. An interviewer asks questions on respiratory symptoms, smoking habits, residence and occupational exposures, reading from a standard questionnaire [6], and enters the answers into computer memory. Next, the subject performs five maximally forced expirations, after a full inspiration, through a pneumotachograph. The flow signal is recorded by the computer and integrated to volume; flow and volume data are plotted on a graphic terminal connected to the computer. The resulting MEFV curve can be viewed immediately; final results are displayed on the terminal after completion of the five blows.

The test system includes several quality control features. Inadequate blows can be detected immediately, from the shape of the resulting flow-volume curve. Numerical results (forced vital capacity, FVC; forced expiratory volume, $FEV_{1.0}$) are displayed for each blow. Inadequate blows can be deleted from computer memory; these do not influence the result. Averages from the best two blows are used for analysis. An index of variability between these blows (i.e., the difference in $FEV_{1.0}$) is part of the final output report. Hence, during data analysis one can examine the extent to which inconsistent effort on the part of some subjects has influenced the results. The system is calibrated with measured flows and volumes; calibrations are checked every two hours by a computer subroutine and a special calibration device that reproduces a standard MEFV curve [12].

The curve which results from averaging flows at 50 ml intervals throughout the forced vital capacity is used as the MEFV curve from which quantitative data are derived: FVC, $FEV_{1.0}$ and instantaneous maximum expiratory flow rates (peak flow, PEF; and maximum expiratory flow at 50% and at 25% of the FVC, MEF50% and MEF25%). The final report of the MEFV curve includes actual data as well as a comparison with previously reported normal values [19], to help identify persons with significant lung function loss. To test for reversibility of function loss, 23 textile workers with low $FEV_{1.0}$ values and no history of heart disease were treated with isoproterenol aerosol; MEFV curves were recorded again 20 min later.

For the textile workers, the questionnaire was expanded with detailed questions on jobs in the mills and on symptoms on return to work after weekends or holidays. Otherwise, the methods used in the study of textile workers and of control subjects were identical.

SELECTION OF POPULATIONS

(a) Textile Workers. In March 1973 we studied textile workers who lived in or near Columbia, South Carolina, at altitudes less than 600 ft. We used union membership lists and company personnel records to define a cohort of workers who (1) had started work in one or more of four Columbia cotton mills in or before 1946, and (2) had worked at least three years in either card- or weaverooms in these mills (see Table 1 for description of cohort). A concurrent mortality study [3] had identified those who had died. Mill records, telephone directories and inquiries through fellow workers were used to verify the addresses of those we assumed to be alive at the time of our study. However, in spite of concerted efforts, more than half of these persons could not be located. Most of these probably had moved away from the area; in some instances we were able to verify a move. Among those who were available for study, the number of refusals was small.

Since we found early on that many weaveroom workers had chronic respiratory symptoms, we decided to broaden the scope of the study to include spinning room workers, yarn preparers and other mill workers as well. Most of these additional workers were recruited by word of mouth. We included workers who had worked for three years by 1955, including some who met the original cohort criteria but were not on the lists. We do not

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Table. 1. Cohort of card- and weaveroom workers

Descriptor	Number of persons	
	Cardroom	Weaverooms
(1) On list	231	320
(2) Assumed alive	153	224
(3) Moved	5	1
(4) Not traced	78	133
(5) Available for study	70	90
(6) Refusals	5	3
(7) Studied	65	87

(1) All workers who had worked at least 3 years in mills, starting in or before 1946.

(2) Number remaining after removal of those known to have died before our study.

(3) Persons known to have moved away.

(4) Persons whose address could not be verified or who could not be con-contacted despite repeated attempts; many of these had probably moved from the area.

know what percentage of the population which met these expanded criteria was actually seen. Table 2 shows the distribution, according to sex, race and age, of the total population. The data on black workers and on whites under age 45 were excluded from analysis; they were too few in number. The workers in the four different mills were considered as one group, since we found no consistent differences among them in either symptoms or lung function.

(b) Control Populations. These consisted of white subjects, aged 45 years or older, who were studied at various times between October 1972 and June 1974 in three communities [26]. They included residents of an urban area in Connecticut (30%), a semirural South Carolina town (25%), and a rural town in Connecticut (45%), all at altitudes less than 600 feet. We excluded the few individuals who had worked more than one year in a textile mill. Persons with respiratory symptoms, with overt disease such as asthma, or with occupational exposures other than textile dust are included in the control population groups. Thus, we believe that these populations provide the best available control data for comparisons

Table 2. Sex, age and race of textile workers[a]

Age	Total	Males		Females	
		Whites	Blacks	Whites	Blacks
≤ 44	32	23	1	7	1
45-54	178	78	3	97	0
55-64	296	128	3	164	0
65-74	146	60	6	80	0
75+	40	15	2	23	0
Total	692	304	15	371	1

[a] All textile workers studied in the mobile laboratory who had worked three or more years in one or more of four mills in the Columbia, S C area, and who started work before 1955

with textile workers. The control group is sufficiently large to allow for age, sex and smoking habits in the comparisons with textile workers.

The three community populations also provided data on normal lung function in adult, healthy, lifetime nonsmoking white men (n = 194) and women (n = 581) [31]. Regression equations of function values on age, height and weight that gave the best fit to the data were developed separately for males and females. We used these equations to calculate the predicted function values for each textile worker. From the predicted data we calculated residual lung function data for each subject (rFVC, $rFEV_{1.0}$, etc.), where the residual equals the difference between the observed and the predicted value. The residuals express an individual's lung function decrement in absolute values, which is consistent with the assumptions made in regression analysis. In contrast, the more common expression of lung function decrements in percentages of predicted values implies a greater function loss in a young person (who has large predicted values) than in an older person, whose predicted values are lower.

Data analysis was performed on a PDP 11/40 computer, using data storage on magnetic tape. Details on statistical methods are included, where necessary, with the results.

RESULTS

Validity of Textile Worker Population Sample. We first compared members of the original cohort (Table 3, A) with those card- and weaveroom workers who were included later in the total study popula-

Table. 3. Respiratory symptoms, smoking habits, and lung function in cotton textile workers

	Cardroom				Weaveroom			
	Females		Males		Females		Males	
	A[a]	B[a]	A	B	A	B	A	B
No. of subjects	20	8	40	32	50	104	34	80
Age ± S.E. (yrs.)	65.4±1.9	55.4±2.7[g]	60.7±1.1	59.9±1.3	61.2±1.4	57.4±0.7[g]	60.1±1.5	59.8±1.1
SYMPTOMS								
Usual cough, > 3 mo. (%)	30	12	25	44	22	32	24	39
Usual sputum, > 3 mo. (%)	30	50	32	38	22	36	38	41
Frequent chest tightness or wheezing[b] (%)	35	38	32	50	28	35	29	35
Dyspnea 2+[d] (%)	10	38	26	22	21	26	16	23
Symptoms on return to work[c] (%)	20	12	38	31	24	25	24	20
SMOKING HABITS								
Lifelong nonsmokers (%)	65	75	30	22	70	69	24	15
Ex-cigarette smokers (%)	20	0	52	34	16	8	44	34
Cigarette smokers (%)	15	25	18	38	14	23	29	41
Smokers, only pipe or cigars (%)	0	0	0	6	0	0	3	10
LUNG FUNCTION								
rFVC[e] ± S.E. (ℓ)	-0.35±0.07	-0.20±0.12	-0.50±0.13	-0.47±0..16	-0.23±0.05[f]	-0.39±0.04[f]	-0.50±0.14	-0.28±0.08
$rFEV_{1.0}$[e] ± S.E. (ℓ)	-0.32±0.08	-0.29±0.12	-0.54±0.11	-0.50±0.12	-0.21±0.04	-0.32±0.04	-0.50±0.12	-0.42±0.07

[a] A = workers in the original cohort (Table 1, line 7), excluding blacks and subjects < 45 years.
B = all other workers, i.e., total seen in each category, minus no. in group A.

[b] A few times each week or worse.

[c] Wheezing, chest tightness or dyspnea on return to work after week-end or vacation.

[d] Dyspnea when walking at own speed on level ground, or worse.

[e] Residual FVC and $FEV_{1.0}$: see text.

[f] $p < 0.05$, [g] $p < 0.01$, for differences between A and B

tion (Table 3, B). Because of the different employment criterion (start before 1955 rather than before 1947), the subjects added later were younger. None of the differences in symptom prevalence or in smoking habits between A and B (for the same sex and job) were statistically significant, nor were there any consistent trends.

All groups in Table 3 had negative lung function residuals, i.e., their averages were less than predicted for white, healthy, lifetime nonsmokers of the same age, sex, height and weight. This was also true for PEF, MEF50% and MEF25% (data not shown). Although among female weavers, B had a significantly lower FVC than A, there was no consistent trend towards greater or lesser function decrements in B than in A.

We conclude from the comparisons in Table 3 that the expanded definition of the textile worker population, while adding younger persons who were essentially volunteers, caused no systematic change in symptom prevalence, smoking habits or lung function. We have therefore combined groups A and B for further data analysis.

Prevalence of Respiratory Symptoms. Three key respiratory symptoms - usual cough, frequent wheezing or chest tightness, and dyspnea grade 2+ - were more prevalent among textile workers (all jobs) than among the controls (Table 4). The data on ex-smokers (not shown in Table 4) followed the same pattern, with symptom prevalence similar to that in nonsmokers. Especially striking is the high prevalence of all three symptoms among nonsmoking female textile workers, the largest subgroup, whose rates are from 2 to 5 times higher than among comparable controls. A similar analysis for usual sputum production followed the pattern shown for usual cough in Table 4. Analyses for other grades of dyspnea or wheezing gave results similar to those shown for dyspnea grade 2+ and frequent wheezing, respectively. There are also differences in symptom prevalence between smoking categories and between sexes (Table 4). For example, male smokers have more cough and frequent wheezing than female smokers. Smokers generally have much higher symptom prevalences than nonsmokers, except for dyspnea.

In order to examine the relative importance of work in mills, of other factors such as sex, age and smoking status, and of interactions between these risk factors, we performed a weighted least squares analysis [21]. We found that an additive model (which describes the proportion, x, of subjects with symptoms as a sum of contributions from each source of variation) did not fit the data as well as a logistic model (see p values for goodness of fit in Table 5). The latter uses a logarithmic transformation of x, i.e., $\ln\left[x/(1-x)\right]$ as the sum of the main effects of mill work, sex, etc., and their interactions. In all instances, work in textile mills is the most significant source of variation in symptom prevalence (Table 5); for dyspnea grade 2+, it is the only one. For all other symptoms, smoking is also a significant variable. Sex and smoking interaction terms are significant for usual cough and frequent wheezing. Age is not a significant factor in the prevalence of any symptom except usual sputum ($p = 0.04$). There is also a significant interaction between work and sex, for usual sputum production. The interaction terms for sex × smoking and sex ×

Table 4. Respiratory symptom prevalence in textile workers and control subjects

Symptoms	Smoking categories	Sex	Age: 45-64				65+				Total (45+)			
			Textile workers		Controls		Textile workers		Controls		Textile workers		Controls	
			%	(n)	%	(n)	%	(n)	%	(n)	%	(n)	%	(n)
Usual cough > 3 mos.	NS	M	17	(42)	10	(69)	28	(14)	19	(26)	20	(56)	13	(95)
		F	23	(168)[c]	9	(266)	26	(86)[a]	11	(115)	24	(254)[c]	10	(381)
	S	M	59	(76)[c]	30	(142)	57	(21)	43	(28)	59	(97)[c]	32	(170)
		F	33	(61)[a]	18	(164)	56	(9)	25	(12)	36	(70)[b]	18	(176)
Frequent wheezing or chest tightness	NS	M	19	(42)	6	(69)	21	(14)	11	(26)	20	(56)[a]	7	(95)
		F	26	(168)[c]	7	(266)	23	(86)[b]	8	(115)	25	(254)[c]	7	(381)
	S	M	42	(76)[b]	22	(142)	62	(21)[b]	18	(28)	46	(97)[c]	22	(170)
		F	33	(61)[c]	12	(164)	44	(9)	8	(12)	34	(70)[c]	12	(176)
Dyspnea grade 2+	NS	M	11	(35)	2	(62)	10	(10)	0	(22)	11	(45)[a]	1	(84)
		F	24	(125)[c]	5	(234)	20	(55)[a]	7	(87)	23	(180)[c]	6	(321)
	S	M	17	(53)	6	(125)	27	(11)	5	(21)	19	(164)[a]	6	(146)
		F	22	(49)[b]	7	(141)	14	(7)	0	(7)	21	(56)[b]	7	(148)

The table shows percentage prevalence (%) and number of persons (n) in each group. For definition of symptoms, see Table 3. [a] $p < 0.05$; [b] $p < 0.01$; [c] $p < 0.001$ for χ^2 test of differences between textile workers and controls in the same age sex and smoking categories.

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Table 5. Weighted least squares analysis of key symptoms

Symptoms	Sources of variation[a]: Work in mill		Smoking		Sex × smoking		Sex × ex-smoking		Age		Goodness of fit
	x^2	p	x^2	p	x^2	p	x^2	p	x^2	p	p[b]
Usual cough, > 3 mos.	52.81	< 0.0001	14.81	< 0.0001	16.06	< 0.0001	NS		3.56	0.06	0.826
Frequent wheezing or chest tightness	79.26	< 0.0001	6.63	0.01	7.90	0.005	11.14	< 0.001	NS		0.891
Dyspnea, grade 2+	52.22	< 0.0001	NS		NS		NS		NS		0.961

For definition of symptoms, see text. NS = not significant

[a] Other sources of variation tested: age (p = 0.04 for usual sputum, NS for all other symptoms); work-sex interaction (p = 0.01 for usual sputum, NS for all other symptoms).

[b] Large p value indicates good fit of the logistic model.

ex-smoking probably reflect the higher tobacco consumption among men (Table 7). However, under-reporting of cough by women smokers might also contribute to these interactions (unpublished data).

For most symptoms, prevalences do not differ significantly between textile workers in different job categories (Table 6). However, those in "other jobs" had, in many instances, the lowest prevalence. Smoking habits are not significantly different among persons of the same sex in different job categories. Hence, the comparison of symptom prevalences between job categories is not seriously affected by an unequal distribution of smokers among persons in different jobs. For symptoms on return to work after a weekend or holiday (now or in the past), prevalence is highest among male cardroom workers (Table 6). The classical acute symptoms of byssinosis (chest tightness or wheezing on return to work on Mondays) occurred in 12.5% of all male cardroom workers and less frequently in other subgroups of textile workers (2.6% among all textile workers). Only 5 of the 1118 control subjects (0.4%; 4 current smokers) reported this symptom.

Lung Function. For the analysis in Table 7, we considered only cardroom workers, spinners, preparers and weavers as textile workers at risk (see below). In each sex and smoking category, these workers have lower values for rFVC and $rFEV_{1.0}$ than control subjects. Among smokers and ex-smokers, differences in smoking habits do not explain the results. Male textile workers smoked slightly but not significantly more than controls. The differences in lung function between textile workers and controls persisted after adjusting for age and pack-year differences, in an analysis of co-variance. The effects of textile mill work and of smoking on lung function are additive. When one adds rFVC and $rFEV_{1.0}$ of nonsmoking textile workers and of smoking controls, the sums are close to the observed decrements of smoking textile workers. Flow rates on MEFV curves were analyzed in the same way. The differences between textile workers and controls were similar in direction to those for rFVC and $rFEV_{1.0}$, and, for the most part, statistically significant.

When the textile workers were subdivided according to jobs in the mills (Table 8), the four categories of workers at risk (defined above) had lower function values than "others", i.e., persons in jobs away from dusty areas (mainly clothroom workers). The differences cannot be explained by differences in smoking habits. The same comparison for only nonsmokers gave similar differences, significant among the women but not among the men (there were only 56 male nonsmokers in all jobs). All differences between the total group of workers at risk and control subjects were highly significant. Among workers not at risk, lung function losses were similar to or smaller than those in the control groups.

There were no differences in lung function among nonsmoking women, aged 45-64 years, comparing those who still worked in the mills with those who retired prematurely (Table 9). Retired men, however, had a significantly greater loss of $FEV_{1.0}$ than men who still worked. The comparisons between active and retired male smokers are less clear because the retired men smoked more than the active men. Among all retired workers (regardless of smoking habits), the prevalence of cough, wheez-

Table 6. Symptom prevalence, smoking habits and textile mill job categories (age 45+)

Sex	Symptom or smoking category	Carding	Spinning	Preparing	Weaving	Others[b]	x^2
M	No. of subjects	72	49	26	114	20	
	% usual cough, > 3 mos.	33	33	35	34	25	0.75
	% usual sputum, > 3 mos.	35	33	38	40	40	1.44
	% frequent wheezing	40	33	27	33	25	2.67
	% dyspnea, grade 2+[c]	24 (50)	13 (38)	6 (18)	21 (87)	6 (17)	5.91
	% symptoms on return to work	35	18	8	21	10	11.98[a]
	% nonsmokers	26	18	8	18	30	6.06
	% ex-cigarette smokers	44	45	42	37	35	2.21
	% cigarette smokers[d]	26	37	50	38	20	7.40
F	No. of subjects	28	126	29	154	27	
	% usual cough, >3 mos.	25	26	24	29	22	0.71
	% usual sputum, > 3 mos.	36	25	24	31	7	8.20
	% frequent wheezing	36	17	17	32	26	10.70[a]
	% dyspnea, grade 2+[c]	24 (17)	23 (87)	10 (20)	25 (117)	14 (21)	2.99
	% symptoms on return to work	18	20	14	25	11	4.04
	% nonsmokers	68	70	69	69	74	0.30
	% ex-cigarette smokers	14	10	14	10	11	0.66
	% cigarette smokers	18	20	17	20	15	0.56

For definition of symptoms, see Table 3.

[a] $p < 0.05$; [b] includes cloth room workers and miscellaneous job categories.

[c] Number in parentheses is number of subjects who said they were not disable from working by other than lung diseases (e.g., heart disease, arthritis).

[d] —

Table 7. Lung function residuals in textile workers at risk and in control subjects (age 45+)

Sex	Smoking category	rFVC (liters)		$rFEV_{1.0}$ (liters)		Pack-years		Current smoking (cig. /day)	
		Textile[a] workers	Controls	Textile workers	Controls	Textile workers	Controls	Textile workers	Controls
M	NS	-0.315±0.118[b] (50)	+0.102±0.060 (95)	-0.272±0.090[b] (50)	+0.004±0.044 (95)	0	0	0	0
M	XS	-0.315±0.071[b] (107)	-0.045±0.046 (191)	-0.445±0.061[c] (107)	-0.188±0.036 (191)	34.3±2.8	28.2±1.5	0	0
M	S	-0.585±0.072[b] (93)	-0.326±0.055 (170)	-0.711±0.059[b] (93)	-0.464±0.048 (170)	39.1±2.0	36.5±1.4	20.4±0.8	22.1±0.9
M	PC	-0.038±0.198 (11)	+0.141±0.101 (42)	-0.159±0.077 (11)	+0.037±0.087 (42)	N.A.	N.A.	0	0
F	NS	-0.283±0.029[c] (234)	-0.057±0.028 (381)	-0.246±0.023[c] (234)	-0.054±0.021 (381)	0	0	0	0
F	XS	-0.297±0.084 (37)	-0.116±0.049 (105)	-0.297±0.064 (37)	-0.155±0.038 (105)	13.7±2.0	12.8±1.3	0	0
F	S	-0.446±0.057[c] (66)	-0.156±0.033 (176)	-0.467±0.052[c] (66)	-0.241±0.028 (176)	21.1±1.5	21.3±1.0	15.3±0.8	17.7±0.8

[a] Cardroom workers, spinners, yarn preparers and weavers (see Table 6).
rFVC, $rFEV_{1.0}$ = observed-predicted values (see text); mean ± standard error of mean; number of subjects in parentheses.
NS = lifetime nonsmokers; XS = ex-cigarette smokers; S = current cigarette smokers; PC = smokers of pipes or cigars only.
NA = not applicable.
P values, unpaired "t" test; see Armitage [2] for approximation in cases where the variances in textile workers and controls differed significantly: [b] $p < 0.01$; [c] $p < 0.001$.

Table 8. Lung function residuals according to job category

		Carding	Spinning	Preparing	Weaving	Total	Others	Controls
Males	n	72	49	26	114	261	20	498
	Age	60.3±0.9	59.6±1.3	58.9±1.5	59.9±0.9	59.9±0.5	60.5±1.6	57.6±0.4
	rFVC (ℓ)	-0.488±0.098	-0.427±0.095	-0.336±0.137	-0.346±0.068	-0.400±0.046	-0.082±0.188	-0.097±0.031
	$rFEV_{1.0}$ (ℓ)	-0.524±0.080	-0.588±0.082	-0.460±0.111	-0.433±0.058	-0.494±0.039[a]	-0.119±0.156	-0.226±0.025
	Pack-yrs.	26.3±3.8	35.7±4.2	26.5±4.3	25.2±2.3	27.6±1.7	24.6±6.1	23.3±1.03
Females	n	28	126	29	154	337	27	662
	Age	62.5±1.7	61.3±0.7	59.3±1.7	58.6±0.7	60.0±0.4	63.2±1.3	58.0±0.4
	rFVC (ℓ)	-0.310±0.063	-0.311±0.046	-0.227±0.079	-0.339±0.034	-0.316±0.025[a]	-0.109±0.086	-0.092±0.020
	$rFEV_{1.0}$ (ℓ)	-0.312±0.067	-0.311±0.037	-0.247±0.078	-0.288±0.028	-0.295±0.021[b]	-0.057±0.052	-0.120±0.016
	Pack-yrs.	5.3±2.1	5.9±1.0	4.8±1.9	5.6±1.0	5.6±0.6	4.4±1.8	7.7±0.5

Total = sum of carding, spinning, preparing and weaving groups.
Others = workers in clothroom and miscellaneous jobs.
Controls = community residents in South Carolina and Connecticut; non-textile workers.
Significance of differences:
[a] $p < 0.05$, [b] $p < 0.001$ for differences in lung function between "total" and "other" groups. "Others" and controls do not differ significantly in any respect. Differences between "total" group and controls: $p < 0.01$ for all lung function comparisons.

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Table 9. Lung function residuals in active and retired workers (age 45-64 years)

	rFVC (liters)		$rFEV_{1.0}$ (liters)	
	Active	Retired	Active	Retired
Males, NS	-0.177±0.139 (34)	-0.648±0.276 (8)	-0.083±0.102 (34)	-0.645±0.271[a] (8)
Females, NS	-0.261±0.049 (99)	-0.244±0.051 (69)	-0.238±0.038 (99)	-0.225±0.042 (69)

See Table 7 for explanation of residuals.

NS = lifetime nonsmokers.

[a] $p < 0.05$ for difference between active and retired men.

ing and dyspnea was significantly higher, for both men and women, than among comparable active workers. Workers who said they retired because of chest symptoms (n = 39, i.e., 18% of those who retired prematurely) had significantly more function loss than those who gave other reasons for retiring or who were laid off. This was true for nonsmokers as well as for smokers and ex-smokers.

In all smoking categories, men or women who had experienced one or more of the acute symptoms of byssinosis had lower function values than those who had not. However, the differences were significant only among female smokers and ex-smokers ($p < 0.05$) for $rFEV_{1.0}$. Age at start of employment, which varied from under 15 to about 35 years, had no significant relation to later lung function values. The subjects in our study had worked an average of 35 years in the mills; very few of them had worked less than 20 years. When age and smoking were accounted for, there were no significant trends in lung function with duration of employment.

The differences in prevalence of dyspnea and of lung function loss between textile workers and controls might be explained if the textile worker population included a larger proportion of obese individuals; obesity can lead to dyspnea as well as to loss of lung function. We suspected that this might be the case among women. However, a comparison of indices of obesity [20] showed no differences between female textile workers and controls. There was a weak association between obesity, on the one hand, and the prevalence of dyspnea and frequent wheezing (but not of cough), on the other. However, the excess prevalence of dyspnea and other symptoms among female textile workers cannot be explained by obesity, since these women were not more frequently obese than the control group.

DISCUSSION

Most studies of byssinosis in the textile industry have used the prevalence of acute respiratory symptoms on return to work ("Monday-dyspnea") and loss of lung function during the workday as indices of responses to textile dust exposures [7, 29]. By relating these acute responses to airborne dust concentrations one can construct dose-response curves [6, 24]; these can be used in programs to prevent the disease [17, 32].

However, textile workers also suffer from chronic lung disease. To relate the prevalence of chronic disease to dust levels in the mills requires knowledge of both current and past exposures, which is not available. Until adequate records are kept of dust concentrations in mills over long periods of time, dose-response relations for the long-term effects of cotton-dust exposure cannot be established. Until then, the acute response to dust exposure offers the only available quantitative basis for programs of prevention.

Most surveys in industry have shown an excess of chronic respiratory symptoms, as well as loss of lung function, among active workers at risk [29, 34]. However, the total population of textile workers at risk of chronic disease also includes retired workers. Active workers form a group biased in favor of healthy individuals. Retired workers, in contrast, include those who left the mills because of disabling lung disease, and thus this group is biased in favor of diseased persons. We had previously identified several cases of disabling byssinosis among retired workers who lived in mill communities [9]. To describe the prevalence of chronic lung disease adequately, we therefore decided on a community-based study which would include retired as well as active workers.

We are confident that our results in members of the original cohort of carders and weavers (Table 1; Group A in Table 3) provide a reasonably accurate picture of the respiratory health of active and retired cotton textile workers who continue to live in the community surrounding the mills. Of those whom we identified and traced, 95% participated in the study. The results obtained in this cohort were similar to those in the additional group of men and women studied (Group B in Table 3). We have concluded that the total study group, too, is representative for active and former cotton textile workers in that community.

However, many persons on the employment lists could not be traced; probably most of these left the mills and moved away. They may have moved to find jobs elsewhere, or they may have moved to a better climate. Since we studied persons 45 years of age and older, the first motive is probably infrequent. Also, we were more likely to trace active rather than retired workers. The prematurely retired men whom we studied had lower function values and more symptoms than the men who were still active in the mills. Therefore, those we could not trace may also be a group biased in favor of diseased subjects. If so, our data underestimate the true prevalence of chronic disease among the total population at risk. In a similar study of hemp workers in Spain [8], disabling lung disease among men was more prevalent than it was in the present study [14]. We know that hemp dust is more toxic than cotton dust [33], but it is also possible that

we were better able to trace older disabled men in Spain, since few of them had moved away.

We are confident that the differences in lung function between textile workers and controls reflect excess loss of lung function among the textile workers. All methods were standardized and identical for textile workers and controls. Throughout all studies, our MEFV curve recordings were calibrated every two hours with a device that accurately reproduces a standard MEFV curve [12]. In addition, the computer methods are inherently more accurate than methods which rely on analog readouts and graphical recordings. Flow measurements with the computer system are accurate to about 0.3%; the system reproduces the $FEV_{1.0}$ of the calibration device to within 0.6% [12]. Hence, we minimized technical sources of error.

The data on respiratory symptoms and lung function indicate an excess of chronic lung disease among the cotton textile workers (Tables 4, 7, 8). It is almost certain that the difference in lung function and in symptom prevalence between textile workers and controls is caused by dust exposure of the workers in the mills. For the symptoms, the weighted least squares analysis indicates that work in mills is the prime variable - the only one for dyspnea grade 2+ - while smoking is a contributing factor for cough, phlegm and wheezing. For lung function, the differences between workers in risk jobs and in other jobs (Table 8) suggest that the lung function decrements are caused by exposure to dust. For both symptoms and lung function loss, the differences between textile workers and controls persist when sex, age and smoking habits are taken into account. Other factors (e.g., urban air pollution, indoor air pollution, altitude) have been considered and may be excluded. Within our control populations there are no systematic differences in lung function that might be related to urban air pollution outdoors [31]. Indoor air pollution has so far not been linked to excess airway obstruction, e.g., among nonsmokers who live in homes with smokers [30]. All subjects lived at similar altitudes, near sea level.

It is important that the small group of textile workers in other jobs, not exposed to dust, was similar to the control subjects in other communities. The workers at risk and those not at risk were studied on the same days and with the same methods, and lived in the same community under similar conditions. Thus, we can exclude the possibility that the textile worker population as a whole differed, for some unknown reason, from the control populations. The differences in lung function are related to specific jobs in the mills, not to some unknown characteristic such as social class of textile workers as a group.

We found an excess of chronic lung disease not only among carders and spinners - groups long known to be at risk of byssinosis - but also among yarn preparers and weavers. It has frequently been stated that byssinosis is absent or uncommon among weavers. However, a detailed study of one mill showed that most weavers in a factory which produced heavy cloth from unsized yarns had byssinosis [5], and in a more recent study [24], the average prevalence of acute byssinosis symptoms among 431 workers in slashing or weaving was 13.1% (36.5% in a subgroup exposed to high dust levels).

The excess of chronic disease among textile workers might be overestimated if the control populations were biased in favor of healthy persons. However, we have evidence that our control subjects provide an accurate picture of the respiratory health of the total populations in their communities [26]. The prevalence of key respiratory symptoms in our control subjects is roughly similar to that in other populations not exposed to major risks of occupational lung disease [1, 28]. Furthermore, the negative lung function residuals among most subgroups of control subjects (Table 7) reflect the inclusion of diseased persons and smokers.

Chronic lung disease among cotton textile workers is obviously an important public health problem. Among those who retired before the age of 65, 18% gave chest symptoms as the prime reason. Of all textile workers, 5.0% of those aged 45-64 years, and 17.4% of those 65 years and older, had $FEV_{1.0}$ values of 1.20 liter or less, i.e., values consistent with considerable disability in most instances. On the basis of these data, and of employment figures in the U.S. cotton textile industry, we have estimated that about 35,000 men and women in the U.S. suffer from disabling lung function loss as a result of their work in cotton textile mills [14]. This figure may be too low, since we may underestimate the prevalence of chronic lung disease among the total population of workers at risk (see above).

Retired workers are usually not included in studies of occupational diseases since they are difficult to trace, at least in the U.S. [4]. Hyatt et al. [23] studied active and former coal miners in West Virginia, and found a higher prevalence of pneumoconiosis than other investigators, who studied active workers only. If laws such as the Occupational Safety and Health Act in the U.S. are to protect workers from the consequences of occupational exposures throughout their lifetime, systematic follow-up of workers who leave risk industries is required. This may benefit those who left the industry, by detection of late effects of exposures, as well as those who still work, by elucidating needs for environmental controls.

The pathology of the chronic lung disease of textile workers remains unclear. Loss of lung elastic recoil .s well as intrinsic small airway obstruction may contribute to their function loss [22]. At autopsy, the lungs of byssinotic cotton textile workers show varying degress of emphysema and chronic bronchitis [18]. However, no correlative studies of symptoms, function loss, and histological findings in the lungs have been reported so far. In the present study, the decrements of FVC were similar to those of $FEV_{1.0}$ (Tables 7 and 8). In contrast, acute exposures to textile dust lead to greater decreases of $FEV_{1.0}$ than of FVC [10, 15]. The additional decrement of FVC in the chronic disease might be related to airway closure. Isoproterenol does not materially improve function in textile workers with chronic lung disease; the average improvement of $FEV_{1.0}$ in 23 workers was 0.13 liters, less than half the difference between textile workers and controls. However, airway obstruction and closure may, in part, be reversible since thiazinamium (Multergan®) increases both FVC and $FEV_{1.0}$ [13]. Among hemp workers, chronic loss of lung function was found only in subjects whose maximum expiratory flows decreased during acute dust exposures [15]. However, we are not certain that only

workers who experience airway obstruction on acute exposure to dust are at risk of developing chronic disease. But pronounced "reactors" to acute dust exposure are probably at greater risk than those who are less sensitive to the acute effects of textile dust exposure [8].

A 7-year follow-up study of hemp workers in Spain showed continued deterioration of lung function among men no longer exposed to dust [16]. Cotton textile workers who remain active in the industry suffer greater yearly losses of lung function than the retired Spanish hemp workers, i.e., up to nearly 0.3 liters per year [25]. We believe that textile workers with chronic lung disease should avoid further dust exposure at a time that their ventilatory reserves are still sufficient, i.e., their $FEV_{1.0}$ should be large enough so that they will not develop disabling lung function loss during the rest of their lifespan, in spite of a continuing accelerated loss of lung function [16].

There is continuing discussion about the definition of the term "byssinosis," and confusion about the presumed co-existence of chronic bronchitis and of byssinosis among textile workers. To a large extent this debate is one of semantics [8]. Cotton and other textile workers are at risk of acute as well as chronic respiratory symptoms and lung function loss. There can be little doubt that both are caused by exposure to respirable dust in textile mills. The progression from repeated acute insults to the chronic disease has not been traced with certainty, but there is no good evidence against - and much evidence for - such a train of events. It seems most logical to define byssinosis as a dust-induced disease with initial acute responses followed by a stage of chronic lung disease characterized by chronic airway obstruction. This definition is implicit in the description of the clinical stages of byssinosis given by Schilling [29]. For purposes of compensation and prevention, acute responses to textile dust as well as chronic airway obstruction in textile workers should be considered as two stages of one disease syndrome, byssinosis.

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POLITICKS & OTHER HUMAN INTERESTS NOVEMBER 22, 1977

COTTON COMES TO HARM

ROANOKE RAPIDS, N.C.—In 1932, at the age of 14, Varnelle Coats began work in a cotton mill in her hometown of Roanoke Rapids. She "had to," she says, because neither of her parents could work and there were eight other children to support; the cotton mills were "the only ones hiring." She labored for the cotton companies for 45 years. During this time, Coats lived much like the country's 230,000 other cotton textile employees, 85 percent of whom are in North and South Carolina: she earned a paltry wage (there are still few unions in the mills); she worked 8 to 12-hour shifts six days a week; and she, like at least 35,000 of her fellow employees, had to inhale poisonous cotton dust. Today, in spite of a harsh life, Coats is angry about only one thing: that the toxic dust made her permanently sick and gave her brown lung disease.

Brown lung is similar to the black lung disease which afflicts coal miners. A mill worker contracts it by continuous exposure to large levels of cotton dust. It causes tightness in the chest, shortness of breath, wheezing, fits of coughing, and often leads to heart disease. Its victims can hardly talk above a whisper; even walking is a chore. The disease gives them, as one victim put it, "the feeling that your air tubes are in someone's fist and that damn fist is getting more and more closed."

The disease is utterly debilitating; after contracting it few can work. "I was



just feeling like I was being smothered to death," Coats says, "and when I'd come off the job, I'd be coughing so bad that I'd upchuck nothing in the world but that brown dust. Now, I can't even do much housework, not even mopping the floors."

But despite the link between brown lung and work in the mills, the textile industry, the states which house them and the Federal government have, for the most part, refused to help brown lung victims. The companies (J.P. Stevens Company & Burlington Industries Inc. being the most prominent) have belatedly acknowledged the existence of brown lung, but claim it affects only 1 percent of textile workers. As a result, employees—even if they have worked for decades—cannot receive workmen's compensation. In addition, the North and South Carolina state governments, which are supposed to oversee disease claims, have taken the side of the companies. And the Federal government has neither passed laws to compensate the sick (an advantage enjoyed by black lung victims), nor has the Occupational Safety and Health Administration established acceptable limits on levels of cotton dust.

Brown lung disease, or byssinosis, was first described in Italy in 1705. Since that time it has been studied and analyzed in medical journals in 16 countries. In Great Britain in 1941 it was made a compensable occupational disease. And as far back as 1913, the Department of Labor said that work in cotton mills "was a dangerous trade, [owing to] the constant confinement in a dusty atmosphere." But to the owners of the mills, company doctors and the companies' powerful political partisans, brown lung is almost a myth. Usually, they claim it is "something else," such as asthma, bronchitis or emphysema. Often they allege that the "so-called victim" has simply smoked too much.

Leading the charge to reverse this treatment is the Carolina Brown Lung Association. Formed two years ago, it now has seven chapters in various Carolina mill towns with 700 active members, and 2,500 others too sick to fully participate. Many other employees are afraid to join. As in similar non-union situations, the workers know that if their interest in the anti-company organization becomes known, they will be fired. "When I left my job I had lots of friends in the mill," explains Thomas Newsome, a brown lung victim and a mill worker for 26 years before he retired last month. "And when I went back last week to pick up some of my things, I knew that they had found out about me and the association, they were kind of afraid to be with me."

The Association has two main goals: to clean up the mills and to get workmen's compensation for disease victims. So far, there has been little change in either area, although former Association chairwoman, Lucy Taylor, declares: "Now we got them thinking about us." To date, national standards on cotton dust have rarely been enforced. The rules require employees to wear heavy protective masks and goggles when the level of cotton particles is more than 1.0 milligrams per cubic meter—the level of visible mist. Largely because of pressure from the Brown Lung Association, however, OSHA has prepared standards, under which the nation's cotton industry would be given seven years to install devices which would lower the level of particles to a maximum of .2 milligrams per cubic meter. In addition, company physicians would have to warn employees about health hazards and test them for brown lung.

But time remains a factor. "Seven years means that a whole other generation is going to suffer," says Charlotte Brody, a B.L.A. organizer. "For some of these people there can be an acute reaction after five years."

The Association has been most active in trying to expedite claims for workmen's compensation. In South Carolina, not a single case has been awarded, although there have been a few out of court settlements. In North Carolina, 49 have been settled out of court, 22 have been denied, dismissed or withdrawn, and 129 are pending. In the Carolinas the cotton industry exerts a great deal of influence over state legislators and administrative agencies. And in the mill towns it is almost impossible for an individual to file for compensation without the help of local doctors and lawyers, professionals who often provide fealty to the town's largest employer.

At the Congressional level, the C.B.L.A. is pushing for legislation that would directly benefit the workers. Senator Ernest Hollings of South Carolina is preparing legislation to offer Federal compensation to disabled brown lung employees. In the House, Representative Phillip Burton of California is pushing a measure that calls for a tax on cotton to pay for benefits to disabled mill workers. At present, however, no one is guessing about the chances of the bills' approval.

Meanwhile, people continue to work in the mills; and they continue to get sick. For those who have retired, the medical costs are exorbitant. Linwood Bougham of Roanoke Rapids, for instance, had to be hospitalized seven times in the last year. "What you might say," says Lucy Taylor, "is that just as long as there is a person sick, we will fight. And," she adds, after having to pause for air, "since these companies only want to think about profits instead of people, I reckon we'll have to keep on pushing 'em."

PETER KOVLER

Carolina
BROWN LUNG ASSOCIATION

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Byssinosis and Respiratory Diseases of Cotton Mill Workers

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Byssinosis is defined by the typical history of tightness in the chest, shortness of breath and cough occurring in cotton, flax and hemp workers on the first day back in the mill after an absence, hence, the name Monday tightness. Because byssinosis has been shown to be prevalent in cotton textile workers in the United States and because protracted exposure to cotton is associated with pulmonary impairment and chronic bronchitis producing higher rates of disability, the history and current concepts of the disease are reviewed. The study of byssinosis offers an important opportunity to relate the production of airway narrowing by an environmental agent to chronic pulmonary lung disease.

The Importance of Byssinosis

Byssinosis has a world-wide distribution in cotton, flax and hemp workers, and has been observed in at least 16 countries. The reported prevalence of byssinosis varies from a few percent to practically all workers. Workers in British cotton mills concentrated in Lancashire have shown a consistently high prevalence of byssinosis.[1,2]

Byssinosis was made a compensable disease in England in 1941, but until recently there were only sporadic reports of byssinosis in the United States. In 1961, McKerrow and Schilling found evidence of respiratory disease and impaired ventilation in cardroom workers in two U.S. textile mills.[3] In 1962 Schilling reported that only 14 cases of byssinosis had been recorded from the United States over a 15-year period.[4] Heaphy and Kilburn in 1965 described 18 hospitalized patients with pulmonary disease who had typical "Monday asthma" and cotton textile dust exposure indicating byssinosis.[5] In 1967, Bouhuys reported 22 nonhospitalized cotton workers with chronic respiratory disease, 14 of whom were diagnosed as byssinotic.[6] Increased interest in byssinosis was reflected in further reports beginning in 1969. In one survey, 29% of 214 workers in a prison cotton mill were found to have byssinosis.[7] Zuskin and coworkers found 25% of 59 carders and 12% of 99 spinners of two South Carolina cotton mills to have byssinosis.[8] Schrag and Gullett, in a North Carolina State Board of Health survey of 509 cotton mill workers, found byssinosis in 12%.[9] In a survey of 441 workers in a North Carolina textile plant, Merchant and associates found 6% had Grade 1 or 2 byssinosis, with a prevalence of 20% in preparation areas.[10] In another survey of 404 workers, byssinosis prevalence was 41% in carding, 22% in spinning and 21% in winding and twisting areas.[11] These prevalence rates are similar to those of foreign studies and indicate the magnitude of health impairment related to cotton dust inhalation in cotton mill workers in the United States.

Cotton remains the single most important textile fiber. Of nearly one million individuals currently working with textiles in the United States, it is estimated that at least a third are exposed to cotton dust. The United States is the world's largest supplier of pure and mixed cotton yarns although the production of cotton fibers in many countries throughout the world is increasing. The problem of byssinosis, therefore, is not likely to be solved in the near future by the replacement of the cotton fiber by synthetic fibers.

Historical Background

Occupational illness due to textile dusts was described by Ramazzini in 1705 "... those who hackle in the flax and hemp to prepare it for being spun and wove, afford frequent instances of the unwholesomeness of their trade; for there flies out of this matter a foul mischievous powder, that entering the lungs by the mouth and throat, causes continual coughs and gradually makes way for as asthma ... But at the long run if they find their affliction grows upon them they must look out for another trade; for 'tis a sordid profit that's accompanied with the destruction of health."[12]

Health impairment among cotton mill workers of Lancashire, England was described in 1818.[13] Kay, describing "spinner's phthisis" in 1831, pointed out the relationship to dust, described the particularly high frequency of illness in cardroom workers, and reported that "methods of ventilation and of covering the machines have considerably diminished the evil."[14] In an official report presented to Parliament in 1860, Greenhow[15] described the illness we now know as byssinosis, but credit for coining the term "byssinosis" belong to Adrien Proust.[16] The word byssinosis is de-

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rived from the Greek word βυσσος or Latin *byssus*. For years the word byssus has meant a fine, soft, white fiber and probably originally referred to flax. *The Shorter Oxford Dictionary* gives the commonest use of byssus as "An exceedingly fine and valuable textile fiber and fabric known to the ancients, it denoted properly a kind of flax, but also of cotton, silk, etc."

In 1971 Ludwig Hirt, in discussing disease caused by inhalation of cotton dust, disliked Van Coetsen's term 'pneumonie cotonneuse' and used 'pneumoconiosis lyssinotica' and 'lyssinosis pulmonum'.[17] Proust, in 1877, realizing that Hirt had misused the lyssa (λυσσα) meaning rabies for byssus (βυσσος), called attention to the mistake and was the first to use the term byssinosis.

The word byssinosis became well known after its use by Sir Thomas Oliver in 1902 and 1908 in his books on occupational diseases. Although it was first used to describe a disease caused by the inhalation of cotton dust, byssinosis also occurs among flax and hemp workers and is used in this context.

The term "mill fever" was first used in 1892 by Arlidge[18] and outbreaks of "weaver's cough" believed due to mildew of cotton threads were recognized as early as 1908.[19] Interest in these conditions seemed to wane until the report of the Departmental Committee on Dust in Cardrooms appeared in 1932.[20] This report described progression from early symptoms of incapacity and included ten post mortem studies. In 1936, Prausnitz conducted an extensive investigation of byssinosis and made a detailed report to the British Medical Council.[21] Carey's comprehensive 1965 report, "Byssinosis in Flax Workers in Northern Ireland", is an admirable, modern investigation of this illness.[22]

Clinical Syndromes

In addition to byssinosis the respiratory symptoms of textile workers attributed to cotton mill dust comprise three syndromes which are not distinct. These are mill fever, weaver's cough and an acute illness among workers with low-grade, stained cotton that has been called "Mattress-maker's" fever. Because these syndromes have been associated with byssinosis, they will be described (Table I).

Mattress-Maker's Fever

This condition, apparently not related to byssinosis, was reported by Neal[23] in 1942 as an acute, febrile illness associated with headache, gastrointestinal symptoms and retrosternal discomfort occurring among workers exposed to high dust concentration from low-grade cotton. Outbreaks occurred in several central depots where families gathered during the Depression to make mattresses for home use. The low-grade, stained cotton used was found to be contaminated with the gram negative bacillus, *Aerobacter cloacae*. The clinical symptoms were reproduced in humans by inhalation of contaminated cotton dust by clean cotton to which the contaminants had been added and by a filtrate of cotton dust extract. Although the clinical picture resembles "weaver's cough", no definite relationship has been established.

Weaver's Cough

Since 1900, periodic outbreaks of an acute respiratory illness have occurred among weavers.[19,24] Various etiological agents associated with the cotton yarn have been implicated. Earlier reports were associated with

Table 1. – Principle Features of Respiratory Conditions of Cotton Workers

	Chronic Bronchitis	Byssinosis	Acute Febrile Syndromes		
			Mill Fever	Weaver's Cough	Mattress-Maker's Fever
Etiological Agents	Multiple respiratory viruses and bacteria. Cigarette smoke. Chemical agents as SO_2, formalin, acrolein.	Unknown component in cotton, flax hemp dust.	Textile dust ingredient	1. "Mildewed" yarn 2. Tamarind seed powder 3. Other sizings 4. Unknown contaminants	Endotoxin contaminated cotton dust
Pathogenesis	1. Viral infection 2. Bacterial infection 3. Chemical damage	1. Nonantigenic histamine release 2. Immunopathogenic 3. Endotoxin action	1. Atopy 2. Endotoxin action	1. Antigen-antibody 2. Endotoxin action	1. Endotoxin action
Clinical Symptoms					
1. Fever	Sometimes	No	Frequent	Frequent	Yes
2. Cough	Yes	Variable	Frequent	Severe	Yes
3. Dyspnea (or tightness)	Frequent	Yes	Rare	Severe	Yes
4. Cough with sputum	Yes	Frequent	No	No	No
Historical Features					
1. Acute onset		No	Yes	Yes	Yes
2. "Monday" onset		Yes	No	No	No
3. Acclimatization		No	Yes	No	No
4. New workers affected		No	Yes	Yes	Yes
5. Old workers affected		Yes	No	Yes	Yes

mildewed yarn.[19 33 34 37] Sizing added to thread prior to weaving has been incriminated in other outbreaks. Tamarind seed powder has been one culprit,[28 29] but the offender in yarn sized with other mixtures remains unidentified.

Characteristically, weaver's cough presents as a sudden epidemic of an acute asthma-like illness with a high attack rate. Both old and new workers are affected, acclimatization does not occur, and the illness does not recur when the offending agent is removed. In an outbreak studied in Italy in 1954, asthma-like symptoms lasted as long as six months.[30] Bacteriological and immunological studies were done but no definite conclusion was reached.

Mill Fever

"Mill fever" is a term used to describe a symptom complex of unknown cause which occurs in susceptible persons unaccustomed to breathing cotton dust.[18 31 32] The terms card-room fever, cotton fever, cotton cold, dust fever, dust chills and heckling fever in flax workers probably refer to the same condition. Individuals who are unaccustomed to these vegetable dusts may develop symptoms of malaise, cough, fever, chills and upper respiratory symptoms shortly after exposure. These symptoms may recur daily for days to months until acclimatization takes place and symptoms disappear. Tolerance may be temporarily lost after a period of absence from exposure or if exposure to a greater concentration of dust occurs. The exact prevalence of mill fever among new employees is unknown, but estimates range from 10 to 80%.

Some asthmatics react severely to cotton dust. Because of this dramatic response to cotton dust, many asthmatics undoubtedly avoid future exposure. Therefore the relationship of symptoms to the atopic state is difficult to interpret. However, there is no evidence that present cotton textile workers with byssinosis are more frequently atopic than those without byssinosis.[33]

The occurrence of an acute illness similar to "mill fever" in workers exposed to inhalation of bacterial contaminated dusts and in others exposed to a high concentration of endotoxins has been said to suggest an etiologic relationship between endotoxin containing cotton dust and "mill fever."[34] The relationship between "mill fever" and the subsequent occurrence of the "Monday morning" illness of byssinosis is unknown. Some investigators believe they are stages of the same illness; others confuse the two or ignore "mill fiver" completely. An understanding of the relationship between "mill fever" and byssinosis may provide clues to the pathogenesis of byssinosis.

Byssinosis

Definition and Natural History:

Byssinosis has been defined as a chronic respiratory disease associated with inhalation of cotton, flax and soft hemp dusts. Chest tightness, cough, wheezing and dyspnea in varying degrees of severity are the initial symptoms. The diagnosis depends upon the characteristic symptoms; the 1936 description of Prausnitz is classic:

> The histories of their illness, given with a surprising uniformity by most of the patients, are as follows: After working for years without any appreciable trouble except a little cough, they notice either a sudden aggravation of their cough, which becomes dry and exceedingly irritating, or peculiar attacks of breathlessness. These attacks usually occur on Mondays, whilst the rest of the week finds them in fairly good condition. For a long time the trouble may be almost or entirely limited to this "Monday fever", but gradually the symptoms begin to spread over the ensuing days of the week; in time the difference disappears, and they suffer continuously. When, ultimately, they are forced to give up work, some improvement may occur. But if they resume work, they are forced sooner or later to give it up again. In some, this occurrence is most characteristic: A rest of some weeks or months gives them an opportunity of recovering so far that they feel perfectly fit; yet on the day that they return to the mill, they are struck down with the disease and are hardly able to return home unaided.[31]

Chest tightness, cough, wheezing or dyspnea are recognized on the first day of the work week. Symptoms usually disappear an hour or so after leaving work but may recur each Monday after a weekend away from dust exposure. With continued exposure, the symptoms appear on Tuesday and may progress to other days of the week. Eventually, it is believed, irreversible obstructive airway disease appears. Initially, 20 or more years of dust exposure was required before respiratory impairment was attributed to byssinosis for purposes of workman's compensation in Great Britain. This requirement was later reduced to ten years.

Schilling[35] suggested a system for grading byssinosis which has become the standard classification for epidemiological surveys. The scheme shown below is based entirely on the history of symptoms which may be obtained by use of the British Medical Research Council questionnaire.

Grade ½ — Occasional chest tightness or cough on the first day of the working week.

Grade 1 — Chest tightness on every first day of the work week.

Grade 2 — Chest tightness on the first and other days of the working week.

Grade 3 — Grade 2 symptoms accompanied by evidence of permanent impairment.

Physical examination and chest x-rays of byssinotic individuals are initially normal. When pulmonary impairment develops these individuals are usually diagnosed as having chronic bronchitis and emphysema. A report in 1968 attributes a single case of pulmonary fibrosis of cotton dust inhalation but this must be considered unusual.[36]

Since McKerrow's 1958 report[37] that symptoms are frequently associated with reduced pulmonary function, objective measurements of such changes have become an integral part of the evaluation of the workers. A variety of methods have been used, but most epidemiological investigations have included the forced expiratory volumes in one second ($FEV_{1.0}$). Recently flow-volume curves have been used.[38] Subjects with byssinosis usually show a decrease in expiratory flow rates and in vital capacity on Mondays after 3 or 4 hours of exposure to dust. There is less effect on the following days. The observed changes in airway resistance and decreased flow rates have been attributed to narrowing of small airways due to bronchoconstriction.[39]

Because in cross-sectional studies,

those workers who have decrements in flow rates with exposure show more evidence of pulmonary impairment than those with no significant flow rate response, it has been suggested that "reactors" are at greater risk from dust inhalation than "non-reactors".[40] Using decrement in flow rate as one major criterion and baseline $FEV_{1.0}$ value as the other, Bouhuys[40] proposed a functional grading system which he compared to the historical grading system of Schilling.[41] This scheme was later modified using $FEV_{1.0}$ before exposure as the major criteria and decrement in $FEV_{1.0}$ as a secondary criteria to classify exposed workers for the purpose of removing those showing evidence of pulmonary impairment and/or flow rate response from hazardous work areas, and preventing new workers with evidence of impairment or "reaction" from being assigned to hazardous areas.[42]

Although the association between acute symptomatic and spirometric responses to cotton dust and pulmonary insufficiency in textile workers is supported by strong clinical inference from cross-sectional studies, the only prospective study reported found no evidence that "reactors" or those with clinical byssinosis showed a greater decrease in pulmonary function over time than did other cotton workers.[43] Synthetic workers showed a decline of 29 ml per year while the decrement of all cotton workers was somewhat greater than 50 ml per year. However, when annual decrement in $FEV_{1.0}$ by diagnosis of byssinosis was considered, byssinotic and nonbyssinotic and "reactor" and nonreactor subjects had similar annual decrements. Unfortunately because it is not clear whether selection out of the population was taken into account interpretation of these findings is difficult.

Byssinosis, Chronic Bronchitis and Smoking:

Both the limited pathological data and cross-sectional surveys of textile workers have indicated that chronic bronchitis is a frequent finding in these populations and specifically among those who have been diagnosed as byssinotic.[10 44] Those exposed to textile vegetable dusts show a strong association between gradient of respirable dust exposure and simple bronchitis.[45] This association has been similar to the association between dust exposure and byssinosis. When byssinosis and bronchitis have been related, the correlation has been strong and prompted Elwood[44] to suggest that byssinosis was essentially chronic bronchitis with superimposed acute symptoms. It appears that the two diseases are closely associated, but whether they share the same mechanism of lung damage and identical pathology is not known.

Many of the problems encountered in sorting out the multiple causal factors in coal worker's pneumoconiosis are met in studying byssinosis. Two problems in accurately classifying byssinosis to establish the etiology are the lack of definitive study of the pulmonary pathology of byssinotic patients, and variable definitions used for the clinical syndromes of byssinosis and of chronic bronchitis. If all grades of byssinosis are compared to all stages of chronic bronchitis, the association is expected to be less perfect than when Grade 3 byssinotics are compared with more severe bronchitics. The relationship with emphysema is more difficult to establish because there is no standard method to make a clinical diagnosis of emphysema. Clearly, the definitions used must be stated and qualified when such comparisons are made.

The role of cigarette smoking in causing chronic bronchitis is well known. The effect of smoking on byssinosis frequency and severity has not been as thoroughly studied, although most evidence indicates that smoking increases the workers risk of byssinosis. Carey[22] found that byssinosis occurred more frequently among smokers than nonsmokers as did Bouhuys[7] and Zuskin.[8] Zuskin found, however, that smoking habits did not affect the decrease in Monday $FEV_{1.0}$. McKerrow and Schilling,[7] based on decrement in $FEV_{1.0}$, suggested that smoking may potentiate the effect of cotton dust. Recent evidence suggests that the smoker is more likely to have byssinotic symptoms and that cotton dust and cigarette smoke may interact in their effect on byssinosis prevalence. For these reasons, it has been suggested that smokers be screened away from dusty work areas.[10] This apparent effect of cigarette smoking on byssinosis makes the determination of the relationship between byssinosis and chronic bronchitis more important

Pathology:

It is thought that patients who die with Grade 3 byssinosis have the pulmonary pathology of chronic bronchitis and emphysema, but no specific abnormality.[20] Specific dust bodies[46] said to be present in the lungs are probably non-specific ferruginous bodies unrelated to byssinosis or to bronchitis. Recent autopsies of mill-room workers in whom neither smoking history nor clinical history was known, failed to reveal pathological changes other than the mucous gland hyperplasia and goblet cell metaplasia usually seen in chronic bronchitis.[47] Until a large, carefully controlled epidemiologic and pathologic study in which exposure to cigarette smoke, environmental and occupational exposures are known, as well as clinical histories, is done it will be difficult to differentiate between and understand the pathological interrelationship of end stage byssinosis, chronic bronchitis and emphysema.

Pathogenesis:

One question in considering the pathogenesis of byssinosis is the nature of the pathology or other end-point to which experimental studies are to be directed. Should the investigator assume that elucidation of the mechanism of the acute airway response will disclose the pathogenesis of the chronic disease process as well? The conclusion that acute byssinosis becomes chronic is supported only by histories of patients who became disabled, but has not been studied prospectively over a sufficient number of years.[38 43] Because the chronic process is neither understood nor defined, the acute process manifested by chest tightness, bronchoconstriction and decrease in flow rate has been studied almost exclusively. Most investigators of the mechanism of byssinosis have assumed that the agent responsible for the acute effects of cotton dust is the same agent which is responsible for pulmonary disability and retirement. This is still an important question.

Other questions regarding the pathogenesis of byssinosis include the nature of the etiologic agent, its loca-

tion in the vegetable plant and the mode of transmission. Neither the active component of cotton dust nor its mechanism of action has been established although respirable dust particles, are considered to be the source and mode of transmission of the active agent.[48] Mechanical factors are not implicated because exposure to much higher dust concentrations of inert dusts and to the vegetable dusts of jute and sisal are not associated with clinical symptoms or physiological changes of byssinosis.[37 49 50] The quantities of inorganic components such as silica and other minerals are too small to be significant.[51]

At present there are three hypotheses for the mechanism of the acute process in byssinosis: (1) a nonantigenic histamine release; (2) endotoxin activity and (3) immunologic mechanism.

Histamine Release:

The role of pharmacologic histamine liberation in the pathogenesis of byssinosis is unsettled despite much discussion in recent articles. Two studies suggest that byssinotic subjects have no greater sensitivity to inhaled histamine than nonbyssinotic subjects.[51 52] The presence of a histamine-like substance in cotton dust was demonstrated by Maitland, Heap and MacDonald and subsequent investigators reported its presence in cotton and various other vegetable dusts.[53 54 55] Antweiler found the small amounts of histamine present in cotton and other vegetable dusts to be insufficient to cause symptoms.[56] Histamine release, from lung tissue by cotton dust was suggested as early as 1937 by Haworth and MacDonald.[55] They believed histamine accummulated in lungs over the weekend and was released by Monday's contact with an "allergen" in cotton dust. Daily exposure the remainder of the week prevented reaccumulation of histamine in the cotton worker's lungs. Biological activity of this factor has been demonstrated by Nicholls et al in extracts of raw cotton, cardroom dust and parts of the cotton plants particularly bracts, but no activity was found in extracts of pericarps.[57] There is no direct documentation of histamine release in vivo although a metabolic product of histamine does increase after exposure.[58 60] Since it is well known that histamine produces acute changes in air flow because of its bronchoconstrictor and edemagenic activity, it has been assumed that this occurs in vivo as well. It is true that the same cotton extracts has in at least one study produced symptoms compatible with byssinosis and reduced flow on spirometric testing.[59]

Characteristics of the active agent which releases histamine from lung tissue include water solubility, resistance to boiling and sensitivity to boiling in acid or alkali.[60] Also, Hitchcock reported that a steam volatile component of cotton dust extract which had physicochemical behavior similar to methylpiperonylate.[61] In a study of textile workers, Hamilton et al demonstrated that the active principle was filterable at 0.22μ, nonvolatile at 40C and nondialyzable using endobronchial challenge as the assay.[52] One objection to the theory of nonantigenic histamine liberation by cotton dust is the lack of a satisfactory explanation of permanent lung damage resulting from histamine release along. Antigenic or nonantigenic histamine release may explain the acute response but is hard to implicate in the chronic response. Several agents may be involved; one agent may produce the acute response mediated via histamine as a reversible protective phenomena without chronic effects, another agent or agents may be responsible for the chronic effects which resemble or are identical with chronic bronchitis. Additional studies of histamine or other chemical mediators released in human lungs and bronchi by plant extracts, dust and their chemical components may be helpful.

Endotoxins:

Because bacteria and fungi are present in large number in cotton dust, several investigators have attempted to show a significant relationship between viable agents and byssinosis.[21 62 63] The lack of an appropriate incubation period and predictable febrile illness, however, along with daily recurrence of chest tightness and rapid remission after leaving the mill was against this possibility. Endotoxin, a bacterial or fungal product, was considered as an alternative. Pernis et al[34] and Cavagna et al[64] proposed that the symptoms of byssinosis were due to release of a histamine-like substance following inhalation of gram negative bacterial endotoxin found in cotton dust. Their reasons included the consistent presence of endotoxin-like substances in cotton dust, correlation of endotoxin-like levels with byssinosis prevalence, the demonstration of inconstant pulmonary function changes upon challenge of human volunteers with purified endotoxin (not from cotton dust) in animals previously sensitized with endotoxin. Subsequent studies by the same authors demonstrated that rabbits develop hemagglutinating antibodies after inhalation of endotoxin or cotton dust extract, and that the challenge of endotoxin sensitized rabbits increases airway resistance. The usual endotoxin content of cotton dust, however, is considerably less than the experimental dose, furthermore, there is no convincing evidence that the response to the inhalation of appropriate endotoxin concentrations by byssinotics is different than that of nonbyssinotic subjects.[65] Cavagna et al also reported pathologic changes in lungs of animals exposed to endotoxin or to cotton extract by aerosol.[64] The changes included bronchial cell exfoliation, endobronchial secretion and peribronchial lymphocyte infiltrates.

Immune Mechanism:

Development of hypersensitivity to a component of cotton dust was suggested as a cause of byssinosis in the Departmental Committee Report of 1932.[20] Prausnitz thought there was a significant relationship between positive skin tests to cotton plant materials and symptoms of byssinosis.[21] Other studies have not supported a positive correlation of disease with skin tests.[66] In an extensive recent study of allergy to cotton, hemp, flax and jute assessed by skin tests immediate skin reactions were occasionally observed, delayed skin reactions were nearly always present in both byssinotic and nonbyssinotic workers and both types of skin tests were usually absent in normal, nontextile subjects.[67] Positive skin reactions to hemp, flax and jute were found in cotton workers. Although many textile workers and even some normals show skin reactions to textile dusts, toxic factors may be involved. Low correlations between skin reactivity

and pulmonary responses except in asthmatic subjects do not support an allergic pathogenesis for byssinosis.

An immunopathologic mechanism unrelated to skin reactivity has been investigated. Taylor and associates[68] reported a condensed polyphenol as the component of cotton dust which reacted with agglutinating antibodies in byssinotic subjects as opposed to nonbyssinotic subjects. Byssinotic subjects had higher titers than nonbyssinotic subjects and normals. In a double blind endobronchial challenge study symptoms of byssinosis were reproduced only in those subjects with known byssinosis but no objective changes in pulmonary function could be demonstrated. The authors suggested that the symptoms of byssinosis were produced directly by the antigen-antibody complex or indirectly by the release of a pharmacologically active substance but did not rule out the possibility that antibody levels could be the result and not the cause of byssinosis. Popa could not demonstrate precipitin antibodies to extracts from cotton, flax, hemp and jute.[69] He found that subjects who were normal, asthmatic, bronchitic, and byssinotic had similar titers of circulating antibodies against textile dust antigens but, no definite causal relationship of these to disease has been established.

Early observers related the prevalence of disease to visible dust. This correlation has since been confirmed by measured dust levels. Attempts to control dust in cotton mills which began in England have continued in the United States. Vacuum exhaust systems on carding engines, hoods, exhaust fans and filtration of air are used extensively. Attempts to control dust by adding mineral oil or water and circulating and filtering air have not solved the problem. Because 20% of the weight of low grade raw cotton may be lost as dust and debris, the magnitude of the problem is obvious. Carding at increased rates also increases dust levels in work areas and often offsets exhaust ventilation. Symptoms were first thought to correlate with total airborne dust concentrations, then with medium-sized particles and later with fine (respirable) particles.[48,54] A dust threshold limit value (TLV) of 1 mg/M^3 for total dust has been recommended by the American Conference of Governmental Industrial Hygienists but has not been achieved in many textile plants.[70] Evidence that the "respirable" or fine dust is the most important fraction has led to the development of sampling equipment for this size range.[11] It has been suggested that the concentration of respirable dust be compared with decrement in $FEV_{1.0}$ and bronchitis prevalence, as well as byssinosis prevalence to determine an improved TLV.[42] Improved dust control may require redesign of ventilation systems and new methods of dust removal by exhaustion, condensation, or precipitation. A major technological advance in the spinning of cotton yarn could reduce this industrial hazard.

Table 2. — Recommendations for Classification and Management

Functional Severity	$FEV_{1.0}$* (% of predicted)	$\Delta FEV_{1.0}$† (%)	Interpretation of $FEV_{1.0}$	Recommendations for Employment
F_0	>80 (no evidence of chronic ventilatory impairment)	a) -4 to 0, or +	minimal or no acute effect of dust on ventilatory capacity	No change, annual $FEV_{1.0}$
		b) -9 to -5	moderate acute effect of dust on ventilatory capacity	No change, 6 mo. $FEV_{1.0}$
		c) -10+	definite and marked acute effect of dust on ventilatory capacity	Move to lower risk area 6 mo. $FEV_{1.0}$
F_1	60-79 (Evidence of slight to moderate irreversible impairment of ventilatory capacity)	a) -4 to 0, or +	As above	No change, 6 mo $FEV_{1.0}$
		b) -5+	As above	Move to lower risk area, 6 mo. $FEV_{1.0}$
F_2	<60 (Evidence of moderate to severe irreversible impairment of ventilatory capacity)	-	-	Work requiring no cotton dust exposure, detailed pulmonary examination

* $FEV_{1.0}$ in the absence of dust exposure (2 days or longer)
† Difference between $FEV_{1.0}$ before and after 6+ hours of cotton dust exposure on a first working day

Dust Removal:

Dust removal from cotton before it enters the mill may well be the most important method to reduce dust-related diseases of textile workers. An economical method for removing or detoxifying cotton textile dust would eliminate byssinosis before the mechanism is understood. Studies on the application of steam to cotton show promise as one means to eliminate byssinosis without altering other manufacturing processes.[71] If, as has been proposed, portions of the cotton plant, such as bracts, are responsible for the active component in cotton dust, the genetic development of a "safe" plant is possible. The admixture of debris resulting from the increased use of the mechanical cotton picker might be eliminated by improved design or by picking the cotton while green and removal from the boll without contamination by vegetable trash. New seed removal techniques applied before bracts and leaves dry and powder could also be effective. Until the active material can be removed from cotton before arrival at the mill or the dust removed from the worker's environment, byssinotic workers with significant pulmonary impairment must be removed before they have irreversible insufficiency.

Medical Approach:

Present methods of medical examination can identify those workers who react to dust and remove them before they have permanent impairment. Preemployment examinations to identify and exclude from dusty areas those who already have evidence of respira-

tory disease, and periodic evaluations to detect workers with bronchitis and early byssinosis are feasible at this time. The initial medical evaluation should include detailed inquiry into occupational, environmental and cigarette smoke exposures, and measurements of flow rates during forced expiration including the well standardized $FEV_{1.0}$. Periodic examinations should include ventilatory studies before and after dust exposures. Those workers with a marked response to dust should be removed before they have developed significant disability, Table 2. Application of present medical knowledge should prevent or delay development of pulmonary impairment among textile workers.

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The CHAIRMAN. Thank you very, very much, Mrs. Briggs. Why don't we proceed with Mr. Bowen?

Mr. BOWEN. On behalf of the Brown Lung Association and the people I represent in North and South Carolina, I want to express sincere thanks to you and Senator Javits. Until your standards were enunciated first in the 27 recommendations and then down to the 19 recommendations, and down to the present bill, the worker in North Carolina and South Carolina would be exploited beyond your belief as far as industrial accidents were concerned. You would not believe the coverage that they received.

They were required to live on $35 a week as a maximum under the workmen's compensation laws as they existed.

We continuously went before our legislative bodies, but the textile industry as a whole had a stranglehold on them. We would get a bill and send it to the Labor or Commerce Committee in our House and Senate and we couldn't get them out until your bill came out. Thanks to you, they are faring better. They are not faring as well as they should.

While your bill is broad, there are some things that could be improved. You did some things I didn't expect you would do. Even though there are other elements that can be covered, it is comprehensible. It is workable. It will not hurt Michigan, New York, Wisconsin or Hawaii. It will hurt the industrial leaders who have failed to protect the workers. It is like the civil rights bill. It was not hurting the major States of the North and many other States, but it did hurt the Southern States who had not given the people the rights they were entitled to, and rightly so. And I was born and reared in the South.

I say the same thing as far as workmen's compensation. We have down South many northern industries with profits flowing into New York, industries like J. P. Stevens and others. Our people have not been protected. We have no reemployment rights in our workmen's compensation. You state in your bill "Rights of Reemployment." It is not as strong as we would like, but it is better than it is now. A worker can have severe injuries and be terminated. He has no recourse except workmen's compensation. Many times, he has a very strong battle to even receive those workmen's compensation rights that he does have.

Senator JAVITS. What are they now?

Mr. BOWEN. As of June, the benefits were increased to more than double. We increased them and we still have a limit.

Senator JAVITS. There is still a limit?

Mr. BOWEN. Yes, sir. We have a 500-week limit in South Carolina. Your bill addresses it.

An employee can have a very serious injury, maybe even heart damage, and he has to go through an employer's doctor, who has no knowledge about it; yet he is compelled to go to him for treatment and even serious and major surgery. He has no choice.

Senator JAVITS. Senator Williams and I had the same experience in ERISA until outraged workers banged on the doors of their legislators. That caused something to happen.

Mr. BOWEN. One of the prior speakers, the executive of a big corporation, said something about lawyers. It seems everywhere I turn I am

hearing comments about attorneys. I am an attorney. I make no apologies. It took me 9 months in the trenches in Korea for the education that I got. Most of the freedoms the people enjoy today are the result of plaintiffs' attorneys who are willing to represent people who have no money. If they don't win, they don't get paid. I wish doctors would treat us on the same basis. If they can't make you well, then you wouldn't have to pay. [Applause.]

There is a strong allegiance between the industrial companies and the medical profession. I am sure you have seen this same type of situation. If you go to the country club, you don't see the doctors out there playing golf with people in overalls. They only play with the captains of industry. It is time that the workers are no longer exploited. This U.S. Senate will have to stop it with these national standards, which I urge you to pass as soon as possible.

The CHAIRMAN. May I ask you a few questions in connection with Mrs. Briggs' case?

She has now finally been found by the Workers' Compensation Bureau to have brown lung disease?

Mr. BOWEN. She has been so diagnosed in a hearing before one single commissioner. It was argued before the full Commission, which consists of six persons. Her case has not been finally adjudicated. It is still before the Industrial Commission.

The CHAIRMAN. When did Ms. Brigs first file?

Mr. BOWEN. 1975, as I recall. We still have these barriers, this business of the medical panel that we have in our State, even though it has been abolished by our subsequent legislation.

In her case, if they say it is not retroactive, then, of course, she will be sent back to a medical panel. Not a single award has been made in South Carolina for byssinosis by the medical panel. Even though Dr. Adrian Proust in 1867 diagnosed it as a cotton industry illness, we have had no presumptive diagnosis. Our law prohibits presumptive diagnosis in this area.

The CHAIRMAN. What happened between 1975 and the first decision?

Mr. BOWEN. There was the taking of depositions before final hearing and opinion and an award was issued by a single commissioner.

Our industrial commissioners were in a state of not understanding what was going to happen because if they went under the old law, the people would not receive the award. The commissioner who heard it, being a layman, took the compassionate view that she was entitled to compensation.

The CHAIRMAN. Since the law has been changed, could this kind of case go through this long, laborious process and still be denied.

Mr. BOWEN. Yes. Unfortunately we have barriers in our workmen's compensation law where the employer can now send this person who files under byssinosis to the medical college to a doctor who specializes in pulmonary diseases. They say it is not binding on the Industrial Commission, but that has not been challenged.

If I have a general practitioner who say, yes, and then they send her to the medical college, the court would look at this and say that this man is an expert and this general practitioner cannot qualify in this area, and we are back where we started in that respect.

The CHAIRMAN. What do you feel would be the best way for us to proceed? With our comprehensive bill, S. 3060, that deals with all occupational diseases, or should we go disease by disease, with a specific law for each disease?

Mr. BOWEN. No. I think it should be a comprehensive bill as you have indicated because you will get bogged down in every area like asbestosis and pneumoconiosis and other conditions that result from chemicals in employment. There are many chemicals now that we are not aware of. You cannot do it disease by disease.

We had one of these provisions in the occupational disease section where they set up a list of diseases. In North Carolina and South Carolina, byssinosis was not listed. If you had a diagnosis, you could not recover because it was not on the list of diseases.

The CHAIRMAN. Under our bill, after a period of study, there will be, for the diseases which have been studied, certain standards dealing with disease compensation, with necessary presumptions, established under procedures spelled out in the bill. Does that suggest to you that we are through standards dealing with this problem on a disease by disease basis?

It seems to us that this mechanism will certainly simplify procedures with respect to compensating those diseases that have gone through the whole study process and the hearing process and the standard-setting process. For other diseases, we have, by taking away the current, artificial barriers to compensation, given the ill employee an opportunity to come in and go to proof on the existence of the disease and causation, even if the disease itself has not been the subject of a standard under our legislation. Is that the way you read it, Mr. Bowen?

Mr. BOWEN. Yes.

The only problem is if we have many people like Ms. Briggs, who have been out of the industry for many years and had no knowledge until recently that she had byssinosis because the doctors refused to diagnose it. It would be diagnosed as chronic bronchitis, emphysema—anything but byssinosis.

Now, doctors are making diagnoses of byssinosis. This would be eliminated under your bill as written because it is not retroactive.

Dr. Peter Barth, when he was testifying, talking about the economics of making it retroactive. Of course he is talking about dollars. But nobody talks about the life and misery and suffering of these people who have the condition who are not going to get compensated unless Congress does something about it just like you did in the black lung field.

The CHAIRMAN. We reach back 2 years with this bill. We also require that recommendations be made for compensating those employed in prior years who contracted the disease and are shut out because of the time limitations of this bill. We require that there be recommendations for compensation of such individuals whether under social security, through its disability provisions, or whatever. But they would not be under the provisions of this bill but we would hope to find some ways that compensation could reach them. We don't know what the answer to that is.

Mr. BOWEN. If you will look at the record of the hearing that Senator Hollings held, I introduced a copy of "The Textile World."

In 1940, when these cases arose, they requested more time to study byssinosis. In 1976, they were making the same request. Today, they are still making that request before our legislative bodies. They have been successful.

We may have won a battle, but they have won the war, without the assistance of you and Senator Javits and Congress.

The CHAIRMAN. Are significant improvements being made in reducing the hazards?

Mr. BOWEN. Our commissioner of labor in South Carolina has said that he has ruled that they had to comply with the national standards recommended by Congress. Of course, it is a matter of having people wear masks in the plant where they work to keep out the cotton dust. There is some effort being made in that respect, but it has a long way to go.

The CHAIRMAN. How are workers accepting the interim protection, the masks? Are they being used? Have they been accepted?

Mr. BOWEN. I understand it just started in the past 2 or 3 weeks since Mr. McGowan, of South Carolina, ruled he would make them comply with national standards. It is something that has just been instituted. He has a paucity of employees to go around and do the necessary inspection, and this business of being able to get in at a time when they wouldn't know he was coming makes a lot of difference in these types of inspections.

The CHAIRMAN. Thank you very much.

Senator JAVITS. I would like to thank you for your compassion and your eloquence. Let us keep it up. We will also.

Mr. BOWEN. I can assure you that I will.

Thank you.

The CHAIRMAN. Senator Hollings who was unable to be here today, has sent his statement, which I shall make a part of this record at this point.

[The prepared statement of Senator Hollings follows:]

STATEMENT BY SENATOR ERNEST F. HOLLINGS (D-SC) ON S. 3060, THE NATIONAL WORKERS COMPENSATION STANDARDS ACT OF 1978. SUBMITTED TO THE SENATE COMMITTEE ON HUMAN RESOURCES.

I APPRECIATE THE OPPORTUNITY TO SUBMIT A STATEMENT TO THE LABOR SUB-COMMITTEE OF THE HUMAN RESOURCES COMMITTEE ON THE ISSUE OF WORKERS' COMPENSATION. I REGRET THAT MY SCHEDULE DID NOT ALLOW ME TO APPEAR IN PERSON. FIRST, LET ME COMMEND SENATOR WILLIAMS AND SENATOR JAVITS, THE CHAIRMAN AND RANKING MEMBER OF THE COMMITTEE, FOR THEIR EFFORTS AND ACCOMPLISHMENTS ON BEHALF OF WORKERS THROUGHOUT OUR COUNTRY AND SPECIFICALLY APPLAUD THEIR CURRENT EFFORTS TO IMPROVE OUR SYSTEM OF WORKERS' COMPENSATION.

LAST DECEMBER, WITH THE HELP OF YOUR ABLE COUNSEL MIKE GOLDBERG, I CHAIRED HEARINGS IN GREENVILLE, SOUTH CAROLINA ON SERIOUS HELATH PROBLEMS AFFECTING COTTON TEXTILE WORKERS. AT THAT TIME WE LEARNED A GREAT DEAL ABOUT THE SPECIFIC PROBLEMS PEOPLE WERE HAVING IN RECEIVING COMPENSATION FOR OCCUPATIONAL DISEASE. A REAL NEED WAS IDENTIFIED AND I AM CERTAIN THAT PROVISIONS EMBODIED IN YOUR LEGISLATION, S. 3060, WILL REMOVE SOME OF THE BARRIERS WHICH NOW PREVENT JUST COMPENSATION.

UNFORTUNATELY, I BELIEVE THE MAGNITUDE OF THE PROBLEM WHICH EXISTS IN THE CAROLINAS AND ELSEWHERE WITH REGARD TO COTTON TEXTILE WORKERS REQUIRES MORE THAN WHAT IS PROMISED BY YOUR PROPOSAL. THE PROBLEM IN THE COTTON TEXTILE INDUSTRY IS BASICALLY THIS: WORKERS EXPOSED TO HIGH LEVELS OF COTTON DUST OVER A PERIOD OF YEARS DEVELOP A DEBILITATING CONGESTIVE LUNG DISEASE KNOWN AS BYSSINOSIS OR BROWN LUNG. THE DISEASE HAS BEEN MEDICALLY RECOGNIZED FOR MORE THAN A CENTURY, HAS BEEN COMPENSATED IN GREAT BRITAIN SINCE 1947, AND HAS BEEN TOTALLY IGNORED AND REFUTED IN THIS COUNTRY UNTIL JUST THE LAST FEW YEARS. WE RECEIVED EXCELLENT MEDICAL TESTIMONY ON BYSSINOSIS FROM TWO OF THE COUNTRY'S LEADING EXPERTS, DR. JAMES MERCHANT OF THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH AND DR. AREND BOUHUYS OF THE YALE MEDICAL SCHOOL. I AM SUBMITTING A TRANSCRIPT OF THIS HEARING FOR YOUR RECORD.

THE HEARINGS IN GREENVILLE HIGHLIGHTED TWO IMPORTANT PROBLEMS IN DEALING WITH COMPENSATION OF BYSSINOSIS. FIRST, THE COMPENSATION SYSTEMS IN NORTH AND SOUTH CAROLINA, BY ANY MEASURE, WERE TOTALLY INADEQUATE. ALTHOUGH CERTAIN CHANGES IN THE SOUTH CAROLINA LAW HAVE SINCE TAKEN PLACE, ONLY A HANDFUL OF AWARDS HAVE BEEN MADE. EACH OF THESE HAS BEEN APPEALED, AND NOT ONE NICKEL HAS BEEN PAYED. SECOND, EVEN IF THE STATE SYSTEMS ONE DAY PROVE TO WORK AS INTENDED, THOSE WORKERS MOST EGREGIOUSLY VICTIMIZED STILL STAND THE LEAST CHANCE OF BEING COMPENSATED. BECAUSE OF THESE FINDINGS,

SENATOR THURMOND AND I INTRODUCED LEGISLATION TO PROVIDE FEDERAL COMPENSATION FOR THE VICTIMS OF BROWN LUNG DISEASE. WE PATTERNED OUR APPROACH AFTER THE WILLIAMS-RANDOLPH-JAVITS BLACK LUNG LAW AND WE ARE HOPEFUL THAT EARLY NEXT YEAR YOUR COMMITTEE WILL SCHEDULE HEARINGS.

I UNDERSTAND THAT YOUR PREFERENCE FOR PROVIDING COMPENSATION FOR OCCUPATIONAL DISEASE IS TO IMPROVE THE STATE SYSTEMS RATHER THAN EXTENDING THE BLACK LUNG APPROACH TO BYSSINOSIS AND OTHER EMPLOYMENT RELATED DISEASES. TO SOME DEGREE I CAN SYMPATHIZE WITH YOUR CONCERNS, HOWEVER, I CONTEND THAT OUR PRIORITIES ARE MISPLACED. IN OUR SEARCH FOR ACCOMMODATION WE HAVE FORGOTTEN THOSE PERSONS MOST DESERVING AND MOST IN NEED OF OUR HELP. I SPEAK, OF COURSE, OF THOSE OLDER DISABLED WORKERS WHO HAVE BEEN SELECTIVELY ELIMINATED FROM STATE ASSISTANCE BY AN ARBITRARY STATUTE OF LIMITATIONS AND WHO STAND TO SUFFER THE SAME FATE UNDER THE COMPENSATION STANDARDS PROPOSED IN S. 3060.

I KNOW THE MEMBERS OF THE HUMAN RESOURCES COMMITTEE SYMPATHIZE WITH THE PLIGHT OF THE VICTIMS OF BROWN LUNG DISEASE AND I TRUST THEY WILL ACKNOWLEDGE THAT THE ONLY WAY MEANINGFUL COMPENSATION WILL EVER COME TO THE OLDER DISABLED TEXTILE WORKER IS THROUGH FEDERAL BENEFITS. WHILE WE ARE ALL CONCERNED WITH LIMITING NEW FEDERAL SPENDING, I HONESTLY DON'T SEE COST AS A MAJOR OBSTACLE TO WHAT I AM PROPOSING. BLACK LUNG BENEFITS ARE EXPENSIVE--$1.2 BILLION A YEAR. HOWEVER, UNDER THAT PROGRAM ELIGIBILITY EXTENDS TO THE ENTIRE DISABLED MINER POPULATION, WITH BENEFITS PRESENTLY GOING TO MORE THAN 60,000 PEOPLE. TARGETING BROWN LUNG COMPENSATION BENEFITS TO A LIMITED, FINITE POPULATION OF DISABLED TEXTILE WORKERS WOULD COST ONLY A FRACTION OF $1.2 BILLION, AND THE INITIAL COST WOULD DECLINE EACH YEAR AS THE POPULATION OF ELIGIBLE PERSONS DIMINISHES.

HOPEFULLY, WHEN FURTHER HEARINGS ARE HELD, WE CAN DIRECT OUR ATTENTION TOWARD ALTERNATIVE METHODS OF PROVIDING FEDERAL COMPENSATION AND DEVELOP AN ACCURATE ESTIMATE OF THE LONG RANGE COSTS INVOLVED. MR. CHAIRMAN, I KNOW POSITIVE RESULTS CAN ONLY BE ACHIEVED WITH THE ACTIVE SUPPORT OF YOU AND YOUR COMMITTEE. I SOLICIT THIS SUPPORT AND OFFER WHATEVER ASSISTANCE I CAN PROVIDE.

The CHAIRMAN. The hearing is recessed for today.

[Whereupon, at 4:35 p.m., the committee recessed, to reconvene tomorrow, Tuesday, September 20, 1978, at 2:30 p.m.]

NATIONAL WORKERS' COMPENSATION STANDARDS ACT OF 1978

WEDNESDAY, SEPTEMBER 20, 1978

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
OF THE COMMITTEE ON HUMAN RESOURCES,
Washington, D.C.

The committee met, pursuant to notice, at 2:35 p.m. in room 4232 Dirksen Senate Office Building, Senator Harrison A. Williams, Jr. (chairman of the subcommittee) presiding.

Present: Senators Williams and Javits.

The CHAIRMAN. We are ready to come to order.

This afternoon we are holding our second day of hearings on S. 3060, the Federal Workers' Compensation Standards Act of 1978.

This bill will reform our Nation's workers' compensation system to meet the needs of our modern industrial society.

The need for reform was first highlighted in the 1972 Report of the National Commission on State Workmen's Compensation Laws. Since that time, it has been generally agreed upon that while the States have made considerable progress in modernizing their laws, much remains to be done if they are to meet the 19 essential recommendations of the National Commission.

It was the National Commission, a group composed of outstanding experts, which first recommended Federal standards for workers' compensation laws.

The target date which the National Commission set for updating State laws has long since passed. And we should now enact Federal standards to make the law work efficiently and effectively for our Nation's working men and women.

Workers' compensation has, in the past, traditionally been a State program. State laws establish eligibility and set levels of benefits. These laws are administered by State agencies and the adjudication of claims is the responsibility of the individual States.

Our bill will not usurp the role of the States. Rather, it will encourage them to revise their systems of compensation so that they are fair and efficient, and provide benefits which reflect the needs of America's workers.

Widespread injury, accident, and disease is still, unfortunately, a fact of industrial life throughout our Nation. There are millions of disabling injuries in America's shops and factories each year. There are still thousands of cases of industrial disease—there are still as many as 100,000 deaths annually which result from job-related causes.

The victims of these tragedies must be adequately compensated. American industry must be encouraged to make its factories and

shops safe. A fair and efficient workers' compensation system will do much to resolve both of these pressing problems.

So without further ado, I welcome our witnesses and open this second day of hearings on this important legislative proposal.

I am very pleased to have as our first witness this afternoon Mr. Andy Biemiller of the AFL–CIO.

We welcome you back to the committee and look forward to your statement.

STATEMENT OF ANDREW J. BIEMILLER, DIRECTOR, DEPARTMENT OF LEGISLATION, AFL–CIO, ACCOMPANIED BY LARRY GOLD, ASSOCIATE GENERAL COUNSEL; AND LAWRENCE T. SMEDLEY, ASSOCIATE DIRECTOR, DEPARTMENT OF SOCIAL SECURITY, AFL–CIO

Mr. BIEMILLER. Thank you, Mr. Chairman.

I am accompanied today by associate general counsel Larry Gold and by our associate director of the department of social security, Mr. Larry Smedley. I have a short resume here that I will read. This is a short summary of the text, which we furnished to you which, I assume, you will place in the record.

The CHAIRMAN. The full statement will be placed in the record. We appreciate that.

Mr. BIEMILLER. Mr. Chairman, the AFL–CIO is pleased to submit its views to this committee on S. 3060, legislation introduced by distinguished members of the committee which would establish minimum Federal standards for State workers' compensation programs.

We wish to commend your committee for directing its attention to this subject, so vital to the economic welfare of every working man and woman in the Nation. Workers' compensation is, indeed, one of the most important legislative issues requiring action by Congress.

MINIMUM STANDARDS

The purpose of S. 3060 is to establish throughout the workers' compensation system minimum standards for greater adequacy and fairness. Section 4 of S. 3060 contains 17 standards which an employer must meet in order to guarantee the victims of work injury and disease a number of basic benefits.

These major standards include: Compulsory coverage of virtually all wage and salary workers in private industry, full coverage of all occupational diseases, adequate weekly benefit amounts, adequate time limits for filing claims, full medical care, free choice of qualified physicians by the injured worker, benefits to the totally disabled for the entire period of disability, and benefits to widows until death or remarriage.

Most of the minimum standards have been approved and recommended for enactment in the States by every major group concerned with workers' compensation matters, including the National Commission on Workers' Compensation, the Department of Labor, the Council of State Governments, and organized labor.

These standards would advance the longstanding objective of the AFL–CIO to establish a Federal responsibility for the income main-

tenance, medical care, and rehabilitation of American workers injured on the job. The AFL–CIO has been urging the Federal Government to meet its responsibilities in this areas for many years. Work injury and disease is a national problem. It requires a national solution.

IMPLEMENTATION

The Secretary of Labor reviews each State workers' compensation law within 2 years after enactment of the law and at least annually thereafter. A certification is made as to the extent of compliance with Federal standards. When a State law is certified as in compliance, workers' compensation claims will be determined solely by the State, without any Federal involvement.

When a State law is not fully certified, an injured worker who is dissatisfied with the award of the State workers' compensation agency which fails to award compensation at least equivalent to that provided by a minimum standard may file a petition for review with a Federal Benefits Review Board for supplemental compensation.

However, on issues relating to supplemental compensation, the findings of fact by State agencies are "conclusive if supported by substantial evidence of the record as a whole." On issues covered solely by State law, the findings of fact and conclusions by the State agency are "conclusive and not subject to review."

In other words, such issues as whether death, injury or disease were work related, the degree of disability, et cetera, will be determined by State workers' compensation laws and commissions. Thus, some of the most vital decisions affecting a worker's claim will already have been made without any opportunity for review or for further evaluation of these issues at the Federal level.

In our opinion, the Federal Benefits Review Board must have broader authority to examine the facts in such cases if workers are going to be adequately protected by the minimum standards.

OCCUPATIONAL DISEASE

S. 3060 authorizes the Secretary of Labor in cooperation with the Department of Health, Education, and Welfare, to devise and issue standards for determining whether certain diseases are occupationally related and whether the worker's death or disability is due to such a disease. The Secretary may include rebuttable presumptions in the standards.

This section of the bill does have great potential for improving the occupational disease protection for millions of workers and, if properly implemented, could insure that the occupational disease standards are effective with regard to changing technology and research.

With increasing frequency, the occupational disease effects of new and changing technology is being borne by workers rather than the workers' compensation system which was created to assume them. In fact, many, perhaps most, occupational diseases are not handled by the workers' compensation system and the victims receive no benefits even though they are disabled or killed by work-related diseases. This section would do much to reverse the tendency of many States to ignore this growing occupational disease problem.

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The Secretary must refer the proposed standards to an ad hoc advisory committee of medical and scientific experts and no occupational disease standard may be promulgated unless the committee determines that it is consistent with available medical and scientific evidence.

The concept of advisory committees composed of medical and scientific experts is good. However, it is not good public administration to delegate veto power to outside, nongovernmental individuals or committees. Such committee members may differ among themselves or their reports may not be clearcut or may be ambiguous in their recommendations.

The Secretary has on tap expert advice in his department and from other agencies in Government and should be able to act on his own if he feels that is necessary. The rulemaking process has many safeguards to prevent any abuses. Other agencies of Government with similar responsibilities do not delegate to outside advisers a veto power over their actions and we see no reason why the Department of Labor should be an exception.

EXCLUSIVITY AND THIRD-PARTY LIABILITY

S. 3060 makes the workers' compensation system the workers' exclusive remedy against the employer, the employer's insurance carrier, and other related persons. Any third-party award or judgment must be reduced by the value of the workers' compensation.

Employers and their insurance carriers are denied subrogation rights to any judgment obtained from a manufacturer. Thus, product manufacturers will pay judgments only where the injured employee obtains a judgment in excess of the value of the workers' compensation award.

Employers, on the other hand, would bear the full cost for providing workers' compensation benefits and would no longer be able to recover the value of such benefits from third-party awards. In short, the effect is to shift some workers' compensation costs to employers and to reduce in an equal amount the costs for product manufacturers.

In general, these provisions do not affect the award amounts paid to workers. Unfortunately, they do restrict worker recoveries in third-party liability suits in at least 10 States that have special provisions regarding third-party liability.

For example, in three States, the entire third-party recovery belongs to the employee without deduction of workers' compensation benefits. Of course, these workers and the vast majority of workers never involved in third-party suits, receive improved workers' compensation protection in exchange.

However, this section is most unfair to partial disability cases in these States since such cases are not covered by the minimum standards of S. 3060, and receive no compensating improvements in workers' compensation protection. This may have been an oversight. We hope it is not the intent of the sponsors of the bill. S. 3060 should not leave any worker worse off as a result of its passage.

CONCLUSION

Organized labor has worked many years at the State level to establish adequate workers' compensation programs. The time has come in

our opinion for Federal action. That is why the AFL–CIO vigorously supports the Federal minimum standards.

Enactment of S. 3060, with the modifications we have suggested, would establish a workers' compensation program adequate to the needs of a modern industrial society and American workers and their families. America should do no less for the victims of industrial accidents and disease.

The CHAIRMAN. Thank you very much. Your full statement is in the record. I have reviewed it. That is very useful, too.

You have offered much for us to discuss, Mr. Biemiller.

First, I would like to get the benefit of your understanding of what has transpired in the States in connection with progress there following the Commission's Report of 1972. Their conclusion was that there should be Federal law if the States didn't meet standards that they felt were essential. The report established 1975 as a target for Federal legislation. Here we are in 1978.

What has been the progress in the States?

We had some testimony on this yesterday. One witness, referring to what is happening in the States, noticed that there has been some improvement, but he said it is like making a judgment of whether a bottle is half full or half empty.

What do you say?

Mr. BIEMILLER. I will leave that to Mr. Smedley.

Mr. SMEDLEY. There is no question that there was progress following the Report on the National Commission Workmen's Compensation and after the introduction of your Senator Javits' bills. But it has slowed up in recent years. The Department of Labor recently did a study. They evaluated the States based on the 19 essential recommendations of the National Commission. They gave one point for each recommendation.

Assuming there are 52 jurisdictions, including Guam and Puerto Rico—the maximum possible figure is 988 they give the States about 610 points or better than 61 percent compliance. The improvements recently have been very slow. The National Commission had more than 80 recommendations of which they picked out 19 which they said were essential.

Now, of the 18 members of the National Commission, not a single member dissented from those recommendations.

Among the members was the executive vice president of Liberty Mutual, the administrator of the Workers' Compensation Program for Ford Motor Company, the associate medical director for the Dept. of Occupational Health for the American Medical Association, the counsel for the American Insurance Association and the vice president of Georgia Pacific Corp.

Not one of these gentlemen in any way dissented from any of the recommendations. These are essential recommendations. Yet, there is not a single State that has met those recommendations fully. The report was issued in 1972. This is 1978. So obviously unless there is Federal legislation, the standards are not going to be met.

The CHAIRMAN. It has been pointed out to me that in at least 12 States, regardless of weekly earnings at the time of injury, the maximum benefit is at a level that is less than a poverty level.

Mr. SMEDLEY. In 12 States, it is less than a poverty level for a family of four.

The CHAIRMAN. We will have testimony that there has been great progress by the States in complying with the National Commission's nineteen essential recommendations and, therefore, there is no need for Federal legislation. It is true that the Commission said if the states timely met those standards, no Federal legislation would be necessary. However, we are well beyond their cutoff time for that determination—3 years.

When our first worker's comp bill was introduced we received a lot of criticism throughout the country that we were premature, because the 1975 deadline had not then arrived and the States indicated they were making progress. That was back in 1974.

Notwithstanding the fact that we are well beyond 1975, the States' record is not very good at meeting those essential recommendations of the Commission.

Mr. SMEDLEY. That is right. The recommendations considered essential.

Your bill and the activity here on Capitol Hill did much to stimulate the States to start to improve some of their laws, mainly to avoid Federal legislation. But there has been very little satisfactory activiy in those States in recent years.

The CHAIRMAN. There has been improvement, but we are well short of the minimum standard goals.

Mr. SMEDLEY. Yes. I agree there were improvements because of the threat of Federal legislation.

The CHAIRMAN. Your statement suggested that the Federal Board created by this legislation should be given broader discretion to review the factual determinations of the State agencies, such as whether the injury did arise out of and in the course of employment and the degree of disability. It appears to me that under your suggestion we would create an appeal basically from the State board or whatever the State agency is; is that right?

Mr. BIEMILLER. That is correct.

The CHAIRMAN. To the Federal Review Board.

Most States have a review procedure within the State, from the workmen's compensation board to a court to an appeal board, and those reviews are generally on the record, I suppose.

You would suggest that this legislation establish a Federal review in addition to any reviews within the State—to the Federal Review Board; is that right?

Mr. BIEMILLER. Correct.

The CHAIRMAN. How would that adapt itself to the review provisions within the State?

Mr. BIEMILLER. Go ahead, Mr. Smedley.

Mr. SMEDLEY. Mr. Gold might also want to comment on this, Senator.

One thing that I think we are concerned about in this section is that there are certain central questions whether the disability was job-related, the degree of disability and so forth, which is solely governed by the State law.

There is a conclusive presumption that the State decision is correct in these cases. What we are concerned about is that you could have a

State certified by a Secretary that it is in compliance with a standard and yet very few people would actually benefit from it. You can have one State doing a very good job concerning occupational disease decisions. In another State, very few people would win their cases with the exact same medical history.

So what we are concerned about is strengthening the bill in this regard.

As you may remember, S. 2018, the Federal Board made the determination as to compensability. We are not asking that. We are just asking that this section be strengthened. We don't want a bill that allows the States to meet the standards but in practice, no one wins any cases.

The CHAIRMAN. I am not sure I understand all that that means because we do provide an evaluation mechanism to see that the States are meeting the standards.

Mr. SMEDLEY. You could have a disease listed under the occupational diseases section as being occupationally related. A worker could apply on the basis that his disease is related to his work and he could be turned down by the Workers' Compensation Board on the grounds that the condition is not related to his occupation.

That decision, as I read this—Mr. Gold can comment also—that decision of the Workmen's Compensation Board would have to be accepted by the Federal Review Board.

So I am saying that you might have another State with the exact same situation, but they would find the workers' claims were compensable.

We need some sort of a mechanism to make sure that the States will be able to meet the standards, but in the implementation, are not living up to the intent of the legislation.

We feel the way the bill is written there is too much presumption on the side of the States as to decisions in these kinds of cases.

The CHAIRMAN. I wonder if the provisions of section 7, paragraph (c) wouldn't be available to review and correct the situations you are raising. It says, "After initial review, provided by section a, the Secretary shall annually review the workers' compensation law of each State, including the judicial and administrative interpretation of the law to determine whether it meets the requirements of section 4 of this act"?

Mr. SMEDLEY. It is ambiguous. That is the point.

I am not sure, the way the other sections read, it might be misinterpreted. We would like the Secretary's role to be a little more clear—that he does have effective authority where a State commission is turning everyone down. I contacted one of our unions that has particular problems in this area. They felt that their State law covered occupational disease quite well, but their own concern was that the procedures of the Commission with respect to such claims that members who file claims would be turned down by the Board. So we are concerned about this section. It is ambiguous.

All we are asking for is that this section be clarified and strengthened so we are sure of its intent.

The CHAIRMAN. I am glad that we had this colloquy. If there is an ambiguity, that should be clarified. That has been very helpful.

I think, Mr. Biemiller, you mentioned one of the questions that you would have go to the review board would be the degree of disability. This would be a question of——

Mr. SMEDLEY. Total.

If it were partial, it would not be covered. It is just between total and partial. That is correct, Mr. Chairman.

The CHAIRMAN. Another situation that you point to as inequitable is that partial disability compensation is not addressed by this legislation. Therefore, none of the benefits of the legislation reaches workers who may have a partial disability. But one of the restrictions on compensation in return does apply to those with partial disability, and that is the section dealing with third-party actions; and this is a concern of all of you; is that right?

Mr. BIEMILLER. Yes.

Mr. SMEDLEY. Yes.

Mr. GOLD. Yes.

The CHAIRMAN. I think Mr. Gold might want to get into this.

Just what is the degree of problem that you see here?

The third-party litigation situation is most complex. It is very expensive litigation and the return to the injured person is greatly reduced because of the complexity of the law. We felt that if we could find a way to simplify this that would be reasonable to all concerned, we would be advancing something worthwhile.

We thought we had done that. We thought that everybody had rather agreed that the approach we had in this bill was useful. I feel strongly that it is useful and fair, particularly in the total disability situation, where a worker is totally disabled due to occupational injury or disease.

Now you have called our attention to the fact that where a worker is partially disabled, this provision constitutes a restriction, yet the bill itself provides no benefits to such workers.

How big a problem have we got here?

Mr. GOLD. Let me begin the response—because I need Mr. Smedley's help in terms of the practical aspects—by saying that the point made at pages 4 and 5 of the summary of our statement relates to a conjunction of circumstances; namely, a present State law where the third-party award in favor of an individual is not reduced, and it is a partial disability payment.

All we are saying is that in that situation, there is a special rule in the bill that doesn't make good sense; and so I would say it is a relatively narrow legal viewpoint. We are not disagreeing with the relative approach to the third-party problem, but rather pointing out this conjunction.

Mr. SMEDLEY. We are not disagreeing with the general intent of the section. We are perfectly willing to go along. It shifts on the employer, off the product manufacturer, the cost of the workers' compensation. Basically, it leaves the workers, as far as the third-party liability is concerned, pretty much the same. However, there are about 10 States who have special provisions regarding third-party liability. Three of them allow the workers to receive their compensation plus their third-party settlement. These settlements would be restricted by your bill.

Now, in the cases of permanent total disability and death, workers get improved compensation benefits in return.

The CHAIRMAN. Yes.

Mr. SMEDLEY. The problem is in these States these sections also adversely affect permanent partial disability cases involving third-party liability. But they receive none of the improved standards in the bill. I think it might have been an oversight. I hope so. We don't think this bill should leave any worker worse off as a result of its passage.

The CHAIRMAN. What would you suggest?

Mr. SMEDLEY. I would rewrite the section and exclude partial disability from the third-party provision.

Mr. GOLD. Or at least in those States where you could cut it even finer by excluding a situation where there is a permanent partial and the State at present would permit the plaintiff to keep the entire award.

Mr. SMEDLEY. That is a finer cut.

Mr. GOLD. That would be the narrowest change that would affect a small number of States and would answer this problem.

The CHAIRMAN. In other words, all but 12 would be—if that is the number you mentioned——

Mr. SMEDLEY. I know of 10 States. One problem to the approach that has been suggested—there could be all kinds of variations in provisions in all the other State laws—and if you try to write provisions for each State to protect each particular legal development that has occurred over the years, it would be difficult.

The simplest thing would be to exclude third-party liability in partial disability cases from the seciton.

The CHAIRMAN. There is a provision in this bill requiring the Secretary to review the situation involving compensation of partial disability and to make appropriate recommendations. That was suggested in a way by both the Commission and the Interdepartmental Task Force. Both suggested that partial disability compensation be studied further.

We say the same thing in this bill. It has to be studied further. There is just no concensus among the experts as to how to deal with this problem area. Until we deal with partial disability compensation legislatively, it might make a lot of sense to follow the course you suggest.

You also address the provision in the bill that permits a panel of scientific and medical experts to as you say, veto, the Secretary's proposed standards. I wonder what conditions there are that would suggest that the Secretary be able to overrule the analysis of the advisory committee? We are quite simply, of course, dealing with scientific-medical situation here. That is what the advisory committee is supposed to understand best and deal with.

Can you describe the situations where you feel there should be authority for the Secretary to overrule those scientific types and their judgments?

Who has thought about this?

Mr. SMEDLEY. Well, Mr. Chairman, there could be cases. I think you have to step back a little bit and examine that section as to procedural rights in terms of advisory committees and scientific experts. You have to have rules promulgated. You have to have hearings on those occupational diseases proposed for listing. It takes at least a year of all kinds of procedures before the Secretary can really list a disease as occupationally related. Then it is not effective for 2 years. Then, dur-

ing the 2-year period, anybody who is adversely affected, can go to court. The courts review the entire record, so there is great protection for those individuals or employers who are affected by these sections.

What I am saying is that there is no evidence of advisory committee vetoes elsewhere in Government. The National Institute of Occupational Safety and Health has scientific and medical committees, but they have no veto power.

I know of nowhere in the Government where veto power is delegated to advisory groups. If you start this as a precedent, where do you stop? We would end up delegating to advisory committees a great deal of the operation of the Government. It is not good public administration.

There are many cases where an advisory board can split. You may have ambiguous reports. Scientists can write very ambiguous language, and so forth. The Secretary has his own experts as well as those available at the National Institute of Occupational Safety and Health. Some of the geratest experts in the country are located there with some of the greatest expertise on the problems of the workers that are affected by this section. I see no reason why we should delegate veto power to an outside group. I don't think it is good public administration.

Mr. GOLD. I would just like to underline the point that you can have situations in which an advisory committee splits and the scientific advisers to the Secretary are strongly united in support of a minority view. In that situation, the report ought to be no more than one other piece of evidence to be considered by the Secretary.

The CHAIRMAN. One of the concerns here that gives rise to this requirement that the Secretary consider the medical-scientific advice of the advisory committee, is the feeling that we wanted to be wary of the increasing anxiety of the Secretary's power. It is a check, really, on the authority of the Secretary. Congressional vetoes are becoming increasingly discussed around here—vetoes of the Secretary both in regulations and, in this case, it would be in standards.

Is there any other way that you could suggest that the scientific and medical community could come to the standard determinations with the degree of authority that would protect us from any suggestion that the Secretary has almost unbridled authority and could go his or her way without the medical-scientific input that is needed?

Mr. SMEDLEY. Actually, I don't thing it is fair to say, Mr. Chairman, that the Secretary would have unbridled authority; because if you examine that section and the procedure of it——

The CHAIRMAN. I don't say he does. I say rather that we want to protect ourselves against any suggestion, or any apprehension, that might exist that he is not restrained by medical and scientific thinking.

Mr. SMEDLEY. I can appreciate, Mr. Chairman, your concern about delegating to officials of the Government too much authority to do things. We all have concerns about that.

But the section, if you examine it closely, the procedures in it are such that it would take many procedural steps—regulations, hearings, et cetera, after the report of the advisory committee to list a disease as occupationally related. This takes a year. After he lists it as an occupational disease, there is a 2-year period before it goes into effect and during which the matter may be taken to court. It would be very,

very unlikely that any Secretary would list a disease as occupational in origin that did not have strong support from the advisory committee, other experts, and from the record developed from the comments and hearings on the proposed regulations. Particularly, since the Secretary would be aware that the full record would likely be subject to review by a court of law before it went into effect.

I am not too familiar with this operation, but I think that we should both examine the procedures under the Food and Drug Administration, under the National Institutes of Occupational Safety and Health, under OSHA these agencies do not give advisory committees a veto power. I do not think we should restrict the Secretary of Labor in any way. We can trust his as much as other officials of the Government.

Mr. BIEMILLER. There is also a point that has been alluded to a couple of times, and that ought to be strengthened. In NIOSH, which this committee had the good sense to create, has pretty well-established committees, sir, and I would think this is where you would turn for your advice.

But again you don't let the NIOSH committees override the final judgment of the chairman, and I think this is the thing that you have to work on. For that matter, there may be other places in the Institutes of Health, although NIOSH would want to be the one you would look to most of the time or to the people in the National Institutes of Health.

But I think definitely you have got to leave the final determination in the hands of the Secretary, and not in the hands of any committee that he has appointed.

The CHAIRMAN. Well, that authority does, even here, reside with the Secretary, but consistent with available scientific and medical knowledge. He or she must consider that when considering the subject matter of the proposed rule.

Mr. BIEMILLER. When you have them and they are split 3-to-2, and the opinion of the Secretary is with the 2, he should have that right reserved.

Mr. SMEDLEY. Suppose after the committee issues the report, new scientific evidence is available as a result of research. Should he have to go through the whole process and place the delay and burden on the workers?

The CHAIRMAN. Go back and start from the beginning with newly discovered findings, through the whole 180-day procedure?

Mr. SMEDLEY. He would have to go through the whole procedure again.

The CHAIRMAN. Well, I wish I could say that all our Secretaries of Labor, and the administrators of OSHA, and NIOSH, could do without public questioning of some of their activities. But you and I know that this has become an area of deep concern. I am not saying this is the only way to do this. There would probably be ways to give some greater flexibility. I am glad you raised it.

Mr. BIEMILLER. That is truly what we are trying to do, the point you are making. That is one of the great values of the public hearings held by the Congress of the United States, in that it does put things upon the table and modifications are made based on the testimony presented.

We have one reservation that we would like to have you insert.

The CHAIRMAN. Now, on the 6-percent cap that we have provided for periodic benefit adjustments, you have a novel proposal. I would suggest this is novel, because it is novel to me.

You propose that if we have a 6-percent cap and wage increases go beyond that level, that we limit benefit adjustments to 6 percent; right? And you would suggest that the surplus over 6 percent be applied to those years where increases are less than 6 percent. This is basically an accounting procedure of banking the excess not counted and drawing on it in the lean years?

Mr. SMEDLEY. Yes. The limit of 6 percent would prevent the worker from getting the full adjustment.

The CHAIRMAN. Is it ever a normal 6 percent?

Mr. SMEDLEY. Yes. The complaint of the insurance industry in writing this kind of thing is they can never make an accurate estimate, so they want a cap. This is one way to put a cap on it to the advantage of the worker. They can easily estimate what the cost would be.

The CHAIRMAN. It is interesting. We won't discuss it and take the time now, but we will certainly take this into consideration. It would be an administrative complexity, I would think. How would it work, anyway? What mechanism would make it work?

Mr. SMEDLEY. If it were 8 percent, the workers' benefits would be adjusted 6 percent, then he would have a 2-percent carryover; so the next year, if it were 3 percent, you would pick up the 2 percent.

The CHAIRMAN. It would be just for 2 years?

Mr. SMEDLEY. We would be flexible. If we get the principal provision, we would be flexible with respect to the details as to how long you can carry it.

The CHAIRMAN. We would use the Internal Revenue Service test for carryback. Then it would be in the other committee.

Mr. SMEDLEY. We would compromise on this point so that it would stay in this committee.

The CHAIRMAN. I think those are all the questions that I have. I appreciate very much your presentation.

Mr. BIEMILLER. As I am sure you are aware, we certainly appreciate the work that you and Senator Javits have put into this matter. It has been responsible for some of the improvements in many of the States. Our staff is available to cooperate with your staff in working out the bill. Thank you very much.

The CHAIRMAN. We know how cooperative you are and we appreciate that. We are grateful for having all of your input.

Mr. BIEMILLER. Thank you.

Mr. GOLD. Thank you.

Mr. SMEDLEY. Thank you.

[The prepared statement of Mr. Biemiller follows:]

STATEMENT BY ANDREW J. BIEMILLER, DIRECTOR, DEPARTMENT OF LEGISLATION
AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
BEFORE THE UNITED STATES SENATE SUBCOMMITTEE ON LABOR ON THE
NATIONAL WORKERS' COMPENSATION STANDARDS ACT OF 1978
S. 3060
September 20, 1978

Mr. Chairman, the AFL-CIO is pleased to submit its views to this Committee on S. 3060, legislation introduced by distinguished members of the Committee which would establish minimum federal standards for State workers' compensation programs.

We wish to commend your Committee for directing its attention to this subject so vital to the economic welfare of every working man and woman in the nation. Workers' compensation is, indeed, one of the most important legislative issues requiring action by Congress.

Congress recognized the tremendous hardships the victims of work injury and disease bear when it enacted the Occupational Safety and Health Act of 1970. Section 27 (a) of that Act established a National Commission on State Workers' Compensation Laws which I shall subsequently refer to as the Commission. This Commission was required to undertake a comprehensive study and evaluation of state workers' compensation laws to determine if such laws provide an adequate, prompt and equitable system of compensation for injury or death arising out of or in the course of employment. The Commission was also required to transmit to the President and Congress a report of its findings and conclusions, together with its recommendations.

This Commission submitted its report on July 31, 1972. The report revealed glaring inadequacies in existing workers' compensation programs. The major finding, contained in the report states:

> "The inescapable conclusion is that State workmen's compensation laws in general are inadequate and inequitable."

This emphatic conclusion was unanimous, without a single member of the Commission -- 18 individuals representing every major group concerned with workers' compensation issues -- expressing a dissenting view.

The AFL-CIO Executive Council, in a resolution adopted February 1977, reiterated organized labor's long standing interest in modernizing this vital program of social insurance. The Council urged Congress to make enactment of minimum federal workers' compensation standards a matter of high priority.

The most recent AFL-CIO Convention, which met in December 1977, endorsed this view and adopted an official policy resolution in support of minimum federal workers' compensation standards. (Copies of these statements are attached.)

Purpose of Legislation

The purpose of S. 3060 is to establish throughout the worker's compensation system minimum standards for greater adequacy and fairness. This legislation would advance the long standing objective of the AFL-CIO to establish a federal responsibility for the income maintenance, medical care, and rehabilitation of American workers injured on the job. The AFL-CIO has been urging the federal government to meet its responsibilities in this area for many years. Work injury and disease is a national problem. It requires a national solution.

Enactment of S. 3060 would furnish more equal protection in case of job-incurred injury or disease to every worker and his family regardless of the state in which the injury occurred or the size of the firm that employed the worker. It would impose an equal responsibility on all employers, which does not exist under present circumstances, and it would permit the state programs to adjust smoothly to on-going industrial change.

Implementation

The Secretary of Labor reviews each state workers' compensation law within two years after enactment of the law and at least annually thereafter. A certification is made as to the extent of compliance with federal standards. When a state law is certified as in compliance, workers' compensation claims will be determined solely by the state without any federal involvement.

When a state law is not fully certified, an injured worker who is dissatisfied with the award of a state workers' compensation agency which fails to award compensation at least equivalent to that provided by a minimum standard may file a petition for review with a Federal Benefits Review Board for supplemental compensation. However, on issues relating to supplemental compensation, the findings of fact by state agencies are "conclusive if supported by substantial evidence of the record as a whole." On issues covered solely by state law, the findings of fact and conclusions by the state agency are "conclusive and not subject to review."

In other words, such issues as whether death, injury or disease were work related, the degree of disability, etc. will be determined by state workers' compensation laws and commissions. Thus, some of the most vital decisions affecting a worker's claim will already have been made without any opportunity for review or for further evaluation of these issues at the federal level. In our opinion, the Federal Benefits Review Board must have broader authority to examine the facts in such cases if workers are going to be adequately protected by the minimum standards.

Minimum Standards

Section 4 of S. 3060 contains 17 standards state workers' compensation programs must meet. Most of these standards have been approved and recommended for enactment in the states by every major group concerned with workers' compensation matters including the Commission, the Department of Labor, the Council of State Governments, and organized labor. Let me discuss some of these major standards.

Coverage Coverage is compulsory for virtually all private employers. However, the bill does contain some major exceptions from coverage. Workers presently covered by other compensation programs, such as federal employees, railroad workers and maritime workers, would continue to be protected under existing work injury legislation applicable in their respective industries.

The coverage requirements of S. 3060 would eliminate the major employer options to remain outside the scope of workers' compensation programs such as numerical exemptions, and industry or occupational exemptions that deny millions of workers the protection of workers' compensation.

Unfortunately, state and local government employees are not covered by the bill. Complex and confusing state laws provide for workers' compensation coverage for some public employees, but they completely overlook the needs of large numbers of state workers and millions of county and municipal workers and employees of other political jurisdictions. Injured public employees must feed, clothe and house their families at all times and in the same manner as other workers. Their protection in the event of a work injury should be no less.

Coverage of public employees by the bill involves constitutional issues and would arouse intense opposition. This no doubt accounts for their exclusion from the bill. We can understand this accommodation to political and legal

realities but urge, after passage of a federal minimum standards bill, that priority be given to finding a way to provide public employees this protection.

An injury to a family breadwinner employed in any of these uncovered firms, industries, or occupations can only result in forcing the family onto the welfare rolls of the community. Workers' compensation was intended to relieve the community of this burden and place the cost of work injury and disease upon the responsible industry. The existing gaps and loopholes in coverage resulting from elective laws and numerical, occupational and industry exemptions are advantageous only to a few irresponsible employer groups. But the gaps in coverage create serious inequities for injured workers and their families, responsible employers and industries, and the taxpaying general public.

The AFL-CIO favors universal coverage of all wage and salary workers under an adequate system of workers' compensation. The minimum coverage standard contained in S. 3060 would assure the overwhelming majority of the labor force, and their families, of basic social insurance protection in the event of a job-related injury or disease.

Benefit Limitations One of the more socially callous deficiencies in workers' compensation today is the limit, in terms of time or money, imposed on the benefit entitlement of the victims of serious work injury and their families. In death cases, it is not uncommon to find benefit entitlement limited to 400 or 500 weeks.

Some programs which do not limit benefit payments in terms of time achieve the same result by limiting the aggregate amount of benefits payable in death cases. These aggregate limits are as low as $14,000. Such pitifully small amounts replace only a very small proportion of the income potential

of workers killed on the job. Similar harsh limitations are applied in cases involving the most serious type of work injury short of death.

Permanent total disability is defined in most state laws as an injury that makes continued participation in the labor market highly unlikely. The majority of state workers' compensation laws presume that certain injuries constitute permanent total disability, e.g., the loss of both hands, or both arms, or both feet, or both legs, or both eyes, or a combination of any two major losses -- a hand and an eye.

Benefit limitations in terms of time or money are provided in at least 12 state programs. Under these programs, a work injury considered permanent and total may entitle the worker and his family to benefits for a temporary period of time equal to a few years of work at full-time wages. We simply do not understand how some state legislatures can recognize the permanent total nature of certain work injuries and still continue to limit the length of time victims of such injuries can receive workers' compensation payments.

S. 3060 would remedy the inherent contradiction of providing only temporary benefits in the cases involving death or permanent total disability. These limits are inconsistent with the basic purpose of workers' compensation -- to maintain the economic well-being of injured workers and their families in the event of a work injury or death -- and they should be eliminated from the system.

S. 3060 would also eliminate another indefensible restriction, that on medical care. Some states, fortunately, only a mere handful, limit the amount of compensation available for medical care and rehabilitation services

in terms of time or total dollar amount. Even though there is absolutely no responsible opposition to furnishing full medical care and rehabilitation services to injured workers, a few states still retain these cruel limitations in their laws. The prohibition on such outmoded restrictions in S. 3060 is long overdue.

Weekly Benefits S. 3060 would over a period of years bring workers' compensation benefits up to a more nearly adequate level.

The original goal of workers' compensation was to restore to injured workers at least two-thirds of the wages lost due to industrial injuries. The gap between this objective and the wage replacement benefit provided in most state laws is the most serious inadequacy in workers' compensation.

The Commission on State Workers' Compensation Laws recognized this deficiency in workers' compensation programs, and in its Report stated:

> "Judged by traditional standards, a majority of states have maximum weekly benefits which are inadequate. Moreover, the wide variation among the states in the relationship of maximums to average weekly wages indicates that the maximum weekly benefits for temporary total disability are not equitable."

Today, in response to the finding of the Commission, the situation has improved but is still bad. The federal government currently classifies as poor a non-farm, four member family with an annual income of less than $6191 - $119 weekly. Injured workers in at least 12 states, regardless of their weekly earnings at the time of injury, are limited to a maximum weekly benefit that is less than the poverty level of income.

This shameful record of state irresponsibility supports the view of organized labor that the present workers' compensation system is inequitable, inadequate and needs to be modernized. This shocking failure of the system is directly attributable to the lack of minimum federal standards state programs must meet.

The AFL-CIO is convinced this record refutes the self-serving statements of employers and industry groups which allege the states have done a good job of improving workers' compensation and greater improvement can be expected in the future. The states have done an excellent job of protecting employers, through maintenance of inadequate workers' compensation programs, but an extremely poor job of protecting injured workers, their families, and the public.

S. 3060 would require benefits paid by employers over a period of years to meet the benefit recommendations contained in the Commission Report. Specifically, it would provide an individual the traditional standard benefit of 66 2/3 percent of wage loss, and would establish a maximum weekly benefit at a level which would assure the majority of injured workers a wage loss benefit equal to 66 2/3 percent of their former weekly wage.

Two years after enactment, the required standard would be a state maximum weekly benefit equal to 100 percent of the statewide average weekly wage and five years after enactment could not be less than 200 percent.

Thus, injured workers and their families for the first time would be assured of decent wage replacement from workers' compensation benefits.

Benefit Adjustment Today, there are totally disabled workers and surviving widows in every state who were awarded $30 or $40 a week many years ago. These people must try to support themselves on these pitiful amounts in today's inflationary economy because most states have failed to provide benefit adjustment for long-term benefit entitlement. Although this problem has been recognized for some time, few states have provisions to update workers' compensation payments to keep pace with escalating living costs.

Benefit adjustment for long-term cases is well established in the workers' compensation system. Congress has provided for benefit adjustment in both federal workers' compensation programs, the Longshore Act and the Federal Employees' Compensation Act. In each program, benefit adjustments are made periodically for long-term cases. But only a handful of states make such adjustments for their workers' compensation beneficiaries.

S. 3060 provides that benefits for death or total disability lasting more than two years must be adjusted by the state at least annually to reflect increases in the statewide average weekly wage but permits limiting any one year's increase to 6 percent. During periods of rapidly rising wages and prices such as those of recent years, the value of these benefits could be seriously eroded. For this reason, we urge a provision for a carry-over of amounts over 6 percent to years when the average wage moves up less than 6 percent.

The AFL-CIO believes such a provision for the periodic updating of benefits must be an essential feature of workers' compensation legislation establishing federal minimum standards.

Choice of Doctor and Supervision of Medical Care S. 3060 would give injured workers the right to select a qualified physician. The people

of this nation have historically enjoyed the privilege of seeking medical care from a doctor of their own choosing. The exercise of this right has been recognized and supported in every aspect of national life except workers' compensation. But injured workers in many states have their doctor selected for them by an employer or insurance carrier.

The AFL-CIO is opposed to this practice. We favor the initial selection of a qualified doctor in workers' compensation cases by the injured worker and are glad that enactment of S. 3060 would implement this fundamental principle.

Time Limit for Filing Claims The rapidly changing character of today's industrial processes makes it increasingly difficult to identify the precise moment at which disability occurred. The most dramatic example is radiation injury. The time of exposure in which radiation induces injury is not clearly known. Many diseases that manifest themselves years after exposure, such as leukemia and various forms of cancer, can be the result of radiation exposure many years ago. Similar results can be traced to the use of a wide variety of other work-related substances.

New chemical processes are bring introduced into industry at the rate of 500 to 600 each year. If workers' compensation is to provide real occupational disease protection in a modern industrial economy, it must establish reasonable time limits for filing claims.

The standard proposed in S. 3060 is reasonable. It would require a worker to file a claim within two years after obtaining knowledge of his disability and its relationship to employment. This time limit is the only just and sensible way to protect the thousands of workers who may be disabled by occupational diseases many years after exposure to the causative agent.

Occupational Disease

S. 3060 authorizes the Secretary of Labor in cooperation with the Department of Health, Education and Welfare, to devise and issue standards for determining whether certain diseases are occupationally related and whether the worker's death or disability is due to such a disease. The Secretary may include rebuttable presumptions in the standards.

This section of the bill does have great potential for improving the occupational disease protection for millions of workers and, if properly implemented, could insure that the occupational disease standards are effective with regard to changing technology and research. With increasing frequency, the occupational disease effects of new and changing technology is being borne by workers rather than the workers' compensation system which was created to assume them. In fact, many, perhaps most, occupational diseases are not handled by the workers' compensation system and the victims receive no benefits even though they are disabled or killed by work related diseases. This section would do much to reverse the tendency of many states to ignore this growing occupational disease problem.

The Secretary must refer the proposed standards to an ad-hoc advisory committee of medical and scientific experts and no occupational disease standard may be promulgated unless the committee determines that it is consistent with available medical and scientific evidence. The concept of advisory committees composed of medical and scientific experts is good. However, it is not good public administration to delegate a veto power to outside non-governmental individuals or committees. Such committee members may differ among themselves or their reports may not be clearcut or may be ambiguous in their recommendations. The Secretary has on tap expert advice in his Department

and should be able to act on his own if he feels that is necessary. The rule-making process has many safeguards to prevent any abuses. Other agencies of government with similar responsibilities do not delegate to outside advisors a veto power over their actions and we see no reason why the Department of Labor should be an exception.

Exclusivity and Third Party Liability

S. 3060 makes the workers' compensation system the workers' exclusive remedy against the employer, the employer's insurance carrier, and other related persons. Any third party award or judgment must be reduced by the value of the workers' compensation. The employer and its insurance carrier are denied subrogation rights to any judgment obtained from a manufacturer. Thus, product manufacturers will pay judgments only where the injured employee obtains a judgment in excess of the value of the workers' compensation award. Employers, on the other hand, would bear the full cost for providing workers' compensation benefits and would no longer be able to recover the value of such benefits from third party awards. In short, the effect is to shift some workers' compensation costs to employers and to reduce in an equal amount the costs for product manufacturers.

In general, these provisions do not affect the award amounts paid workers. Unfortunately, they do restrict worker recoveries in third party liability suits in at least ten states that have special provisions regarding third party liability. For example, in three states the entire third party recovery belongs to the employee without deduction of workers' compensation benefits. Of course, these workers and a vast majority of workers never involved in third party suits, receive improved workers' compensation protection in exchange.

However, this section is most unfair to partial disability cases in these states since such cases are not covered by the minimum standards of S. 3060 and receive no compensating improvements in workers' compensation protection. This may have been an oversight. We hope it is not the intent of the sponsors of the bill. S. 3060 should not leave any worker worse off as a result of its passage.

Rehabilitation

The disparity between the generally accepted goals of the rehabilitation of the industrially injured worker and the actual accomplishments has long been a matter of deep and troubled concern for organized labor. S. 3060 provides for complete medical rehabilitation and vocational rehabilitation, adequate financial support for such services until maximum restoration is achieved, and reemployment rights, though limited, for disabled workers. These standards should improve the situation in many states.

Unfortunately, workers who object to prescribed vocational rehabilitation services could have their benefits terminated. Successful rehabilitation requires the voluntary cooperation of an injured worker. This is a drastic proposal and we oppose it.

Legal Representation

S. 3060 provides for the payment of attorney fees in addition to the award in successfully litigated cases. The bill should be amended to provide for the payment of fees to individuals representing claimants other than attorneys. Some states license or certify specially trained and qualified individuals, who are not attorneys, to represent injured workers before Boards and Commissions. These individuals should be entitled to a payment of a fee if this is the arrangement used to obtain their services.

Conclusion

Basically, we see the problems of workers to be similar throughout the nation. For this reason, we favor national solutions to national problems. Construction workers in Montana face the same safety and health hazards as construction workers in Kentucky. Lumber workers in Oregon and in Arkansas have identical interest in occupational health and safety. Chemical workers in New Jersey and chemical workers in California are exposed to similar work hazards. Just as federal legislation was the only solution to assuring a safe and healthy work environment, it is also the only way America will get a modern workers' compensation program which will provide real protection to injured workers and their families. At the same time, minimum federal workers' compensation standards are one of the weapons the nation desperately needs to encourage employers to wage an effective fight to reduce the appalling toll of work injuries and illnesses.

Organized labor has worked many years at the state level to establish adequate workers' compensation programs without great success. The time has come for federal action. That is why the AFL-CIO vigorously supports federal minimum standards. Enactment of S. 3060, with the modifications we have suggested, would establish a workers' compensation program adequate to the needs of a modern industrial society and American workers and their families. America should do no less for the victims of industrial accidents and disease.

AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS

Policy Resolution on

WORKERS' COMPENSATION

Adopted December, 1977

Workers' compensation is a subject vital to the economic welfare of every working man and woman in the nation. It is a subject that has been ignored by Congress far too long. The result of this lack of federal leadership has led to the development of a haphazard, inadequate and inequitable system of social insurance to compensate the victims of work injury and disease.

The AFL-CIO is convinced a federal system of workers' compensation, with full protection of the job rights of employees who presently administer the state programs, is essential if an adequate program is to be established.

Until such a system is established, the AFL-CIO will support passage of legislation to establish minimum federal standards including: compulsory coverage of all wage and salary workers without numerical, occupational or industrial exemptions; full coverage of all occupational diseases; full medical care; adequate weekly benefit payments; adequate time limits for filing claims; free choice of physician by the injured worker; full protection for all workers under a broad second injury fund, administration of program under state agency rather than the courts; benefits to the totally disabled for the entire period of disability, and benefits to widows until death or remarriage.

The AFL-CIO urges immediate action by Congress to establish these minimum federal workers' compensation standards. But until this goal is achieved, every AFL-CIO affiliated organization should intensify efforts to secure the same standards in state workers' compensation laws.

Statement by the AFL-CIO Executive Council

on

Workers' Compensation

February 21, 1977
Bal Harbour, Fla.

For many years the AFL-CIO has recommended universal coverage and a broad range of other improvements in the workers' compensation system. Our recommendations have been submitted to state legislatures and incorporated in legislation introduced in the Congress to establish federal standards for state workers' compensation programs. The AFL-CIO has testified in support of these measures before the House and the Senate.

Despite the determined efforts of state federations to improve workers' compensation, we are convinced that federal standards are needed to provide an adequate program of workers' compensation for all workers. They are essential if the original concept of workers' compensation as an exclusive remedy -- which provides adequate assistance to workers injured on the job without requiring lengthy litigation — is to be maintained.

Today, many injured workers, their dependents and, in some cases, their survivors, are forced to the courts for protection through third party suits for damages, because of inadequacies in state workers' compensation programs.

Enactment of federal standards would eliminate many inadequacies in the present system and establish a nationwide system of adequate, equitable workers' compensation, restoring it as the exclusive remedy of injured workers and making uncertain and often inequitable alternate remedies unnecessary.

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STATE WORKERS' COMPENSATION LAWS IN EFFECT ON JULY 1, 1978 COMPARED WITH THE 19 ESSENTIAL RECOMMENDATIONS OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS

Prepared from information available July 31, 1978, to the:
U. S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs
Division of State Workers' Compensation Standards
JUNE M. ROBINSON
Associate Director

The following tables compare State laws in effect July 1, 1978, with the National Commission's 19 essential recommendations.

Table 1 summarizes the total number of essential recommendations met by each State law. Tables 2, 3, and 4 show State-by-State breakdowns for recommendations relating, respectively, to coverage, income benefits, and medical benefits. An "X" means that the law meets the recommended standard. A "-" means that the law does not meet the recommended standard. "NA" means that data were not available.

A supplement, entitled "Pending Changes", shows legislation enacted by July 1, 1978, which will newly meet, or approach meeting, an essential recommendation on an effective date later than July 1, 1978.

The essential recommendations are reproduced on page 7.

TABLE 1. SUMMARY OF STATE TOTALS

(NOTE: The possible total score is 988, or 19 recommendations multiplied by 52 jurisdictions for which data were available. The current total of 610.50 represents 61.8% of the possible total.)

State	Total	Coverage	Benefits	Medical
Total	610.50			
Average	11.74			
Alabama	10.00	4.00	4.00	2.00
Alaska	13.00	3.50	8.50	1.00
Am Samoa	NA	NA	NA	NA
Arizona	12.50	6.50	4.00	2.00
Arkansas	9.00	3.00	4.00	2.00
California	11.00	6.00	4.00	1.00
Colorado	12.50	5.50	5.00	2.00
Connecticut	10.75	3.50	5.25	2.00
Delaware	11.00	4.00	5.00	2.00
Dist Columbia	14.00	5.00	7.00	2.00
Florida	7.50	4.50	2.00	1.00
Georgia	9.50	2.50	5.00	2.00
Guam	NA	NA	NA	NA
Hawaii	14.75	6.00	6.75	2.00
Idaho	9.00	5.00	2.00	2.00
Illinois	14.00	4.00	8.00	2.00
Indiana	11.00	5.00	4.00	2.00
Iowa	14.50	4.50	8.00	2.00
Kansas	9.50	4.50	4.00	1.00
Kentucky	11.50	5.50	4.00	2.00
Louisiana	11.75	5.00	4.75	2.00
Maine	13.50	4.50	8.00	1.00
Maryland	15.25	4.50	8.75	2.00
Massachusetts	9.50	4.00	3.50	2.00
Michigan	11.00	5.00	4.00	2.00
Minnesota	13.50	4.00	7.50	2.00
Mississippi	7.00	2.00	3.00	2.00
Missouri	10.75	5.00	4.75	1.00
Montana	16.00	5.00	9.00	2.00
Nebraska	14.00	6.00	6.00	2.00
Nevada	14.00	4.00	8.00	2.00
New Hampshire	18.50	8.00	8.50	2.00
New Jersey	10.50	6.50	3.00	1.00
New Mexico	12.00	4.00	6.00	2.00
New York	9.00	3.00	4.00	2.00
North Carolina	12.50	2.50	8.00	2.00
North Dakota	13.75	4.00	7.75	2.00
Ohio	16.50	5.50	9.00	2.00
Oklahoma	6.00	1.00	3.00	2.00
Oregon	13.50	5.00	6.50	2.00
Pennsylvania	13.00	4.00	7.00	2.00
Puerto Rico	9.50	6.00	1.50	2.00
Rhode Island	13.50	3.00	8.50	2.00
South Carolina	11.00	2.00	7.00	2.00
South Dakota	10.25	2.50	5.75	2.00
Tennessee	7.50	2.50	3.00	2.00
Texas	9.50	2.50	5.00	2.00
Utah	12.00	5.00	6.00	1.00
Vermont	11.50	4.50	7.00	--
Virginia	10.50	1.50	7.00	2.00
Virgin Is	NA	NA	NA	NA
Washington	10.00	6.00	2.00	2.00
West Virginia	14.75	5.00	7.75	2.00
Wisconsin	15.00	5.00	8.00	2.00
Wyoming	9.00	4.00	3.00	2.00

TABLE 2. 8 RECOMMENDATIONS RELATING TO COVERAGE

State	Recommendation number								
	2.1(a)	2.1(b)	2.2	2.4	2.5	2.6	2.7	2.11	2.15
Total States Meeting	49	34	37	14	1	30	23	27	51
Alabama	X	X	-	-	-	-	X	X	X
Alaska	X	-	X	-	-	-	-	X	X
Am Samoa	NA	NA	NA	NA	NA	NA	NA	NA	NA
Arizona	X	-	X	X	-	X	X	X	X
Arkansas	X	X	-	-	-	X	-	-	X
California	X	X	X	X	-	X	X	-	X
Colorado	X	-	X	X	-	X	-	X	X
Connecticut	X	-	X	X	-	-	-	-	X
Delaware	X	X	X	-	-	-	-	X	X
Dist Columbia	X	X	X	-	-	X	X	-	X
Florida	X	-	X	-	-	X	-	X	X
Georgia	X	-	-	-	-	-	-	X	X
Guam	NA	NA	NA	NA	NA	NA	NA	NA	NA
Hawaii	X	X	X	X	-	X	-	X	X
Idaho	X	X	X	-	-	X	-	X	X
Illinois	X	X	X	-	-	-	-	X	X
Indiana	X	X	X	-	-	X	-	X	X
Iowa	X	-	X	-	-	X	-	X	X
Kansas	X	-	-	-	-	X	X	X	X
Kentucky	X	-	X	-	-	X	X	X	X
Louisiana	X	X	X	X	-	-	-	X	X
Maine	X	-	X	-	-	X	X	-	X
Maryland	X	-	X	-	-	X	X	-	X
Massachusetts	X	X	X	X	-	-	-	-	X
Michigan	X	X	-	X	-	X	X	-	X
Minnesota	X	X	X	-	-	-	X	-	X
Mississippi	X	X	-	-	-	-	-	-	X
Missouri	X	X	-	-	-	X	X	X	X
Montana	X	X	X	X	-	X	-	-	X
Nebraska	X	X	X	-	-	X	X	X	X
Nevada	X	X	X	-	-	X	-	-	X
New Hampshire	X	X	X	X	X	X	X	X	X
New Jersey	-	X	X	X	-	X	X	X	X
New Mexico	X	X	-	-	-	X	-	X	X
New York	X	X	X	-	-	-	-	-	X
North Carolina	X	-	-	-	-	-	-	X	X
North Dakota	X	X	X	-	-	X	-	-	X
Ohio	X	-	X	X	-	X	X	-	X
Oklahoma	X	X	-	-	-	-	-	-	-
Oregon	X	X	X	X	-	X	-	-	X
Pennsylvania	X	X	X	-	-	-	-	X	X
Puerto Rico	X	X	X	X	-	X	X	-	X
Rhode Island	X	X	-	-	-	-	X	-	X
South Carolina	-	-	-	-	-	-	-	X	X
South Dakota	X	-	X	-	-	-	-	-	X
Tennessee	X	-	-	-	-	-	X	-	X
Texas	-	X	X	-	-	-	-	-	X
Utah	X	X	X	-	-	X	X	-	X
Vermont	X	-	X	-	-	-	X	X	X
Virginia	X	-	-	-	-	-	-	-	X
Virgin Is	NA	NA	NA	NA	NA	NA	NA	NA	NA
Washington	X	X	X	-	-	X	X	X	X
West Virginia	X	X	X	-	-	X	X	-	X
Wisconsin	X	X	-	-	-	X	X	X	X
Wyoming	X	X	X	-	-	-	-	X	X

TABLE 3. 9 RECOMMENDATIONS RELATING TO INCOME BENEFITS

State	Recommendation number											
	3.7	3.8	3.11	3.12	3.15	3.17	3.21	3.23	3.25(a)	3.25(b)	3.25(c)	3.25(d)
Total States Meeting	48	25	51	47	23	35	30	20	16	11	18	7
Alabama	X	-	X	X	-	X	-	-	-	-	-	-
Alaska	X	X	X	X	X	X	X	X	-	X	X	-
Am Samoa	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Arizona	X	-	X	X	-	X	-	-	-	-	-	-
Arkansas	X	-	X	X	-	X	-	-	-	-	-	-
California	X	-	X	X	-	-	X	-	-	-	-	-
Colorado	X	-	X	X	-	X	X	-	-	-	-	-
Connecticut	X	-	X	X	-	X	X	-	X	-	-	-
Delaware	X	-	X	X	-	X	X	-	-	-	-	-
Dist Columbia	X	X	X	X	X	X	-	X	-	-	-	-
Florida	-	-	X	-	-	X	-	-	-	-	-	-
Georgia	X	-	X	X	-	X	X	-	-	-	-	-
Guam	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Hawaii	X	X	X	X	X	X	-	-	X	X	X	-
Idaho	-	-	X	-	-	X	-	-	-	-	-	-
Illinois	X	X	X	X	X	X	X	X	-	-	-	-
Indiana	X	-	X	X	-	-	X	-	-	-	-	-
Iowa	X	X	X	X	X	X	X	X	-	-	-	-
Kansas	X	-	X	X	-	-	X	-	-	-	-	-
Kentucky	X	-	X	X	-	X	-	-	-	-	-	-
Louisiana	X	-	X	X	-	X	-	-	X	X	X	-
Maine	X	X	X	X	X	X	X	X	-	-	-	-
Maryland	X	X	X	X	X	X	X	X	X	X	X	-
Massachusetts	X	-	X	X	-	-	-	-	-	-	X	X
Michigan	X	-	-	X	-	X	X	-	-	-	-	-
Minnesota	X	X	X	X	X	X	-	X	X	-	X	-
Mississippi	X	-	X	X	-	-	-	-	-	-	-	-
Missouri	X	-	X	X	-	-	X	-	X	X	X	-
Montana	X	X	X	X	X	X	X	X	X	X	X	X
Nebraska	X	-	X	X	-	X	X	-	X	X	X	X
Nevada	X	X	X	X	X	X	X	X	-	-	-	-
New Hampshire	X	X	X	X	X	X	X	X	-	-	X	X
New Jersey	X	-	X	X	-	-	-	-	-	-	-	-
New Mexico	X	X	X	X	X	-	-	X	-	-	-	-
New York	X	-	X	X	-	X	-	-	-	-	-	-
North Carolina	X	X	X	X	X	X	X	X	-	-	-	-
North Dakota	X	X	X	X	X	X	X	-	X	X	X	-
Ohio	X	X	X	X	X	X	X	X	X	X	X	X
Oklahoma	X	-	X	X	-	-	-	-	-	-	-	-
Oregon	X	X	X	X	X	X	-	-	X	-	X	-
Pennsylvania	X	X	X	X	X	X	-	X	-	-	-	-
Puerto Rico	-	-	X	-	-	-	-	-	X	-	X	-
Rhode Island	X	X	X	X	X	X	X	X	X	-	X	-
South Carolina	X	X	X	X	X	-	X	X	-	-	-	-
South Dakota	X	-	X	X	-	X	X	-	X	X	X	-
Tennessee	X	-	X	X	-	-	-	-	-	-	-	-
Texas	X	-	X	X	-	-	X	-	X	X	X	X
Utah	X	X	X	X	-	X	X	-	-	-	-	-
Vermont	X	X	X	X	X	-	X	X	-	-	-	-
Virginia	X	X	X	X	X	-	X	X	-	-	-	-
Virgin Is	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Washington	-	-	X	-	-	X	-	-	-	-	-	-
West Virginia	X	X	X	X	X	-	X	X	X	-	X	X
Wisconsin	X	X	X	X	X	X	X	X	-	-	-	-
Wyoming	X	X	X	-	-	-	-	-	-	-	-	-

TABLE 4. 2 RECOMMENDATIONS RELATING TO MEDICAL BENEFITS

States	Recommendation number 4.2	4.4
Total States Meeting	49	45
Alabama	X	X
Alaska	-	X
Am Samoa	NA	NA
Arizona	X	X
Arkansas	X	X
California	X	-
Colorado	X	X
Connecticut	X	X
Delaware	X	X
Dist Columbia	X	X
Florida	X	-
Georgia	X	X
Guam	NA	NA
Hawaii	X	X
Idaho	X	X
Illinois	X	X
Indiana	X	X
Iowa	X	X
Kansas	X	-
Kentucky	X	X
Louisiana	X	X
Maine	X	-
Maryland	X	X
Massachusetts	X	X
Michigan	X	X
Minnesota	X	X
Mississippi	X	X
Missouri	X	-
Montana	X	X
Nebraska	X	X
Nevada	X	X
New Hampshire	X	X
New Jersey	X	-
New Mexico	X	X
New York	X	X
North Carolina	X	X
North Dakota	X	X
Ohio	X	X
Oklahoma	X	X
Oregon	X	X
Pennsylvania	X	X
Puerto Rico	X	X
Rhode Island	X	X
South Carolina	X	X
South Dakota	X	X
Tennessee	X	X
Texas	X	X
Utah	-	X
Vermont	-	-
Virginia	X	X
Virgin Is	NA	NA
Washington	X	X
West Virginia	X	X
Wisconsin	X	X
Wyoming	X	X

SUPPLEMENT: Pending Changes

The following changes in State laws, affecting accordance with the 19 essential recommendations of the National Commission, were enacted and approved on or before July 1, 1978, to become effective after that date.

State	Effective date	Maximum weekly compensation for total disability and death will equal:
Alaska	1-1-79	166.6% of State average weekly wage
	1-1-81	200% of State average weekly wage
Iowa	7-1-79	166 2/3% of State average weekly wage
	7-1-81	200% of State average weekly wage
Missouri	8-13-78	$155
Oklahoma 1/	1-1-79	$90
	1-1-80	$110
	1-1-81	66 2/3% of State average weekly wage
South Dakota	7-1-79	100% of State average weekly wage

1/ Compensation shown for Oklahoma pertains only to permanent total disability and death, not to temporary total disability.

ESSENTIAL RECOMMENDATIONS OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS

R2.1 Coverage by workmen's compensation laws be compulsory and that no waivers be permitted.

R2.1(a) Coverage is compulsory for private employments generally.

R2.1(b) No waivers are permitted.

R2.2 Employers not be exempted from workmen's compensation coverage because of the number of their employees.

R2.4 A two-stage approach to the coverage of farmworkers. First, as of July 1, 1973, each agriculture employer who has an annual payroll that in total exceeds $1,000 be required to provide workmen's compensation coverage to all of his employees. As a second stage, as of July 1, 1975, farmworkers be covered on the same basis as all other employees.

R2.5 As of July 1, 1975, household workers and all casual workers be covered under workmen's compensation at least to the extent they are covered by Social Security.

R2.6 Workmen's compensation coverage be mandatory for all government employees.

R2.7 There be no exemptions for any class of employees, such as professional athletes or employees of charitable organizations.

R2.11 An employee or his survivor be given the choice of filing a workmen's compensation claim in the State where the injury or death occurred, or where the employment was principally localized, or where the employee was hired.

R2.13 All States provide full coverage for work-related diseases.

R3.7 Subject to the State's maximum weekly benefit, temporary total disability benefits be at least 66 2/3 percent of the worker's gross weekly wage.

R3.8 As of July 1, 1973, the maximum weekly benefit for temporary total disability be at least 66 2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R3.11 The definition of permanent total disability used in most States be retained. However, in those few States which permit the payment of permanent total disability benefits to workers who retain substantial earning capacity, the benefit proposals be applicable only to those cases which meet the test of permanent total disability used in most States.

R3.12 Subject to the State's maximum weekly benefit, permanent total disability benefits be at least 66 2/3 percent of the worker's gross weekly wage.

R3.15 As of July 1, 1973, the maximum weekly benefit for permanent total disability be at least 66 2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R3.17 Total disability benefits be paid for the duration of the worker's disability, or for life, without any limitations as to dollar amount or time.

R3.21 Subject to the State's maximum weekly benefit, death benefits be at least 66 2/3 percent of the worker's gross weekly wage.

R3.23 As of July 1, 1973, the maximum weekly death benefit be at least 66 2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R3.25 (a) Death benefits be paid to a widow or widower for life or until remarriage, and (b) in the event of remarriage two years' benefits be paid in a lump sum to the widow or widower. (c) Benefits for a dependent child be continued at least until the child reaches 18, or beyond such age if actually dependent, or (d) at least until age 25 if enrolled as a full-time student in any accredited educational institution.

R4.2 There be no statutory limits of time or dollar amount for medical care or physical rehabilitation services for any work-related impairment.

R4.4 The right to medical and physical rehabilitation benefits not terminate by the mere passage of time.

Source: Report of the National Commission on State Workmen's Compensation Laws, U.S. Government Printing Office, 1972.

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The CHAIRMAN. The American Insurance Association, Jim Kimble, counsel, and Robert Flockhart, counsel.

We welcome you.

STATEMENT OF ROBERT W. FLOCKHART, COUNSEL FOR AMERICAN INSURANCE ASSOCIATION, ACCOMPANIED BY JAMES L. KIMBLE, COUNSEL

Mr. FLOCKHART. Thank you.

I am Robert Flockhart. I am counsel for the American Insurance Association in New York. On my left is Jim Kimble, counsel with the American Insurance Association located here in Washington.

The American Insurance Association is an organization comprised of 147 property and casualty insurance companies. Our member companies write approximately 45 percent of the workers' compensation insurance written throughout the country. We greatly appreciate, therefore, this opportunity to present our views on S. 3060.

At the outset, I should like to advise this subcommittee that our association is presently reviewing the question of whether Federal legislation establishing minimum standards for State workers' compensation laws is desirable legislation. We adopted support of that concept in 1971. Since that time, considerable changes have taken place in the economy of the country and in the workers' compensation system in many States. Accordingly, we feel now is the time to review the concept to determine whether it is still a desirable proposal.

It is still our policy to support the concept of Federal standards for workers' compensation, but we cannot endorse S. 3060. There are several provisions of the bill which would pose serious problems for the operation of a State workers' compensation system and which would have a severe, adverse inflationary impact on the economy.

Section 5 of this bill gives the Secretary of Labor extremely broad authority to establish standards regarding occupational disease. In a previous statement presented to this subcommittee on June 30, 1977, when the subcommittee was holding oversight hearings regarding occupational disease, we noted our concern over the establishment of "legal diseases" and the use of the workers' compensation system to provide income replacement for those suffering normal wear and tear of life. We must reiterate our position that we are opposed to the creation of "legal diseases," that is, diseases established by presumption rather than by sound medical evidence.

Furthermore, standards could be established which might eliminate or undermine the well-established principle that compensation should be paid in an individual case when the evidence establishes that the disease arose out of and in the course of employment.

While this specific piece of legislation does not address this issue, it does open the door to this ultimate end by its broad grant of authority to the Secretary of Labor. Today, every State is in compliance with the recommendation of the National Commission that the workers' compensation system provide broad occupational disease coverage as opposed to coverage limited to certain specific diseases. We are fully aware that in some States there are limitations, such as requiring a specific period of exposure before the disease is compensable,

which, in effect, eliminates legitimate occupational disease claims from the system.

The American Insurance Association and others interested in establishing sound, adequate, and equitable State workers' compensation laws have worked in the past, and shall continue to do so in the future, to eliminate these anachronisms in the law. We do not believe the method of addressing this issue, as presented in S. 3060, is a desirable alternative. Indeed, it is equally undesirable from the point of view of a sound, State-operated workers' compensation system.

I would like to digress to say that I am making reference to a specific case and I am not doing this to waive a bloody flag. Those who would push us back a century can usually find flags. I merely cite this case as illustrative of a point I wish to make.

In a recent decision in Arizona, compensation was paid on the basis that the claimant's nervous breakdown was due to the stress and strain of the claimant's job. There was no question, due to the considerable growth of the employer's business over a brief period of time, the claimant's workload and responsibility was markedly increased. There were other causative factors in the case, however, which were not related to the job. The claimant had serious domestic probelms and during the period of the increased workload she had lost her mother.

In fact, the immediate incident resulting in the claimant's hospitalization was the fact that she had an argument with her husband, after which she took an overdose of medication. In a dissenting opinion, Justice Gordon stated:

> Although the Workers' Compensation Act should be liberally construed to meet its intended job, we must not lose sight of the fact that the act was not intended to be a general health and accident insurance substitute.

Over the last few years when the question of a national health program has been considered, various figures have been quoted as to the cost of such a program. Even the most modest of these proposals has borne a cost figure which has caused even some of the most ardent advocates of the proposal to pause. If we were to add substantial wage replacement cost on top of the cost of medical benefits for a comprehensive health program, these cost figures must increase substantially. If the workers' compensation system were to become a comprehensive health program, the cost impact of such a proposal could possibly destroy this system.

Again, we wish to note that this bill does not mandate such a system. Nevertheless, it grants broad authority to the Secretary and, therefore, the possibility of this evolving is very real.

One final comment on section 5 of this bill. There is substantial sentiment both in the country and in this Congress in opposition to granting broad authority to the various agencies of the Government to flesh out laws by issuance of regulations. These regulations have the effect of law but are promulgated by individuals who are not responsive to an electorate. We cannot support the granting of such broad authority to the Secretary of Labor in the area of occupational disease, which, due to the fact that medicine is not a precise or definitive science, is open to many diverse opinions.

When our association endorsed the concept of Federal standards for State workers' compensation laws, it did so in the belief that this

might be a necessary means of establishing an adequate and equitable workers' compensation system countrywide. We have always been committed to that system being a State-operated system. To preserve the State-operated system, any Federal standards legislation should have concise, quantitative standards which would mandate broad coverage and adequate benefits. Beyond that point, we do not believe that any such legislation should involve the Federal Government in the State-operated workers' compensation system. S. 3060 goes far beyond any such approach to Federal standards legislation.

Section 13 gives the Secretary of Labor broad powers to issue regulations establishing what reports will be made to the State regulatory agency with respect to work related injuries or illnesses.

Sections 11 (e) and (b)(2) directly involve the Federal Government in the insurance aspects of the workers' compensation delivery system.

Section 4(f) mandates the indexing of benefits. Indexing of benefits is a comparatively new concept in workers compensation. Today only 12 States have such a provision in the law. These laws vary considerably with regard to such things as the type of injuries covered, the funding of the benefits, and the nature of computing the escalation. Indexing of benefits on an individual case basis can be extremely costly.

Furthermore, it has been estimated by the National Council on Compensation Insurance that this provision in S. 3060 alone would increase the cost of workers' compensation insurance by approximately 16 percent. I should note that this figure contemplates that permanent total and death benefits would be open ended. It does not estimate costs. It also contemplates the average weekly wage of the States today at the 6-percent inflation rate. That is the index we use.

This is a conservative cost figure since it does not include the cost increase of States with exclusive State funds or the cost impact on self-insurers.

Recently before the Senate Finance Committee, Treasury Secretary Blumenthal, discussing the House passed tax proposal, stated:

> Indexation is a response to high inflation rates, but the proliferation of indexation schemes tends to make those rates accepted facts of economic life. The economic defect becomes institutionalized. Rather than accommodating to inflation, we should bend all our efforts to control it.

We believe that a provision in Federal workers' compensation standards bill, as set forth in section 4(f), would also tend to institutionalize inflation.

In considering indexing of benefits, it should be noted that benefits can easily result in an annual level which would exceed the expected wage increases that the workers would have made. Wages just do not keep abreast of the increased cost of living throughout the working life of every employee. Usually, sometime after age 40, a worker's salary adjustment tends to taper off.

We recognize that the inflation rates of recent years have greatly deteriorated the value of benefits received through the workers' compensation system in many States. Indexing of benefits is not the only solution to this problem, however. In some instances when inflation has deteriorated the value of the benefits being received by workers' com-

pensation claimants, the State's legislature has provided for an updating of those benefits for outstanding cases. This is a fiscally sound approach frequently used by private companies to adjust outdated benefits paid under retirement plans.

Considering the serious problems we have in the country today with inflation, we do not believe it is desirable to include the costly concept of indexing of benefits in any Federal standards legislation.

It has been our belief that any Federal standards legislation would generally be confined to the 19 essential recommendations of the national commission. There are several other provisions in this bill which go beyond the 19 essential recommendations.

For instance, section 4(h) mandates a vocational rehabilitation program of not less than 2 years. Section 4(j) provides for the free choice of physician and the definition of "physician" in section 3 includes chiropractors and clinical psychologists.

Section 4(k) prohibits the termination of benefits if medical treatment is refused on the grounds that the claimant wants to be treated through prayer or spiritual means.

Section 4(m) fixes the waiting period for 3 days with retroactive payment after 14 days. Section 4(n) mandates a 2-year statute of limitations to file claims. Section 4(o) deals with compromise and release agreements.

None of these provisions are included in the 19 essential recommendations of the national commission. Some of them go well beyond the provisions in most States' laws. Others, we believe, are unsound as far as the operation of any workers' compensation system is concerned. We believe, therefore, that such provisions should be deleted from any Federal standards legislation. A proposal dealing with Federal standards for State workers' compensation laws would be best if limited to the clearly defined 19 recommendations of the National Commission.

I thank you for this opportunity to allow me to present to you the views of the American Insurance Association on S. 3060. As in the past, our association stands ready to provide whatever assistance you and your staff may feel desirable.

Thank you.

The CHAIRMAN. Thank you. Your statement arrived last night. The staff read it. The staff sent it on to me at 7:45 p.m., following the arrival of the statement at 7:30. The staff note says: "Flockhart's statement is unexpectedly negative."

What happened?

Mr. FLOCKHART. I can't imagine who said that.

The CHAIRMAN. We anticipated something different.

Mr. FLOCKHART. As I said at the outset, we are reviewing the whole concept of Federal standards. We have great concern about what is developing in the area of workmen's compensation in the last few years. It has a lot to do, no doubt, with inflation, but actually workers' compensation rates have more than outpaced inflation. As you know or may know, one-third of the losses in workers' compensation involve medical benefits, and medical costs have doubled the normal inflation rate. They run about 15 percent.

We are concerned with overutilization of the system when we reach high benefit levels. You are running into the same type of problem in

the Federal Employees Compensation Act. A recent article in U.S. News and World Report noted after the 1972 amendments to this act which greatly liberalized it, claims quadrupled, and they were not legitimate claims. For instance in Atlanta with air traffic controllers, they found a whole flurry arrived with claims. All had the same psychiatrist who had given a most cursory review and then determined they were disabled as a result of the job.

We are running into these problems in the operation of the system. We are still committed to an adequate and equitable workers' compensation system, but we are concerned at the prospect of a piece of Federal legislation such as this trying to mandate all at once a comprehensive solution to the problems that exist and which we recognize and which we oppose, but we are questioning whether they can be done on a Federal basis.

The CHAIRMAN. Are you by any chance mixing in problems that you, as insurers, are facing with partial disability cases?

Are you confusing those problems which we feel we cannot yet deal with with what we do address in this bill, compensation in the death cases and the permanent total disability cases?

Mr. FLOCKHART. No, we realize that you have left the permanent partial situation out.

The CHAIRMAN. Were the psychiatric cases of the air traffic controllers permanent total cases?

Mr. FLOCKHART. I believe they were. I can leave the article with you if you haven't read it. It is a very interesting article. It clearly points out that when the law had become liberalized, it had become badly abused. It also commends Secretary of Labor Elisburg's comments on enforcement of the law, that is bringing people in to more clearly and more carefully investigate the cases. An awful lot of the problems which have developed are due to the low-benefit levels that existed in many States for a long time.

When things like that happen, the State administrative agency and the courts can be quite ingenious in finding avenues or revenues that are not specifically described in the law. But once you bring the benefit levels up to a high level, those circumventions of the law which overcompensate, which leave little incentive for the employee to return to work because he is taking home practically as much as he would have received and he has none of the added costs of working such as commutation costs, eating costs and things of that nature. There is no incentive to return to work. This is driving costs up.

We are very much concerned. Between 1972 and now, this was somewhere in the area of a $4 billion line of insurance. Now it has risen to $10 billion.

The CHAIRMAN. Have you isolated those figures to cases that are permanent total?

Mr. FLOCKHART. We have not.

The CHAIRMAN. I have an uneasy feeling that you are taking workers' compensation in total and not breaking out only those areas that we are dealing with in this bill, namely death and permanent total disability. We are not dealing with partial disability cases.

Mr. FLOCKHART. I agree. We recognize that. We have not made our decision as yet. I hasten to add that. We would still have problems,

especially with section 5 in its broad grant of authority to the Secretary of Labor in the occupational disease areas.

The CHAIRMAN. You were here when the AFL representatives thought we restricted the Secretary too much. So you are way off in left field, and they are in the right field, and we are in the middle—or in the other way. I never felt more comfortable in my life being in the middle.

Mr. FLOCKHART. We have concern that the balance is not there. First of all, to leave the Secretary involved in making these standards and establishing what is valid medical evidence and which is not valid in an area which is not a precise science, involves the Secretary and the Federal Government directly in the State-operated system, and that we are opposed to.

Every State has a broad occupational disease law today. As things evolve, the Secretary may find what is written in the law isn't what is happening at the judicial or administrative level of the State. There is authority for the Secretary to review the operation of every State's law, and if he finds, due to administrative rulings, certain diseases which sound medical evidence has determined to be occupational and related to a particular industry, he can withdraw that finding that they are in compliance with the law. He doesn't need this grant of authority.

We strongly support those in the Congress and elsewhere who are concerned with this broad grant of authority which is, in effect, law-making authority to branches of the executive Government which are not responsible to an electorate.

The CHAIRMAN. You approach the artificial barrier question as we do—that the artificial barriers are an impediment to necessary judicial or administrative finding, and that this impediment should be removed.

Mr. FLOCKHART. Yes.

The CHAIRMAN. The only difference is that you feel every individual should come to his tribunal without any outside standard to be applied to the question of determining compensability of the disease which he is carrying. In your view, such cases should be decided case by case without any generalized medical or scientific content in the way of a standard?

Mr. FLOCKHART. That is correct.

The CHAIRMAN. Then it is doctor against doctor in court?

Mr. FLOCKHART. I don't think you will find that to be the case.

The CHAIRMAN. Down in Atlanta, they found a psychiatrist. Let me tell you about this.

Mr. FLOCKHART. We will find a psychiatrist too, I am quite sure.

The CHAIRMAN. The situation that concerns you, based on what you read, is that you have a psychiatrist who says a guy is off his rocker and, therefore, he is getting compensation; is that right?

Mr. FLOCKHART. Yes.

The CHAIRMAN. We are saying in our bill, that if this subject matter is one that lends itself to scientific-medical knowledge or definition, it would be better to make these determinations based on that knowledge than on a case by case basis. Just eliminating the artificial barriers and making all determinations on a case by case basis could get into real abuses; particularly where medical-scientific knowledge is pretty clear.

Mr. FLOCKHART. You don't have to go case by case. There are certain diseases that are generally recognized. I don't think in the practical aspect of it that it works. Asbestosis, where a man is working in a shipyard and is exposed to a heavy dosage of asbestos, the self-insurers are not picking up that case.

The CHAIRMAN. I don't know why that is. We had the president and chief executive officer of Johns-Manville here yesterday, and he indicated that his company accepts the medical-scientific findings on the relationship of the exposure to asbestos and the disease. They accepted that.

Again what we are saying is that the Secretary look to the same kind of medical and scientific knowledge.

Mr. FLOCKHART. For instance, Dr. Selikoff, who is quite a leading authority on asbestosis, noted in his conclusions and findings that the things that we see and know about today were developing since 1935. I believe he said. He was one of the first doctors that found a relationship between this respiratory disease and the exposure. It took that long perhaps to get Johns-Manville and many others to do something about it. I don't know where between 1935 and 1978 we reached the point of "sound medical evidence."

But it would be much too easy for someone to say back in 1935 when a substantial portion of the medical profession did not accept it, and one doctor found it; therefore I find that to be sound medical evidence.

The CHAIRMAN. I agree. But you would agree that once that level of scientific-medical agreement is reached, it should be relied upon?

Mr. FLOCKHART. Yes. I agree. But the powers of the Secretary to withdraw his certification that the State has a broad occupational disease law on the basis that there are a series of cases in the past 2 or 3 years where sound medical evidence was presented and the claim was denied is ample authority to keep an operative workers' compensation standard bill without directly involving the Secretary and the Federal Government in a very vital and very flexible, amorphous area of law.

I think there are better alternatives that will maintain the State-operated workers' compensation system than is proposed here.

The CHAIRMAN. This has to be clarified. You have made several points, just now.

I wonder if we could take that last line of observation you made right from the top.

Mr. FLOCKHART. I wonder what it was.

The CHAIRMAN. Well——

Mr. FLOCKHART. I think what I said, Senator—and I hope I don't contradict myself in the record—I think what I said was that the key to the bill or the key to Federal standards is to have a consistent quantitative list, essentially the 1970 recommendation, to determine whether the State is or is not in compliance. One of those which you have included in these standards is a broad occupational disease law as opposed to what we had in most States or in many States which was a specific listing of diseases that were recognized as occupational.

The Secretary has given the authority to review the compliance of the State on a yearly basis. If he feels, in looking at a series of cases—and there are many, for instance byssinosis, and I realize you heard

from the Brown Lung Society yesterday—if he looks at the decisions and the results of a series of cases over the course of 1 year or 2 years, and he finds that there is clear medical evidence of byssinosis and that there is sound medical evidence that the inhalation of cotton dust causes byssinosis and nevertheless the administrative agency of a particular State has failed to grant compensation to those claimants, he can say that it is very nice that you have a broad occupational disease list in your workers' compensation law, but the administration of that law as presented by these decisions has negated your compliance with this law; therefore we would withdraw your certification of compliance with the minimum standard which says you must have a broad occupational disease law.

The CHAIRMAN. You approve of that provision? You approve of a provision which broadly covers occupational diseases rather than a law that lists compensable diseases? That is what your real fear is, is it not?

Mr. FLOCKHART. Well, in effect, Senator, what is being suggested is almost an about-face of what we were confronted with. Only instead of having the States write up a list of occupational diseases into their statute which everyone complained of, now you are saying that the Secretary of Labor should write it.

The CHAIRMAN. You disapprove of that?

Mr. FLOCKHART. Yes.

The CHAIRMAN. But you approve that provision which provides Federal review of the case experience of the States?

Mr. FLOCKHART. As of today.

The CHAIRMAN. If we have an established medical and general conclusion on the relationship of dust and a specific disease and the cases in a particular State are not giving credence to that relationship and are not awarding compensation in such cases, you would agree that the Secretary on review of the State's law, should have the authority to deal with that?

Mr. FLOCKHART. Yes. It has to be consistent with the State-operated system instead of turning a substantial portion of that system over to an arm of the Federal Government.

The CHAIRMAN. That puts each claimant to the full medical proof. What would the burden be? What would be the difference of burden on a claimant with the situation that you would have and the situation if we did have standards which incorporated accepted medical-scientific findings of the relationship between the workplace environment, whether it is dust, asbestos or whatever, and a disease?

What would be the difference? As you would have it, wouldn't the claimant just have a major additional burden of coming in and really inventing the wheel again?

Mr. FLOCKHART. No, but as a practical matter, even with the medical standards, the claimant would have to, if the case were challenged, he would have to come in with a doctor who would, in fact, provide testimony consistent with these standards, whatever they happen to be, and with the medical finding of what is byssinosis, what does the degree of involvement, if cotton dust is, in fact, responsible for it.

I am not an authority on byssinosis. However, I do believe that there is some question as to whether it is the inhalation of cotton dust or

other things involved in dealing with cotton that causes byssinosis. Assuming that it has been decided that it is the result of inhalation of cotton dust, as a result of inhalation of cotton dust over certain numbers of years, certain things would show up on an X-ray. You have to have medical testimony on any given case. Say I am a doctor and I treated him, and it is my medical conclusion, based on 1, 2, 3, 4, and 5, which may be the standard the Secretary put forth, that this individual is totally disabled from byssinosis, and he or she has byssinosis because he or she worked in the cotton mills.

I do not think you are eliminating, by the setting of standards, the need to look at individual cases. It is just a matter of having a measure to determine it set by the Secretary of Labor as determined by each case.

The CHAIRMAN. Would the claimant have to come in with a qualified expert and present evidence on the relationship of cotton dust and disease; not just a general practitioner, but someone that could be qualified as expert in the field in order to establish the relationship with exposure for a period of time to the dust?

Would all of these things have to be proven?

Mr. FLOCKHART. I think they would in either alternative.

The CHAIRMAN. Then it looks to me as though, basically, you accept the approaches here?

Mr. FLOCKHART. No, we do not accept the approaches of the Secretary of Labor coming up with standards in this area. Byssinosis, asbestosis——

The CHAIRMAN. You are accepting the concept of medical-scientific experts coming up with consensus judgments of the relationship between exposure and disease; is that right?

Mr. FLOCKHART. Certainly we do. We believe that is happening in most States today. It becomes difficult——

The CHAIRMAN. You have what I have explained to my friends from Labor, an apprehension about Secretary power.

Mr. FLOCKHART. Apprehension is a very kind way to put it.

The CHAIRMAN. I think we can certainly build in protections. I do not think we are really so far apart. We can certainly try to accomodate your concerns and still meet our objectives.

Welcome, Senator Javits. We have had very good discussion. The initial impression was that he was negative. The more we talked, the more I think he is positive about many of the things in our legislation.

Mr. FLOCKHART. Well, positively negative.

Senator JAVITS. Mr. Chairman, may I ask just one or two questions?

The CHAIRMAN. Please.

Senator JAVITS. Do I understand that your organization is generally speaking in favor of establishing minimum standards for State workers' compensation laws?

As I see it on the first page of your statement, and I know from personal experience that you adopted that position years ago—you say in 1971?

Mr. FLOCKHART. That is right.

Senator JAVITS. That about checks my recollection. So you differ with our approach in its detail. Isn't that what it really comes down to?

Mr. FLOCKHART. As I said in our second paragraph of our statement, we are reviewing the concept of whether it is desirable to have minimum standards. We still endorse that concept. In the context of being in support of Federal legislation, we have problems with S. 3060.

Senator JAVITS. Are you reviewing whether you favor them, or are you still committed to Federal standards?

Mr. FLOCKHART. We are still committed to Federal standards, but we are reviewing the issue.

Senator JAVITS. Reviewing the issue of the bill?

Mr. FLOCKHART. Of Federal standards.

Senator JAVITS. When will we know your final position?

Mr. FLOCKHART. We have a subcommittee of the board which is committed to report to our board of directors by November 1.

Senator JAVITS. This bill is not going to be passed by November 1, so we should have your position before action is taken on this bill, right?

Mr. FLOCKHART. Yes, sir.

Senator JAVITS. I notice a reference in your statement—this appears on page 5—that our bill would increase the cost of workers' compensation insurance by approximately 16 percent.

Now, is that a fatal defect?

Mr. FLOCKHART. No. I explained that, Senator, that the 16-percent figure is strictly using a 6-percent inflationary rate. It is using the average weekly wage of the States today, and it contemplates that every State that has S. 3060 would have open-ended, permanent total and death benefits, and they don't. This 16 percent is just dealing with indexing on that limited scope.

Senator JAVITS. I still ask is that a fatal defect?

Mr. FLOCKHART. We are very much concerned with the indexing of benefits. The 16 percent is, as I think our excerpt from Secretary Blumenthal's recent comments on indexing in the tax bill that passed the House states, we look upon indexing as institutionalizing inflation, and this is at a very high level.

Senator JAVITS. I am not talking about the 16 percent necessarily being indexing. I am talking about an absolute increase of 16 percent, assuming that there is a 16-percent increase without any commitment that it is to be indexed. Is that a fatal defect?

Mr. FLOCKHART. First of all, 16 percent is just a broad, countrywide ballpark figure. It is going to vary extremely by State. Evaluation of this bill has not been done state by state. For instance, if you took the State of Maine, it would have deminimus cost impact. They already have cost indexing benefits. They have open-ended death and permanent-temporary benefits. So the cost is there. The cost impact in other States that have limits, there the added cost impact plus indexing will be significantly higher. The 16-percent figure is a countrywide figure.

Senator JAVITS. But we are dealing here, are we not, with the matter of a human person. A person does not get worker's compensation unless he or she has been hurt. Do you think we can apply the standards of cost savings for that kind of difficulty?

I mean, after all, there are grave injustices in the State laws, and you gentlemen feel that there should be Federal standards. If that is

so, should you not, in all fairness, accept one of the problems? There is going to be some increased cost, and there should be.

Mr. FLOCKHART. We recognize that there will be increased costs, Senator. We also feel that Federal legislative standards should be quantitative standards. Indexing was not one of the recommendations.

Senator JAVITS. I am not arguing about indexing. That is a separate problem. I am arguing whether we have a right to pass a law involving Federal standards which will involve additional costs in some States which have been behind their time and almost barbarous in their treatment of worker's comp?

You desire to be with us. We agree in the final analysis. It may not be all our bill or all you think. However, we feel your organization, as long as you are with us in principle, should be with us in the sense of bringing up the States which have caused this problem, which is so iniquitous to people who are injured or killed on the job.

Mr. FLOCKHART. We adopted the concept, as I said, in 1971, because we felt that possibly the States would not act. I believe at the time, the President recommended a grace period of 4 years for the States to bring themselves into compliance with the essential recommendations. And minimum standards at that time were deemed as probably the only means of forcing compliance.

We are reviewing that position in light of distortions that have developed in several States that have made major benefit increases. We are reviewing that position in light of the marked increase in cost of workers' compensation insurance which has far outstripped the inflationary rate of the country.

We are reviewing that position in light of distortions that have made in many States. There are certainly some States that are well behind the time, as far as having a fair and equitable workers' compensation system. We are wondering, and questioning, and reviewing, the issue as to whether a Federal sledge hammer, if you will, at this time is a desirable course to proceed with.

Senator JAVITS. We will await your results. I hope very much, in the interest of fairness and equity in your own organization, you will stay with the support of some equity nationally in this field and a humane consciousness of what we are talking about which is broken bodies and minds of workers and that you are not going to scrimp on that.

Mr. FLOCKHART. I can assure you that I will pass that along.

Senator JAVITS. Thank you.

The CHAIRMAN. Thank you.

I will call on the Alliance of American Insurers, Mr. Andre Maisonpierre, vice president of the Alliance.

Good afternoon. We welcome you back.

STATEMENT OF ANDRE MAISONPIERRE, VICE PRESIDENT, ALLIANCE OF AMERICAN INSURERS

Mr. MAISONPIERRE. Thank you very much, Mr. Chairman and Senator Javits, for allowing us to testify on S. 3060. We have a very extensive statement. We would appreciate it if it can be made a part of the record. We have summarized it and, at this time, we will proceed with a very brief summary of the statement.

The CHAIRMAN. That is fine. Thank you.

Mr. MAISONPIERRE. In our prior testimony before this committee, we expressed our faith in the existing State compensation system, and stressed our conviction that Federal legislation was not needed. Our position remains unchanged.

We are aware of the criticism that is being voiced to the effect that the impetus for improvement of State laws generated by the publication of the National Commission report has worn off and that today the benefits are lagging behind both inflation and increases in the national average weekly wages. The facts do not support this contention. 1977 workers' compensation temporary total benefits replaced significantly more spendable earnings than they did in 1975.

Moreover, since temporary total benefits are quite often supplemented by generous payments in the form of permanent partial disability benefits, one can safely state that as a whole, benefits paid under the compensation system today are equal to, or outstrip, total wage losses sustained by most industrially disabled workers.

Improvements in our State compensation laws have come at a heavy price. In fact, cost increases have far outstripped what supporters of changes were predicting at the time the National Commission's report was published. We do not believe that as a matter of public policy we can continue to ignore the cost of State workers' compensation law improvements.

Observers of our workers' compensation program have repeatedly stressed the need to keep the system within reasonable cost bounds and it is doubtful whether the National Commission would have urged the adoption of its recommendations had it been in a position to estimate more accurately the cost of those recommendations.

The Alliance believes that three major factors account for the unexpected spiraling cost of workers' compensation. They are:

One: Legislative efforts have been directed at meeting the National Commission's recommendations without simultaneously attempting to achieve much needed reform in the benefit distribution system.

Two: The new high benefit levels have generated entirely new utilization patterns.

Three: Little or no efforts have been made to improve the administration of laws at the State level.

With respect to the increase in utilization, the Alliance has completed two separate studies which support our contention that the substantial benefit increases have led to entirely different and unexpected use of the compensation system in many States. These studies are detailed in our statement.

Mr. Chairman, we believed that important lessons can be learned from the difficulties which have developed with the Longshoremen's and Harbor Workers' Compensation Act. The problem with that law has been fully examined by the House Subcommittee on Compensation.

In truth, the cost of workers' compensation under the Federal Act has reached a dramatic point. For instance, in the District of Columbia, what was in 1972, a $100 insurance premium, is today $629.97. The picture is no different from those employers involved in other activities covered by the Longshore Act. This applies to the shipbuliding industry, as well as the stevedoring industry. With respect to in-

surance, the act has become, in the view of most knowledgeable insurance experts, an uninsurable hazard. It is a line of insurance which few companies dare write today.

It has become so because of circumstances much like those developing in a number of States today. The major difference between the Federal Act and the State laws is that in the Federal law the excesses are more pronounced and costly and abuses will be more difficult to overcome.

Mr. Chairman, our statement details some of the important objections which we have with S. 3060.

In the first place, we are convinced that the type of reforms needed in most States are not those being sought by S. 3060, but rather reforms which will curtail the serious abuses and the lack of balance existing in many State laws. S. 3060 brings about no such reform. In fact, it would require the States to go further in their liberalization of benefits without in any way curtailing any of the abuses that have been identified.

It can, of course, be argued that there is nothing in S. 3060 to prevent the States from correcting abuses. However, the political realities are such that such expectations are but idle dreams.

To bring the States back into balance will require extensive cooperation between business and labor and such cooperation is unlikely to come about unless some quid pro quo can be arranged. Why should labor cooperate? If Congress forces the States into acquiescing to those benefit levels which Labor has dreamt about without, simultaneously, requiring the States to correct the abuses of the system, what incentive is there for Labor to cooperate with employers to correct such abuses?

Further, S. 3060 splits responsibility for benefits between States and the Federal Government. The Federal Government takes on responsibility for total disability and death benefits and leaves the responsibility for the establishment, determination, and distribution of partial disability to the States. This makes little or no sense. The function of all benefits in the compensation system is recognized as being a replacement for lost wages. Splitting the responsibility for benefits between the States and the Federal Government is a poor approach from the standpoint of efficient legislative management.

Second, S. 3060, deals unrealistically with occupational disease. The complexities of the occupational disease problems are completely overlooked by S. 3060. The bill removes the traditional safeguards which have been built into most compensation laws and dumps the responsibility for determination of occupational disease guidelines on the Secretary of Labor without providing adequate direction as to congressional intent.

In this connection, it should be noted that the Department of Labor is presently contracting for extensive research projects in the area of occupational disease. It is premature, we believe, to establish public policy when so little is known and so much is at stake. To force the States to absorb an uncontrolled occupational disease benefit system is both unrealistic and uneconomical.

Third, S. 3060 will explode costs. The legislation would aggravate present cost problems and would likely make workers' compensation unaffordable for many. Frankly, we do not believe, Mr. Chairman, that

this legislation can be costed out. Prior experience in attempting to cost new compensation concepts clearly shows that traditional costing and actual practices are of relatively little value. All that can be said is that S. 3060 would come very close to approaching those costs being generated under the Longshore Act.

Finally, we believe that S. 3060 will create administrative chaos as a result of the juxtaposition of the Federal Longshoremen and Harbor Workers' Compensation Administration over State administrative agencies. S. 3060 will in fact provide in many instances, for a lateral right of appeal from a State agency to a Federal agency and this will create much confusion in the adjudication of claims. Mr. Chairman, in conclusion, we believe that the recent substantial upgrading of State laws has created serious cost pressures on the business communities. There is strong evidence that the cost of workmen's compensation is fast approaching a level of nonaffordability in many States. This level has, we believe, been reached with respect to the Federal Longshore Act and now is not the time to pursue new legislation. There are abuses under the existing system. There is nothing in S. 3060 directed at controlling those abuses. If enacted, the legislation will lead to a complete breakdown in our State laws which we do not believe is in the interest of labor or industry.

Thank you.

The CHAIRMAN. Thank you.

We will have to have some clarification on some of the broad statements. Perhaps the full statement does include that. I have not had a chance to read your full statement.

Mr. MAISONPIERRE. I understand.

The CHAIRMAN. In two or three parts of your statement just now, you referred to the Longshoremen's and Harbor Workers' Compensation Act and used that to speculate as to the expense of the problems that will arise under this act.

Mr. MAISONPIERRE. That is correct.

The CHAIRMAN. I am just wondering now if we could get a little finer description of what you are including when you talk about the Longshoremen's Act which is far more comprehensive than this bill.

In this bill we are dealing with the compensation of death and permanent total disability and that is all.

The Longshoremen's Act of course has the comprehensive coverage of the partial disability situation.

Could you tell me just how you are approaching the application of the longshoremen's experience with this bill?

Mr. MAISONPIERRE. Mr. Chairman, I don't view this bill as simply a bill affecting total disability or death benefits because this bill is an addition to existing State programs. This bill cannot be looked at as a separate entity. It does not replace existing State programs. It supplements existing State programs.

The CHAIRMAN. Well, it replaces—in terms of its benefits—the State benefit structure as to death and total disability so it is, in a sense, a replacement. It is not a supplement in those terms. It is a replacement.

Mr. MAISONPIERRE. That is right. It replaces part of the State compensation laws. It does not repeal the other sections of the State compensation laws, obviously.

The CHAIRMAN. And they are not touched.

Mr. MAISONPIERRE. They are not touched directly. But, what we would have if S. 3060 were to be enacted, we would have entirely new State compensation systems. We would have as systems those parts not touched by S. 3060 in addition to those parts that are being replaced by 3060.

What I am comparing the Longshore Act with the State system—I am now comparing the total Longshore Act with what the State systems would look like after S. 3060 would be enacted, so I am comparing really apples and apples—a complete State compensation system with a complete Federal compensation system. I believe that if S. 3060 were to be enacted, most State laws would be forced to come very much in line, in conformity or would parallel very closely the Federal Longshore Act. There would be some minor differences, but those would not cost very much.

The CHAIRMAN. Let us if we could, to further understand this, ask you what or where in the Longshoremen's Act coverage is the situation you are concerned about?

Mr. MAISONPIERRE. There are really two major areas, or perhaps three areas, Mr. Chairman.

The first one is the indexing of benefits. I recognize in S. 3060, there exists a difference between the Federal Longshore Act and the proposals. The Federal Longshore Act does not have a cap on the indexing benefits. But in our costing of the index section of the Longshore Act, we never used, the National Council on Compensation Insurance, has never used an indexing factor in excess of 6 percent. So from the standpoint of cost, we would see no difference to the business community between the Federal act, Federal Longshore Act and the State act.

Now, there may perhaps be a difference with respect to the availability of insurance. One of the very serious problems under the Longshore Act today is that there are very, very few insurance companies that are still writing the business. In fact, there are about three companies that are doing so.

As our statement indicates, they are seriously considering curtailing their writing.

One of the problems is the lack of cap on the indexing. There is no way of accurately measuring the value of cases. And companies find it very difficult to secure reinsurance under the Longshore Act because of the uncapped index.

So it is possible that we would find somewhat less concern by the companies on this standpoint because of the existence of a cap. However, we believe a cap of 6 percent would still create serious problems from a rate and cost standpoint. We doubt very much if insurance commissioners would grant us an automatic 6 percent increase, or would allow us to figure in an automatic index factor of 6 percent, because they would say their crystal ball is as good as ours, and theirs might indicate only 3 percent.

Note that each indexing point makes a great difference in the cost of insurance.

The CHAIRMAN. All right. That is that. This bill is better than the Longshore Act which has no cap.

Mr. MAISONPIERRE. It has some slight improvement from an underwriting point. From a cost standpoint, no improvement at all.

The CHAIRMAN. What else?

Mr. MAISONPIERRE. The whole area of permanent disability is in chaos under the Federal act.

The CHAIRMAN. What are the elements of chaos?

Mr. MAISONPIERRE. There is little ability to control permanent-partial disabilities.

The CHAIRMAN. I see. I thought you were talking about total.

Mr. MAISONPIERRE. No. Payments are required in insignificant disability, or no disability cases. The same as is occurring at the State level. A tremendous amount of benefits is going to relatively insignificant claims.

The CHAIRMAN. It is a matter of administration.

Mr. MAISONPIERRE. As well as a matter of law. We believe that the whole concept of permanent-partial disability can be controlled, partly through legislation, as well as through administration. But it has to be done on a State-by-State basis.

We do not believe there is any way in which one can set up a single system of permanent-partial disability which will be effective, and which will work well with all States.

The CHAIRMAN. We are not intruding on the States' opportunities, but their system.

Mr. MAISONPIERRE. No, but you are making it virtually impossible for the States to correct the abuses existing under permanent-partial disability. We must be realistic. If we are going to correct the abuses on permanent-partial disability, we are going to have to reduce the number of payments in which payments are made. The only way to do this is to get labor and management to agree to such concepts. There are no incentives whatsoever for labor to agree to such concepts, since you are providing under S. 3060 everything labor would want with respect to total disability, occupational diseases, et cetera. There is nothing left to negotiate with labor.

From a realistic standpoint, as we explained in our statement, we believe we will never be able to correct the abuses under the system. Just as we feel we will not be able to correct the abuses under the system in the Federal act.

Labor has shown absolutely no acceptance whatsoever, no sense of accepting, or willingness to accept any change in the Federal act which would bring the Federal act back into some kind of economic viability. I do not think that labor will show any willingness to do this on the State level if S. 3060 ever were to be enacted.

The CHAIRMAN. I am sure you are convinced of that, but you have just not made it clear to me, I will say.

While I go over to vote, could you have a little staff conference? I will be back after I vote.

[Short recess.]

The CHAIRMAN. Now we will find the loose threads and bring them together.

Mr. MAISONPIERRE. Well, we have had a discussion, Mr. Chairman.

The CHAIRMAN. I left at the point where you left me on the loss of leverage, am I right?

Mr. MAISONPIERRE. Yes. We were discussing the problems which States would have in controlling the abuses, particularly with respect to permanent-partial disability, as well as other abuses in the law.

There is no quid pro quo to provide labor. S. 3060 would provide labor with everything which I would believe labor would ever hope to have with respect to those areas dealt with in S. 3060.

The CHAIRMAN. All right.

If we come forward with S. 3060, which deals with the death and total disability situations exclusively, the question of improvement or changes in partial disability compensation still resides with the States?

Mr. MAISONPIERRE. That is right.

The CHAIRMAN. If there is to be any improvement, it will be hard to come by State-by-State under your line of reasoning, because the States will have lost leverage because there has been a benefit improvement for the death and total disability cases. Is that right?

Mr. MAISONPIERRE. That is correct.

The CHAIRMAN. You did use the word "leverage" in bargaining with the unions? I am referring to the phrase you used, in other words.

Mr. MAISONPIERRE. I have used the phrase of "bargaining between management and labor."

The CHAIRMAN. That would vary from State to State in how it would be worked out?

Mr. MAISONPIERRE. Yes. And I think the solution to the partial disability would have to vary from State to State. I made an observation to the staff in your absence that the interesting thing about the Longshore Act is here we have a Federal act with uniform methods and supposedly uniform administration countrywide. But we see that the way the act is administered from region to region varies greatly. In fact, the differences in the administration of the act between regions account in part, not totally, but in part, for some of the wide variations in the cost of insurance between regions.

New York is probably three times higher than South Carolina, for instance.

We find that there are great dissimilarities in the administration of the Longshore Act in South Carolina and the Longshore Act in New York.

The reason for the differences in the way the law is administered in different States is that the claims are handled in ways that are responsive to the social mores of the community, the claims consciousness of the community, the amount of attorney involvement in workmen's compensation litigation in workers' compensation claims, the amount of union involvement, the amount of employer involvement.

The ease by which insurance carriers are prepared to settle cases for nuisance value is also involved.

We find the same concepts in the State acts carrying over in the Federal act. We have been requested by your staff repeatedly to come forth with a solution to the permanent-partial problem. They beg us to do this and we really have not done it. And the reason we have not done this is because we do not think that there is a one-shot approach. This has to be handled on a State-to-State basis. We have to analyze what the problems are in New York which are quite different from the problems in New Jersey which are totally different from the problems in South Carolina. And we have to approach each State separately.

Now, we believe in the overwhelming majority of the States, Mr. Chairman, the level of benefits today has reached a level of adequacy. As our statement indicates, and we have a chart in the back of our statement, the States are increasing the level of spendable earnings being replaced by temporary total disability.

In 1977, 39 States had replacement rates in excess of 70 percent. By the way, only 18 States had such a replacement rate in 1975, so we have seen a tremendous improvement for benefit levels in temporary total disability between 1975 and 1977, and with a very high level of temporary total benefits in those States.

We believe we have come to the point where we must address today the problems of abuses of partial disabilities, et cetera.

Our statement also provides a comparison of what the National Commission's cost estimates were to implement its recommendations with the actual rate increases that have been granted by State insurance commissioners in the States, and you will find that the National Commission's expectations were grossly undervalued.

I might add that what the State insurance commissioners have granted with respect to rate increases are considered by insurance people in many States as being very, very inadequate. The result being the companies are withdrawing from the workmen's compensation market and we are having very serious availability problems for more and more companies.

The CHAIRMAN. I would gather that your recommendation is that we not even include a provision for a further study of the partial disability situation in this case?

Mr. MAISONPIERRE. That is correct, Mr. Chairman. There have been a number of studies already made. You had one performed by Mr. Burton and another one performed by Professor Johnson of Syracuse University. They have not been what we call satisfactory studies because the problem is a very complex one to study.

I think each State has to approach the problem on a State-by-State basis.

If there would be some way to assist the States with their individual problems, I think that would be very helpful. This is one of the aspects of the Federal involvement in workmen's compensation which is very helpful.

The Department of Labor has helped the States in analyzing their laws somewhat better. I think there could be some greater efforts in that direction in providing some assistance to the States and pointing them in the right direction as to how to go about analyzing their law. Many States do not have the resources, either the financial resources or the capabilities of looking at their laws in an adequate manner.

The Department of Labor could help them do this. The Department has developed quite a competent staff in this area and has helped the States already. This is an area of very significant assistance by the Federal Government to the compensation system, and I would hope that this could be augmented in the months ahead.

The CHAIRMAN. That is a constructive and positive suggestion. I think with that, we will pause here with your testimony. I can see that much of your material requires considerably more analysis than I personally have been able to give at this time. However, I will do so at a later time.

I notice that the staff has had an opportunity to do so, and they appreciate the opportunity you gave them to analyze your material. They have been giving me some of their judgments, but I think it would be more efficient if I had my own independent study and then I might come back to you with some observations.

Mr. MAISONPIERRE. Very good. I would be glad to sit down with the staff if they have any questions about the technical materials.

The CHAIRMAN. Thank you.

Mr. MAISONPIERRE. Thank you very much.

[The prepared statement of Mr. Maisonpierre follows:]

Workers' Compensation Reform

THE NEED FOR A BALANCED SYSTEM

BENEFITS - COSTS

Statement of the

ALLIANCE OF AMERICAN INSURERS

before the

Subcommittee on Labor

of the

Senate Committee on Human Resources

September 20, 1978

Alliance
of American Insurers

HIGHLIGHTS OF ALLIANCE STATEMENT

1. The Alliance remains convinced that there is no need for federal workers' compensation legislation. (pages 1 -2)

2. Benefit increases under state workers' compensation have been dramatic -- far outpacing increases in national average weekly wages or increases in the CPI. (pages 2 -4, exhibits I, II, III, IIIA,IIIB).

3. Improvement in workers' compensation laws have come at a heavy price. In fact, cost increases have far outstripped what supporters of changes were predicting at the time the National Commission's Report was published. (pages 5 -7, exhibit IV).

4. High costs are a reflection of state legislative efforts directed at meeting the National Commission's recommendations without simultaneously attempting to achieve much needed reform in the benefit distribution system. (pages 8 - 10)

5. The new high benefit levels of workers' compensation have increased utilization excessively and beyond expectations. (pages 10 - 14, exhibit V).

6. The nightmarish problems of the Longshoremen's and Harbor Workers' Compensation Act are an example of what can be expected from unbalanced reform -- i.e., concentrating on high benefits without major changes in permanent partial disability and major upgrading of administration. (pages 15 - 18, exhibits VI & VII).

7. S. 3060 would perpetuate and aggravate the imbalances of state workers' compensation. (pages 19 -21).

8. S. 3060 completely ignores the complexities of the occupational disease problem. (pages 21 - 23).

9. S. 3060 would explode costs and create administrative chaos. (pages 23 - 25).

10. The Alliance believes that it is contrary to the public interest to pursue a new vast and expensive liberalization of state workers' compensation laws until we have learned to control the abuses under the present system. (pages 25 - 26).

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EXHIBITS:

I. Temporary Total Benefits Have Increased in Both Amount And As A Proportion of Spendable Earnings

II. Temporary Total Benefits Have Risen Faster Than CPI And Wages Between 1975 and 1977

III. A Dramatic Shift in the Ratio of Spendable Earnings Replaced by Temporary Total Benefits

IIIA/IIIB: " " " "

IV. Comparison of National Commission Expected Cost Increases with Actual Cost Increases

V. Comparison of Increases in Benefit Levels and the Cost In Average Incurred Claims Per Full Time Employee

VI. District of Columbia Workers' Compensation Cost

VII. 1977 Longshoremen's and Harbor Workers' Compensation Act Costs

I. INTRODUCTION

My name is Andre Maisonpierre and I am a vice president of the Alliance of American Insurers. We are a major association of mutual property and casualty insurance companies. Our member companies write workers' compensation insurance in all fifty states and the District of Columbia. Not only are some of our member companies among the largest workers' compensation insurers in this country, but many were organized specifically to provide this type of insurance coverage. Some of the companies have gained an international reputation for the pioneering work performed in related fields of occupational health and safety, occupational medicine and rehabilitation.

Alliance companies underwrite about 25% of the workers' compensation business provided by insurance companies in this country and this line of insurance represents a major portion of the entire insurance business written by our companies. This explains why the Alliance has traditionally been so deeply a part of the total workers' compensation system and has involved itself so actively with reform movements. We appreciate the opportunity to present our views on S. 3060.

We have testified previously before this Subcommittee on federal workers' compensation legislation. On June 20, 1974, and again on March 2, 1976, we stressed that our dispute with the then pending legislation was not with the stated objectives of the bills, but with their implementations. We expressed our faith in the

existing compensation system, believing that the states would meet these objectives without the need of federal legislation.

Mr. Chairman, we remain convinced that there is no need for federal workers' compensation legislation at this time.

Our state workers' compensation laws today bear no resemblence to those described by the National Commission in 1972. Benefit increases have been dramatic, far outpacing increases in national average weekly wages or increases in the CPI.

Workers' compensation benefit improvements have not, however, come cheaply. In fact, the workers' compensation costs to the business community have far outstripped the estimates used by the National Commission in support of its recommendations to the states. The spiraling upward cost of workers' compensation is beginning to create serious affordability problems for some. Unfortunately, the present benefit levels have created serious imblances in the system which, unless remedied at an early date, will lead the workers' compensation insurance system into a position similar to the well publicized morass of medical malpractice and product liability insurance.

II. STATE WORKERS' COMPENSATION PROGRESS

Most observers of the workers' compensation scene continue to insist that the only true measure of state legislated improvement is the comparison of state laws with the nineteen Essential Recommendations of the National Commission. As we have stated

before and repeat again today, this method totally fails to either credit any state law which substantially complies with the recommendations or to recognize that, obviously, some of the Essential Recommendations are more important than others. The extent to which benefit payments replaces loss of wages due to industrial accidents is of paramount importance to the success or failure of state compensation laws to meet their social objectives. Many present critics of the state compensation system will readily admit that states have dramatically improved their benefits since 1972. However, they allege that the impetus for improvement generated by the publication of the National Commission Report in 1972 has long worn off and that today the benefits are lagging behind both inflation and increases in national average weekly wages. We do not believe that facts support this contention.

The attached charts (Exhibit I, II, III and IIIA) show that 1977 workers' compensation temporary total benefits replace significantly more spendable earnings than they did in 1975 -- 72% versus 64%. (See Exhibit I). Further, temporary total benefits increased at almost twice the rate of increase in spendable earnings during this two year interval -- 31% versus 16% and almost three times that of the CPI (See Exhibit II). Finally, a dramatic shift has taken place in the number of states which now replace a high proportion of spendable earnings through temporary total benefits. In 1975, 64% of the jurisdictions replaced less than

70% of spendable earnings. In 1977, the ratio was reversed with 78% of the jurisdictions replacing more than 70% of spendable earnings. (Exhibit IIIA).

Besides increasing the benefits, most states removed the specific dollar maximums that existed in 1975. In 1975, 42 jurisdictions had dollar maximums while only 15 had such limitations in 1977.

Mr. Chairman, it must be emphasized that benefits paid under workers' compensation laws are not limited to temporary total benefits. In addition, many injured workers, after they return to work following the initial period of total disability, receive additional payments in the form of permanent partial benefits. Since temporary total benefits by themselves replace such a high percentage of wage losses, it can be safely stated that as a whole, benefits paid under the compensation system are equal to or outstrip the total wage losses sustained by most industrially disabled workers.

Of course, benefit level increases are not the only improvements that have been made in state workers' compensation laws. Today, for instance, there is no single jursidiction which does not provide for "full medical benefits" to the industrially disabled. Additionally, today just about every state provides for full coverage for occupational diseases, and most laws have become compulsory in nature. With respect to coverage under the laws, most states have abolished numerical exemptions, and whatever such exemptions still exist are rapidly disappearing.

III. THE SPIRALING COST OF WORKERS' COMPENSATION

As we have mentioned above, improvement in our state workers' compensation laws have come at a heavy price. In fact, cost increases have far outstripped what supporters of changes were predicting at the time the National Commission's Report was published. The National Commission staff calculated, that if all the states increased their maximum weekly benefits to 200% of state average weekly wages, workers' compensation costs would have increased by 44%. However, today, in 32 jurisdictions, the costs of workers' compensation costs has increased by an amount far in excess of that average. In only 12 states has actual cost increases been within the Commission's predictions. We have no information on the six monopolistic state funds.

It may be argued that since workers' compensation rates are determined on a state basis, national averages are meaningless. But, when the actual cost increases are compared to the estimated increases or decreases in cost which the National Commission estimated would be necessary to implement all of their recommendations, the results are identical -- 32 states showing substantial cost overrun, 12 states under the National Commission's expectations. (See Exhibit IV). Obviously, if the actual cost increases are compared to the National Commission's cost estimates to implement its more limited Essential Recommendations, the picture is considerably grimmer. (See Exhibit IV).

Frankly, Mr. Chairman, the Alliance does not believe that, as a matter of public policy, we can continue to ignore the cost of state workers' compensation law improvements. These rising costs are causing serious dislocation to both the business and the insurance communities. The cost of workers' compensation insurance is reaching a level of "unaffordability" for many small employers engaged in hazardous work -- i.e., construction. Obviously, this rise in cost must be passed on to consumers with attendent effect on the inflation rate.

The rate level increases which insurance companies seek in the different states are, for the most part, resisted by the business community. State insurance commissioners are often unwilling to grant rate increases which companies believe are actually needed. The result is that the companies, to survive, must withdraw from this line of insurance. When this happens serious market problems will obviously develop. To illustrate, consider that in a number of states there are close to or in excess of 50% of employers insured through their respective state's assigned risk plan.

Observers of our workers' compensation program have repeatedly stressed the need to keep the system within reasonable cost bounds. Dr. Arthur Larson, for instance, noted that since the establishment of the workers' compensation system, it has been recognized that

"measures had to be taken which would ensure that the cost of providing this protection to injured employees did not escalate to the point of economic impracticality." Of course, the "point of economic impracticality" is in itself elusive and there is very little data available today with respect to the total cost of workers' compensation as a function of gross revenues. However, the information submitted to the House Subcommittee on Manpower, Compensation and Health and Safety, as to the cost to the business community of the Longshore and Harbor Workers' Compensation Act, makes it apparent that this "point of economic impracticality" has been breached. We will comment further on this in the course of the statement.

It is doubtful whether the National Commission would have, in fact, urged the adoption of its recommendations had it been in a position to estimate (more accurately) the cost of those recommendations. Throughout its Report the Commission stressed the sensibility of its action program in light of its modest cost increases to the business community. Thus, it is clear that the Commission did weigh cost as an important factor in making its recommendations.

IV. WHY THE COST OVERRUN?

The Alliance believes that the following three major factors account for the unexpected spiraling cost of workers' compensation.

1. Legislative efforts have been directed at meeting the National Commission's recommendations without simultaneously attempting to achieve much needed reform in the benefit distribution system.

2. The new high benefit levels have generated entirely new utilization patterns.

3. Little or no effort has been made to improve the administration of laws at the state level.

ADOPTION OF NATIONAL COMMISSION'S RECOMMENDATIONS

When the National Commission's Report was issued in 1972, the Alliance categorized it as a "blueprint for action." We were strongly supportive of the proposed essential recommendations. In fact, these recommendations were in many respects similar to the Alliance Action Program which had been developed in 1970 and which the Alliance was then seeking to have adopted by the states. The Alliance position in support of the National Commission's recommendations was shared by the overwhelming segment of the business community. The National Commission's criticism of the inadequacy of state compensation laws did not come as a surprise to any student to any student of the workers' compensation system. Efforts at upgrading the state compensation laws had not been generally successful because representatives of the business community were often unwilling to support adequate benefit levels without securing, in return, control over the many wastes that had been identified in the system. However, the Commission's report painted such a dismal

picture of the general inadequacy of benefit levels that the urge to get a quid pro quo was temporarily laid aside and a general consensus developed in support of higher benefit levels.

The high cost of workers' compensation today is a reflection of the decision to temporarily side track demands for elimination of wastes within the system. As a result, many state compensation laws not only provide generous benefits but also condone substantial wastes and abuses. If the cost of workers' compensation is to be brought back under control, we will have to attack those practices which allow waste and abuse to flourish.

The National Commission made little effort in this direction. It faintly suggested that temporary total disability benefits be limited to those workers who were, in fact, unable to perform any work. This obvious need for reform, has been overlooked by most reformers. The Commission did however recognize that substantial waste and abuses had crept into the determination and adjudication of permanent partial disabilities and suggested the appointment of a "follow-up" Commission to review the whole area of permanent partial disability and make recommendations. Unfortunately, this recommendation was never acted upon.

The Alliance continues to support the high benefit level recommended by the National Commission to the states. However, the need to press for correction of the system's abuses is today just as important as was the need, in '72, to achieve adequacy in benefits. We are firmly convinced that the over compensation resulting from the present system's abuses cannot be tolerated for long and that its effect on the business community will become startling within the next two to three years.

HIGH BENEFITS INCREASE UTILIZATION OF SYSTEM

The closer benefit payments replace loss of wages, the greater the utilization of the benfits. This is an axiom which is being proven correct for workers' compensation just as it has been proven correct in other social benefit systems whose level of benefits have rapidly increased. Analysts of the social security disability system, for instance, have repeatedly argued that the unexpected deficits in the Social Security Disability Trust Fund are a direct result of the over utilization of the system because of its high benefit levels. Thus, it surely is no surprise that as workers' compensation benefit levels increase, more claims will be filed and the duration of disabilities will lengthen measureably.

It must be remembered that workers' compensation benefits are free of any taxes. As benefit levels approach wages, the incentive for work is bound to diminish. Additionally, we live in a society in which more than one member of the household is working. If

workers' compensation benefits paid to an industrially injured member of the household approach the lost wages of that member, the total household support (combination of benefits plus earnings from the other members of the household) is likely to be in excess of what the household "spendable earnings" were prior to the industrial accident.

The high benefit level in workers' compensation today attracts greater utilization through other sources as well. For instance, new theories are being advanced to substantially broaden the scope of compensation laws. New concepts such as "cummulative trauma" may soon extend the workers' compensation system to cover the majority of physical and mental conditions medically acknowledged to be primarily associated with aging or personal habits. The high benefit level makes it attractive to attempt to shift to the workers' compensation system many disability claims which historically have been covered under other benefit systems. However, since the workers' compensation system uniquely pays also for additional benefits over and above those needed to compensate during the period of inability to work, the transfer of disabilities from one benefit system to the compensation system not only adds substantial new costs to the compensation system, but as well to society because the reduction in cost to other systems is not enough to offset increased costs to the workers' compensation system.

It is, of course, difficult to quantify the allegation that today's high benefit levels have increased utilization excessively and beyond expectations. Of course, one can point to countless "horror stories" but, such would be misleading.

We have, however, performed two studies which support our contention that as benefits changed drastically, there occurred a corresponding explosion in utilization.

Our first study assumed that if utilization had not been affected by higher benefit levels, cost increase for the adoption of its recommendations should have been fairly close to actual rate increases in those states which adopted most of the recommendations. This assumption is predicated on the observation that we found no basis flaw in the actuarial techniques of the National Commission in costing its recommendations.

An analysis of state laws indicates that by 1976, four states -- Illinois, Iowa, Maryland, and Montana -- had complied with fourteen or more of the nineteen Essential Recommendations and, the recommendations complied with represented almost all those with anticipated increase in cost. Two other states, Pennsylvania and Oregon, also complied with a sufficient number of recommendations to account for almost all anticipated cost increases. In all six states, the actual increase in cost between 1972 and 1976, expressed in constant dollars, was greater than originally estimated.

The results of this study are as follows:

State	National Commission Estimated Cost Increase to Implement 19 Essential Recommendations	1972 - 1976 Actual Cost Increase in Constant Dollars
Illionis	10%	106%
Iowa	28%	73%
Maryland	14%	39%
Montana	49%	50%
Oregon	12%	35%
Pennsylvania	27%	108%

We believe that this chart supports our hypothesis that substantial benefit changes have led to entirely different utilization patterns.

Our second study compares the difference between the percent of benefit increases between 1974 and 1976 in selected states and the percent of increases in the average incurred claim per full time employee in that state. (See Exhibit V). It will be noted, the average incurred claim per full time employee has increased substantially more than the increase in the percent of benefits.

This also would indicate that as benefits increase substantially -- as has been the case recently -- the utilization of the compensation system increases at a rate far in excess of benefit increases.

ADMINISTRATION OF THE SYSTEM

Although there has been a major revolution in the nature of workers' compensation over the last eight years, there has been little change in the structure of our state administrative agencies. Little or no attention has been given to the need to assist state administrators in the management of the system. We believe that major efforts should be directed to assist state industrial commissioners by providing them with the necessary managerial tools. Effective supervision over insurance carriers and doctors and lawyers, in addition to the prompt adjudication of disputes must be looked upon as essential roles of administrators. Today, however, too many commissioners have little time or available resources to do anything but tend to the adjudication of claims. Hence, the system has become overly adversary in nature. The resources available to workers' compensation administrators must be substantially increased if they are to perform their expected functions within the system.

V. LESSONS TO BE LEARNED FROM THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

The House Subcommittee on Compensation and Health and Safety has held extensive oversight hearings on the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) over the past year and one half. The problems with the law have been fully examined and are now part of the record. We will not now even attempt to outline those problems since time does not permit. We would, however, suggest that a study of the printed hearings record would be in itself an education in what can go wrong in a workers' compensation law. The LHWCA is an outstanding demonstration of the truth of Murphy's Law.

No one can deny that the benefits of the act are very liberal. In fact, the Subcommittee developed actual case histories in which expected individual employee benefit payments will be in the millions of dollars. Payment of weekly compensation in amounts exceeding the individual's actual earnings are not uncommon. Extensive delays in the adjudication of disputes and the lack of objectivity by adjudicating officers have also been highlighted.

In truth the cost of workers' compensation under the LHWCA has reached a dramatic point. For instance, in the District of Columbia, a 1972 $100 insurance premium is today $629.97. (See Exhibit VI). But averages are misleading. For some of the more hazardous occupations the increase has been even more pronounced.

Prior to the LHWCA amendment of 1972 (PL 92-576), insurance companies were actively competing for the sale of workers' compensation insurance in the District of Columbia. Today, only a handful of companies are seeking to provide this coverage in the District.

The picture is no different for those employers involved in activities covered by the LHWCA in other areas. The rates under the act increased by 400% for the shipbuilding industry from 1972 to 1976 and continue to rise at an unabated level. Insurance rates in excess of forty dollars per one hundred dollars of payroll are not unusual in stevedoring operations. In fact, the National Association of Stevedores has presented evidence that on average, the cost generated by the LHWCA to its members is about six percent of gross revenues. Today, some of the members of the Association are paying 10 and 15 percent of gross revenue in workers' compensation costs and the trend is upward.

The American Waterways Operators have submitted to the House Subcommittee a chart identifying the cost to its membership for workers' compensation coverage under the LHWCA as a function of gross revenue. We have attached a copy of that chart as Appendix VII. Note that ten percent or more is not unusual.

Mr. Chairman, in the course of testimony before Congress on product liability a general consensus seemed to have developed that a cost for product liability insurance in excess of three to five percent of gross revenue is "unaffordable". Bear in mind that in the product liability area, even with the rapid increase in insurance costs, it is rare that product liability insurance premiums exceed one percent of gross revenues.

Very few insurance companies today are voluntarily writing LHWCA insurance coverage. Admittedly this is a relatively specialized line of workers' compensation insurance. Nevertheless, prior to 1972, there were a dozen or more companies vigorously competing for this business. Today, there are but two or three companies voluntarily providing the coverage and, even these are substantially restricting new writings or withdrawing from the market. As a result, large companies are turning to self insurance and smaller ones seek coverage in the state assigned risk pools. The LHWC Act has become, in the view of most knowledgeable insurance experts, an uninsurable hazard. It is a line of insurance which few companies dare write.

The LHWC Act today is a nightmare. It has become so because of circumstances not unlike those developing in state workers' compensation today. The major difference between the federal LHWC Act and the state laws is that in the federal law the excesses are more pronounced and costly and the abuses more difficult to overcome. Abuses of the federal system have been graphically described by the New York Water Front Commission in a Special Report issued in December 1976. While the extent of the abuses was surprising, the existence should have been expected in view of the Act's high benefits coupled with extremely loose and inadequate administration.

Incidentally, the Alliance testified in support of high benefits under the LHWCA before this Subcommittee when it was reviewing the law prior to the enactment of the 1972 amendments. We did, however, strongly urge Congress to couple these proposed high benefits with major reforms in permanent partial disability programs as well as major upgrading in the administration of the Act. Unfortunately, our quest for a balanced program was rejected.

VI. WHAT IS WRONG WITH S. 3060?

S. 3060 PERPETUATES AND AGGRAVATES THE IMBALANCES OF COMPENSATION

As we have mentioned above, we are convinced that many state compensation laws today are out of balance. High benefit levels, coupled with serious abuses, and over utilization of benefits have strained the system to the point where cost has become a major factor. Reform is, indeed, needed if the system is to continue to be economically operable. But S. 3060 will bring about no such reform. It will require the states to go further in the liberalization of benefits without in any way curtailing any of the abuses that have been identified. S. 3060 will, in fact, bring the state compensation laws "in conformity" with the LHWCA. This will be a tragedy in the light of testimony presented to the House Subcommittee on Compensation and Health and Safety that the LHWC Act is no longer economically viable. Enactment of S. 3060 will bring about the same end results with respect to state compensation acts.

It can, of course, be argued there is nothing in S. 3060 which would prevent the states from correcting the abuses in their laws. However, the political realities are such that such expectations are but idle dreams. To bring the states

back into balance will require extensive cooperation between business and labor. Such cooperation is unlikely to be achieved unless some quid pro quo can be arranged. Why should labor cooperate? If the Federal Congress forces the states into acquiescing in those benefit levels which labor has dreamed about without, simultaneously, requiring the states to correct the abuses of the system, what incentive is there for labor to cooperate with employers at the state level to correct abuses? There is no evidence before the House Subcommittee on Compensation, Health and Safety that labor is prepared to voluntarily support or to cooperate in a reform program which will bring the LHWCA back to some economic stability. Why should labor do this at the state level, if it is not willing to do this at the Federal level today?

S. 3060 splits benefit responsibilities between state and federal governments. The federal government takes on responsibility for total disability and death benefits and leaves the responsibility for the establishment, determination, and distribution of partial disability to the states. This makes little or no sense. The function of income benefits in the compensation system is recognized as being a replacement for lost wages. Again, as we have mentioned above, losses are

replaced under different benefit categories -- temporary total benefits, temporary partial disability, permanent total disability and permanent partial disability. Still, all these four categories have but one purpose in mind -- wage replacement. It is difficult enough for any one government body to attempt to bring these different benefit categories in balance. It is totally unrealistic to expect to ever achieve a balance if the responsibility for these different categories is split among two government entities.

Splitting the responsibility for benefits between the states and the federal government is a poor approach from an efficient management standpoint.

S. 3060 DEALS UNREALISTICALLY WITH OCCUPATIONAL DISEASE

The complexities of the occupational disease problem are completely overlooked by S. 3060. The bill removes traditional safeguards which have been built into most state compensation laws. It bucks the responsibility for the determination of occupational disease guidelines to the Secretary of Labor. The bill provides no direction to the Secretary with respect to the extent to which diseases should become the responsibility of employers except to prohibit him from developing presumptions which are either unreasonable or unrebuttable.

Historically, substantially stronger defenses for occupational diseases than for traumatic injuries were legislated in state compensation laws because of the many undertainties surrounding the whole field of occupational diseases. As more knowledge was acquired many of the more onerous restrictions were eliminated from laws. S. 3060 would abolish all of the remaining restrictions. When coupled with the provision allowing the Secretary of Labor to issue broad presumptions, the magnitude of the occupational disease burden on the business community could well boggle the imagination. In this connection, the Department of Labor is presently contracting for extensive research projects in this area. It may be that when those research efforts are completed that we will have a better understanding of the nature of the occupational disease problem. It is premature, we believe, to establish public policy when so little is known and so much is at stake. We repeat, we believe in the soundness of our present compensation programs. They need to be brought back into some balance, but, except perhaps for the LHWCA, we continue to expect the programs to be, in the long run, manageable. To force the states to absorb an uncontrolled occupational disease benefit system is both unrealistic and uneconomical.

Incidentally, we question whether the authority given to the Secretary of Labor to promulgate standards for determination of occupational disease is constitutional. This authority would provide that any standards so promulgated shall be enforceable in any state as if the standard was included in the workers' compensation law of that state. Thus, a federal official could determine what should be incorporated in a state's law without consideration by the state legislature. We do not believe that this is proper.

S. 3060 WILL EXPLODE COSTS

We have spent considerable effort already discussing the present cost problems associated with workers' compensation. We have already noted that S. 3060 will aggravate present costs and is likely to make workers' compensation unaffordable for many.

Frankly, we do not believe S. 3060 can be costed out. Experience which we have described in attempting to cost out new compensation concepts--as was attempted by the National Commission--clearly shows that traditional costing and actuarial practices are of relatively little value. All that can be said at this time is that the cost of state compensation laws under S. 3060 will come very close to approaching those costs generated under the Longshoremen's Act.

Under the LHWCA, benefits must be indexed on a yearly basis and there is no cap on such indexing. S. 3060 would allow the states to limit the indexing to no less than six percent per year. Hence, it might be argued that this cap would moderate the cost of state laws. However, this is not a correct assumption. The National Council on Compensation Insurance, in developing rates under the LHWCA, has never used an indexing factor in excess of six percent. Thus, the cap allowed under S. 3060 cannot be used as an argument that, if enacted, the costs of state compensation laws would likely be less than those generated today under LHWCA.

S. 3060 WILL CREATE ADMINISTRATIVE CHAOS

The legislation would require that the "supplemental compensation" benefits shall be administered by the Federal LHWCA. If an employee feels aggrieved by the state workers' compensation agency's order insofar as it fails to award supplemental compensation, he may appeal to the LHWCA Benefits Review Board. The Board may refer the case to federal administrative law judges if it believes that the record has not been sufficiently developed by the state agency.

We believe that these provisions provide for a lateral right of appeal from a state agency to a federal agency and will cause much confusion in the adjudication of claims. It will moreover increase substantially litigation costs. Additionally, testimony before the House Subcommittee on Compensation, Health and Safety, with respect to the Benefits Review Board reflected considerable dissatisfaction with its operation. There is pending legislation before the House which would abolish the function of the Boards with respect to all LHWCA claims and would return the review authority to Federal District Courts.

VII. CONCLUSION

Mr. Chairman, the state workers' compensation system has come a long way from what it was when examined by the National Commission in 1972. Amendments to state laws have created serious cost pressures on the business community. It is easy to say that businessmen will always complain when they have to pay more for benefits. But, there is strong evidence that the cost of workers' compensation is fast approaching a level of non-affordability in the states.

This level has been reached with respect to the Federal Longshoremen's Act. We do not believe that it is in the public interest to pursue at this time a new vast and expensive liberalization of our state compensation laws until we have learned to control the abuses under the present system.

There is nothing in S. 3060 directed at controlling these abuses. S. 3060 will critically impact on our state compensation systems and will render them economically non-viable.

If enacted, it will quickly lead to a complete breakdown of our state system of workers' compensation. We do not believe this is in the interest of either labor, industry, or the public.

Exhibit I

Temporary Total Benefits Have Increased in Both Amount and as a Proportion of Spendable Earnings

	1975	1977	% Increase
Weekly Spendable Earnings	$166	$193	16%
Weekly Temporary Total Benefits	$106	$139	31%
Ratio of Benefits to Earnings	64%	72%	13%

RKK:kao

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Exhibit II

Temporary Total Benefits Have Risen Faster Than CPI and Wages Between 1975 and 1977

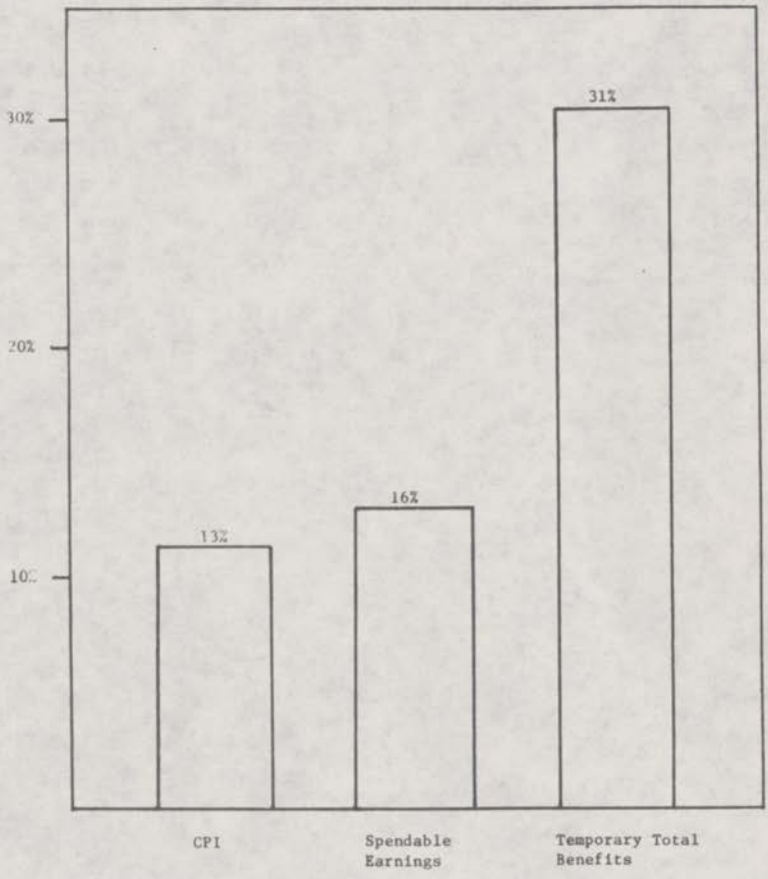


Exhibit III

A Dramatic Shift in the Ratio of Spendable Earnings Replaced by Temporary Total Benefits

Ratio of Spendable Earnings Replaced by Temporary Total Benefits	Number of Jurisdictions 1975	1977	% Change
Under 40	2	1	-50%
40-49	8	4	-50%
50-59	12	4	-67%
60-69	10	2	-80%
70-79	15	24	+60%
80 & Over	3	15	+400%
Summary			
Under 70	32	11	-66%
70 & Over	18	39	+117%

RKK:kao

6/23/78

Exhibit III A

1975

Range	Under 40	40-49	50-59	60-69	70-79	80 & Over
	LA*	DE*	AL*	CA*	AK*	AZ*
	OK*	ID*	AR*	IL*	CT	DC*
		IN*	FL*	KS	HI	IA*
		MS*	GA*	MA*	ME	
		ND*	KY*	MN*	MD*	
		SC*	MI*	NV*	MT*	
		TX*	MO*	NJ*	NH*	
		WY*	NE*	NC*	NY*	
			NM*	VA*	OH	
			TN*	WA*	OR*	
			VT*		PA	
			WI*		RI*	
					SD	
					UT*	
					WV	

Exhibit III B

1977

Range	Under 40	40-49	50-59	60-69	70-79	80 & Over
	OK*	IN*	AR*	MS*	AL	AK
		LA*	CA*	NY*	CA*	AZ*
		MO*	NE*		CT	DE
		TX*	TN*		FL	DC
					KS	IA
					KY	HI
					ME	ID
					MA*	IL
					MN*	MD
					NV	MI
					NH	MT
					NJ	OH
					NM	OR
					NC	WA
					ND	WI
					PA	
					RI	
					SC	
					SD	
					UT	
					VT	
					VA	
					WV	
					WY	

* Fixed Dollar Maximum

In 41 states the ratio went up
2 states the ratio stayed the same
7 states the ratio went down

RKK:kao
6/23/78

Exhibit IV

Comparison of National Commission Expected Cost increases with actual cost increases

States	National Commission Expectations (1975 maximum weekly benefit levels)		Actual rate level change 1972-77
	All Recommendations	Essential Recommendations	
Alabama	64%	48%	82%
Alaska	80%	45%	91%
Arizona	7%	2%	80%
Arkansas	30%	21%	29%
California	30%	19%	93%
Colorado	34%	5%	82%
Delaware *	52%	37%	90%
District of Columbia	34%	25%	274%
Florida *	44%	32%	168%
Georgia *	67%	50%	65%
Hawaii	17%	9%	91%
Idaho	21%	15%	108%
Illinois	26%	17%	153%
Indiana *	50%	35%	9%
Iowa	49%	36%	92%
Kansas	61%	49%	73%
Kentucky	62%	42%	113%
Louisiana	84%	60%	119%
Maine	- 2%	8%	119%
Maryland	28%	21%	57%
Massachusetts **	18%	11%	7%
Michigan	35%	25%	91%
Minnesota	32%	23%	55%
Mississippi	64%	51%	17%
Missouri	52%	43%	29%
Montana	82%	62%	37%
Nebraska	33%	20%	32%
Nevada	25%	10%	N.A.
New Hampshire	17%	10%	132%
New Jersey	32%	21%	16%
New Mexico	62%	42%	24%
New York	28%	19%	50%
North Carolina ***	42%	37%	4%
North Dakota	52%	39%	N.A.
Ohio	72%	26%	N.A.
Oklahoma *	68%	53%	68%
Oregon	37%	19%	88%
Pennsylvania *	60%	38%	188%
Rhode Island *	18%	12%	80%
South Carolina **	45%	35%	3%
South Dakota	49%	38%	25%
Tennessee	43%	32%	50%
Texas	65%	49%	71%
Utah	57%	40%	64%
Vermont	29%	20%	68%
Virginia	48%	32%	76%
Washington	33%	7%	N.A.
West Virginia	36%	28%	N.A.
Wisconsin	21%	15%	37%
Wyoming	81%	62%	N.A.

* last rate change in 1976

** last rate change in 1975

*** last rate change in 1973

Exhibit V

Comparison of increases in Benefit levels and the cost in Average incurred claims per full time employee

State	% of Benefit increases 1974-1976	% of increase in average incurred claim cost per full time employee 1974-1976
Arizona	7%	15%
California	39%	47%
Florida	23%	29%
Illinois	56%	93%
Kansas	42%	49%
Kentucky	13%	158%
Louisiana	41%	29%
Maine	46%	66%
Massachusetts	9%	22%
Minnesota	47%	94%
Montana	12%	18%
New Hampshire	5%	59%
New Jersey	5%	41%
New York	20%	30%
Pennsylvania	22%	76%
South Dakota	43%	47%
Wisconsin	12%	34%

Exhibit VI

District of Columbia

Workers' Compensation Cost

Date of increase	Rate Increase	Effect on $100 premium
--	--	$100.00
1/1/73	43.66%	$143.66
1/1/74	27.1 %	$182.59
1/1/75	9.9 %	$200.69
7/1/75	9.6 %	$219.93
1/1/76	15 %	$252.92
9/1/76	19.99%	$305.25
1/1/77	13.6 %	$344.50
7/1/77	22 %	$420.29
1/1/78	12.7 %	$473.66
7/1/78 *	33 %	$629.97

* Rate increase pending

Exhibit VII

1977 Longshoremen's and Harbor Workers' Compensation Act Costs

American Waterways Operators

REGION OF SHIPYARDS*	NUMBER OF EMPLOYEES COVERED UNDER LHWCA	1977 LHWCA COST	PERCENTAGE OF LHWCA COST TO GROSS REVENUE
I	325	$ 310,000.00	3.0
II	164	123,156.00	3.376
III	95	115,000.00	4.0
IV	1,650	1,599,000.00	4.0
V	213	485,737.00	4.5
I	125	700,000.00	3.0
II	20	20,000.00	4.0
III	30	100,000.00	10.0
IV	16	8,000.00	4.0
V	50	250,000.00	15.0
I	100	106,748.00	3.3
III	100	106,000.00	4.0
V	40	52,000.00	7.3
I	190	241,600.00	4.2
V	19	23,342.57	3.0
I	96	304,136.39	10.0
V	-	201,246.90	4.5
I	250	360,000.00	4.0
V	10	40,000.00	10.0
V	15	25,000.00	5.0
V	300	1,000,000.00	15.0
V	1,152	4,500,000.00	10.0

* This information was supplied anonymously by shipyards.

The Region of the shipyard's operation was identified as follows:

I. Gulf Coast
II. East Coast
III. Western Rivers
IV. Great Lakes
V. West Coast

The CHAIRMAN. All right, Mr. Bunn, you have been most patient. It has been a long afternoon.

STATEMENT OF HOWARD BUNN, VICE PRESIDENT, WORKERS' COMPENSATION, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS (NAII)

Mr. BUNN. Thank you, sir.

The CHAIRMAN. Now, you are vice president?

Mr. BUNN. That is correct.

The CHAIRMAN. We appreciate your being here to testify.

Mr. BUNN. Senator Williams, we last faced you in this forum, I think, in 1974. At that time I was chairman of the North Carolina Industrial Commission.

The CHAIRMAN. Yes.

Mr. BUNN. Since that time, I have been the Director of the Interdepartmental Compensation Task Force.

The CHAIRMAN. Some of your ideas are in this bill.

Mr. BUNN. Perhaps they are. I think I am aware.

The CHAIRMAN. Well, someone heard. It got a good response.

Mr. BUNN. There are certainly some ideas in the bill that I do agree with. I do not agree with all of them obviously.

The National Association of Independent Insurers is a property-casualty insurance trade association comprised of over 400 member companies. In fact, there are nearly 450 companies.

Until recently, its activities had been primarily directed at concerns relating to automobile insurance, property insurance, and lines other than workers' compensation in which our companies write a large percentage of the market volume. Our membership is comprised of both the very large carriers, for example, Allstate and Nationwide, and other companies of varying sizes.

In the field of workers' compensation, our premium volume has grown and is growing to the point where we are now writing over $1 billion annually or approximately 10 percent of the market. While most of our companies provide policies of general workers' compensation coverage, there are two specialty areas that certain of our member companies write a sizeable percentage of the workers' compensation coverage for farm employers and the long haul trucking industry. Both groups have concerns peculiar to their operations which will be commented on subsequently.

The testimony that will be presented will not endeavor to be a line by line commentary on the bill—we will reserve this type of commentary for the next year when we understand more lengthy hearings will be held.

Instead, we will address some of our chief concerns with the bill and discuss our perceptions on the workers' compensation reform efforts to date and what we believe to be the proper Federal role at this time.

S. 3060 is, in our opinion—having viewed the progression of bills, for example, S. 2008, S. 2018, et cetera—a more pragmatic minimum Federal standards approach. It is, nevertheless, a bill we believe to be untimely and unlikely to pass because of the current problems in the Federal Government's own compensation programs and because of

the antiexpansion of the Federal Government involvement in traditional State affairs and, for that matter, the climate of antiexpansionist trend of any Government operation. We view this as a fortunate sequence of events in view of the considerable progress in workers' compensation at the State level in recent years and the continuing existence of troublesome areas to the system in which reasonably clear answers still appear to be lacking, for example, occupational disease, permanent partial disability, administration, et cetera.

Several areas of concern in the bill will now be commented on.

First, is the occupational disease section. We agree that if, at some point, there is minimal Federal involvement that this is a subject that must be addressed. The method outlined in the bill is so elaborate, however, that the time and steps involved to promulgate a standard is unnecessary for dealing with every occupational disease. We agree with Dr. Thomas Mancuso's assessment that there is a great wealth of knowledge about how many occupational diseases and there is no need to "reinvent the wheel" to deal with these.

We take cognizance of the comments you made yesterday and that the bill, absent any standards, would probably rely on current procedures at the State level. But we feel in the area of developing standards, if that becomes the case, they should be reasonably simple or clear-cut as possible.

From my own experience as a former head of a State compensation system, simplicity is the key to making the program function as it should.

Permanent partial disability—while the answer to this difficult area remains elusive, more studies are not what is needed at this time. Instead, practical pilot projects in the States utilizing the research recently completed by Dr. John Burton, former chairman of the National Commission on State Workmen's Compensation Laws and the suggestions of the Interdepartmental Workers' Compensation Task Force should be tried. Other suggestions directly from the insurance, self-insurers, labor, et cetera, should be also critically examined for possible use.

It is interesting that both the task force and Dr. Burton's suggestion indicates some type of wage loss for dealing with permanent partial disability is what should be tried.

As Mr. Maisonpierre said, there was a bill passed in Florida Legislature that would establish this. John Lewis, who was the former general counsel, and Dr. Burton drafted this. There will be another bill that will be introduced at this time. I think the wage loss concept is being considered seriously by several State legislatures, and I think that maybe in the area of what needs to be done to deal with the problems of permanent partial disability.

Next, the enforcement of supplemental compensation through the vehicle of the Benefits Review Board. We question whether this body is equipped to handle the many claims that could descend upon it. In fact, our understanding is that this Board is already under severe criticism as recounted in the many Longshore and Harbor Workers' Act hearings held recently in Congress.

As our companies that deal with longshore and harbor workers have related, it is difficult to get cases adjudicated promptly and effi-

ciently. We question if there is a large number, whether they are equipped. We are concerned further about the use of the Office of Workers' Compensation program and the Longshore Act to deal with cases where States have refused to assert jurisdiction again involves both a program and an act which are currently embroiled in great controversy—both in administration and in cost.

The Longshore Act sometimes pointed to as a model of a good workers' compensation act, is, in fact, an act bordering on unaffordability. These concerns have been helpful to you and the other committees looking at these programs more than I think is necessary for me to go into.

In any event, we are concerned about that. The two areas our member companies have specific concerns in, as I mentioned earlier—farm coverage and coverage of long-haul truckers require these observations. Much more study needs to be made to determine the most feasible ways and thresholds to cover farmworkers. Such problems as coverage of family farmworkers, migratory workers, labor interchange, et cetera, have needed more attention by those interested in workers' compensation reform.

We are concerned that some practical threshold be reached rather than trying to blanket in every single farmworker although, admittedly, that would be ideal.

So far as insuring long-haul truckers or, for that matter, mobile employment generally, insurance rating problems are presented with the extraterritoriality provisions of the bill. Rates are based generally not on where the accident happened, but upon other criteria which caused the premium charged not to reflect actual costs of coverage.

The present way that the rates are devolved deal primarily with the charging rates where the person is employed or where the trucking company is based. But if a person comes through the District of Columbia and has an accident under the extraterritoriality provisions of the District of Columbia Compensation Act, which employs the Longshore and Harbor Act, they usually will collect benefits here, but they will have to pay premiums based on where they were employed. There is an inequity. We have addressed this to the National Council. Until this point, we have been unable to reach a conclusion.

But it is a concern to companies who write in this area.

These have been general comments on the bill without going into great detail. We share the same concerns that Mr. Flockhart and Mr. Maisonpierre have about indexing. It is costly, but it has much inflation in it.

I would suggest that if you hold hearings next year, if you benefit by holding field hearings by States that have a major cost in workmen's compensation programs. Florida and Minneapolis are States that you would benefit from holding hearings in. Sometimes I get the impression in the field we are dealing almost in two different worlds, dealing with the Federal level, and where we have two States——

The CHAIRMAN. I have to vote. How much more do you have on your direct?

Mr. BUNN. Another 5 minutes.

The CHAIRMAN. Let me go over and vote, and then I will come back.

[Short recess.]

The CHAIRMAN. All right, Mr. Bunn, we will reconvene now.

Mr. BUNN. Thank you, Senator. I appreciate your taking the time to come back.

State legislatures and insurance commissioners are today wrestling with the spiraling increases in costs of workers' compensation. What has been a comparatively low cost item has now been catapulted into a high percentage of payroll in certain industries and generally much more costly to most. The greatly increased benefits in most States has brought about a phenomenon generally referred to as "over utilization" of the system. This was referred to by Mr. Flockhart and by Mr. Maisonpierre.

When you have considerable amount increases, you attract claimants who are legitimate and not so legitimate. The fact is that when one goes down to the State legislature, if it happens to be a State that has been experiencing considerable increases in cost, it is not so much what can you do to improve compensation or do the things that the National Commission task force wants to do, but you get hit with what you can do to decrease costs. I do not know what is going to happen to the reform effort in workers' comp. You will see some of the benefits perhaps rolled back. You may want to mention this to Mr. Shebel when he testifies on Florida, for in Florida there you have a State which enacted broad coverage through the recommendation of the National Commission. I think these things are indicative of some of the frustrations that some of the States are having in the field of workers' compensation.

If right now is not the climate conducive to passing some type of Federal legislation, what is the Federal role to be? We would advocate, as Mr. Maisonpierre did, that you take the role of technical assistants, utilizing what the U.S. Labor Department has at their disposal. The person who heads it up is Ms. June Robinson. She was an associate of mine when I was in Washington with the task force, and I would again commend to you that she is someone at some point you might wish to have testify. She is capable and particularly knowledgeable in the area of occupational diseases. Her current staff has been improved and beefed up. She has with her now Mrs. Eleanor Ross. She is very knowledgeable in the field of rehabilitation and workers' compensation. She is considered as being one of the better and more knowledgeable workers' compensation.

As far as helping States improve administration, Mr. Ed Woodward, former chief of planning for the California State Fund, is a very capable person.

By using these types of people who are on Ms. Robinson's staff, I think they certainly can address some of the concerns that, in many instances, will get outside of the strictly legislative concerns of the bill that have been stated today.

The debate over whether or not there should be a direct Federal involvement in State workers' compensation programs will be an ongoing one that will be examined continuously by our association.

We have felt they are traditionally best handled at the State level.

To quote an often repeated statement from the report of the interdepartmental workers' compensation task force, "* * * a program

so affected by local employment conditions and local services, and requiring so much interaction with claimants probably is more effectively managed at the State level."

We conclude that it is not only more effectively managed at the State level that changes in the compensation laws at this time are also best made at the level of Government where they can reflect the needs and concerns of those affected by them.

That is the formal statement.

I would like to comment some on the occupational disease concerns that are expressed in the bill and some of my own personal experience in this area.

As I think you are aware, the area of occupational disease is an area that has been a personal concern of mine for some time, and it was the subject of an occupational disease conference on workers' compensation that was held at the University of Chicago in 1976, and this is one that your committee reproduced the proceedings of.

It is the only instance of trying to bring together some of the brightest people in workers' compensation, management, labor, insurance and so on, to wrestle with the concerns.

I would like to speak specifically to North Carolina, which is a State which has recently had to come to grips with problems in the occupational disease area and, particularly, in the byssinosis or brown lung area. You heard comments yesterday from the lady from South Carolina and from the attorney who represented her about how the problems wind through the system to obtain workers' compensation for brown lung. There is a distinction between the North and South Carolina approach.

I think you need to know the history of the law in North Carolina and what changes have been made in recent years.

Until 1963, workmen's compensation disease claims either were covered by a list of diseases or there was a provision, or there were some provisions for broader coverage of occupational diseases, but that provision said it only covered inflation of external organs to the body like dermatitis and so on. It did not say anything like internal diseases which would be respiratory.

In 1963, it was amended and it provided coverage for both internal and external organs of the body.

Since 1963, the Commission has generally felt and held that byssinosis would have been covered, but the cases did not begin to be filed until sometime in the early seventies.

However, in 1971, the law was amended so that the general provision dealing with occupational diseases was greatly broadened so there is no question that byssinosis is covered, certainly since 1971. Probably since 1963.

Here are some statistics as of August 8 this year from the chairman of the North Carolina Industrial Commission, Mr. Stevenson.

As of August 8, there have been, by agreement or opinion, compensation paid in 129 cases in North Carolina relating to byssinosis. There has been a total of $1,433,000 paid in these cases which have been closed.

There has been only six cases that have been denied. There are 120 cases that are pending.

There are 270 cases which have been filed. Some of these have been filed for the protection of people who are still working and are not pursuing a claim right now, but they have filed for their own protection.

Thirty-five cases have been either withdrawn or dismissed. They have been heard—there has been an actual hearing at the adjudicatory level of 90 cases. One case is on its way to the supreme court right now. It has gone to the Court of Appeals in North Carolina and will be argued before the North Carolina Supreme Court this fall. The procedure in which byssinosis is handled in North Carolina is one that was developed basically at the time I was chairman of the Commission. I would like to outline that to you and explain to you how it was developed.

In the early seventies over at Duke University, in the Medical Center, there was a considerable amount of research that was done in the field of byssinosis. It is among the best simply because it was done in a State that was close to textile workers. The procedure that was used in North Carolina was a procedure that was developed by the Commission in conjunction with three people who were, at that time, the physicians who had done the research—Dr. K. Kilburn, Dr. John Hamilton, and Dr. Jim Marchant. Dr. K. Kilburn is with Dr. Irwin Selikoff doing research. Dr. Jim Marchant is with the black lung program in NIOSH. He is in charge of their basic research. And Dr. Hamilton is with the Veterans' Administration. Those are three people who had done serious research in the field of byssinosis, and the procedure that was developed was the one that was basically instituted in and is still being used.

There have been some modifications to shorten paperwork in an effort to cut out some of the criticism about the physicians who were doing the workups.

The basic procedure was fairly simple. For the people who filed a claim, the cases were presented to the carrier to the employer that had the person employed. They were asked to pay for a workup, a medical workup by one of the physicians who were on the list of doctors at that time without prejudice. In most instances, the carriers or the employers went along with this.

The criticism that was launched at a proceeding, we asked the physicians to do the research to help us develop a panel of physicians who were knowledgeable in the area of byssinosis. That is what was done. There were not many of them. One of the criticisms of people in the brown lung field is the slowness with which they were processed. I don't know any answer. We had to have physicians who were competent to make proper diagnoses.

The Commission, when a claim is filed, selects the doctor in order to try to make it a more orderly process and one that will move faster. They have a 30-day diary. Every 30 days, they call to check on the status if it hasn't been brought to a conclusion. The procedure is one that is basically fair. I would like to see, like others, that it is speeded up. We have tried. The commission has tried to use a commission procedure that would utilize people who are experts in the field.

Those are some of the experiences I have had in the occupational disease area.

I happen to agree that if there is one area that is a real threat to the compensation system, it is the occupational disease area.

I feel that we take, as an insurance industry and as an industry in general, I think we take probably too much comfort in the fact that there are very few cases that are getting into the system. We take too much comfort that the laws have been amended for half-broad coverage. This is the most basic thing that has needed to be done. The most difficult areas are not just changing the laws to provide broad causes, but to set up a mechanism that cases, which ought to be in the system, get into the system. That is where much of the weakness lies.

As I was talking with Mr. Mittelman during the recess, I think the real concern about Federal legislation and workers' compensation at the present time is not so much concern about a particular workable bill. I thing it is primarily a disenchantment or disaffection with the way the Federal Government runs its own compensation programs, and the general feeling and fear that if the Federal Government gets into the problem at the State level, that the same problems that the Federal Government has developed will become problems in the States. That is as much a reason for the opposition to the bills as anything else.

All companies, I think, are just, as I see it, very disappointed and disenchanted with the Federal approach to workers' compensation. These are my general comments.

I will be glad to respond to any specific questions you may have.

The CHAIRMAN. I didn't expect you to come here sounding "hallelujah" and giving us hosannas. But in drafting this legislation we were quite sensitive to the broad apprehension of Federal law, Federal bureaucracy, and Federal administration.

Quite simply, we have recognized the valuable work of a commission that everybody respects. That Commission having looked at all the States, came to a judgment that there are many things that can be improved.

Then we boiled the Commission's recommendations down, and we made some suggestions of improvement.

We started out on one way and now, after long, long years of study, that you are familiar with, we came to these standards. But as far as the administration of the program, it would reside within the States as it is under the present systems. I do not see why the old fear of the Federal administration should be such a problem, because we do not have the Federal administration.

We only offer Federal review on the question of whether or not the standard is being applied?

Mr. BUNN. Well, my response to that is this. Maybe you are right. Maybe it is fear. Maybe the old saying of FDR "All we have to fear is fear itself," is what is involved.

I think people who work in workmen's compensation feel it is more than just fear. There is every reason to believe, based on experience and other programs like OSHA, ERISA and so on, even though you may go in at a very minimal level, or maybe at even more than a minimum level, once the foot is in the door, you have a problem.

The CHAIRMAN. Nobody suggested we went in at a minimum level.

Mr. BUNN. Well, OK, but particularly in OSHA you went out with a thrust initially trying to get the States to operate these programs.

The CHAIRMAN. We gave them an option under OSHA. But OSHA also established a Federal program if the States didn't take the option. This law does not provide a Federal program to supplant the States.

Mr. BUNN. Yes. And many of them who have tried it have had so many frustrations with it that they have given it back.

I am not drawing a perfect analogy between that and this, but there is a considerable strong sentiment at the State level that once there is Federal involvement, even at a minimal level, as Arthur Larson frequently says, it is just one of those things that would tend to grow and grow. Maybe it would not be that way at workers' compensation. No one knows for sure, but many people feel that way about this phenomena.

The CHAIRMAN. I do not know how closely people follow it. You mentioned ERISA and OSHA. It is true. We did set goals for the comprehensive application of laws in both area.

I have not spent 1 minute defending the administration action under OSHA for the first 5 years. Not once have I defended that. It has been atrocious. It has been a long, long labor, and we are still embroiled now in refining the product of 1970.

The same with the ERISA legislation which we are now in the process of refining. But this is entirely different. You are going through our refinements which we have made over these many years before enactment. That has not been appreciated by those who were early on opposed to the idea. We have thoroughly considered this legislation and adopted so many ideas, and many who were, in the early days, critical of our approach have not come forward recognizing that.

We have had opposition from labor. Some of our refinements, as you heard today, are not to their liking.

Mr. BUNN. I do recognize that the current bill is a much refined bill. If you recall in the statement I made, I make the point to say that in the progression of bills, I think I told them—I think I follow them all since they began—it is a much more refined bill.

I guess the point that I was trying to get across is that, in addition to the concerns that I registered specifically about the proposed legislation as improved through the years, is that I think that you should not fail to take note that a lot of the opposition is not just—in other words, suppose, let us just say arguendo that S. 3060, was a bill that I read over and felt embodied all the principles that should be in a good workers' compensation bill, and one that was, in theory, at least workable.

I think the real bottom line opposition, and I am sure people will disagree with this, I think a lot of the real serious opposition lies not necessarily in the specifics that are in a bill, but it lies in a concern with Federal involvement in the workers' compensation. That was the point I was trying to get across.

I am not trying to say that you cannot draw a perfect parallel between OSHA, ERISA, and so on, but there is that concern in the minds of many people who deal with FEC and black lung and workmen's compensation that once the Government gets in, they will necessarily get into the program whether you intend to or not.

I do not know the answer. That is as much reason for opposition as specific recommendations where I say I disagree with this, why

are you not doing this permanent partial or this with occupational disease? It is that reason that is just as much a specific opposition to the bill.

The CHAIRMAN. You have been very fair.

Thank you very much.

Mr. BUNN. Thank you. I appreciate you hearing my testimony.

The CHAIRMAN. If we need further enlightenment, may we call you again?

Mr. BUNN. I would very much appreciate it. I have tremendous respect for members of your staff whom I know very well.

The CHAIRMAN. We will be in recess.

For the record, we will be returning on Friday at 2 p.m.

[Whereupon, at 5:40 p.m., the subcommittee recessed, to reconvene at 2 p.m., Friday, September 22, 1978.]

NATIONAL WORKERS' COMPENSATION STANDARDS ACT OF 1978

FRIDAY, SEPTEMBER 22, 1978

U.S. SENATE,
SUBCOMMITTEE ON LABOR
OF THE COMMITTEE ON HUMAN RESOURCES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2 p.m., in room 4232, Dirksen Senate Office Building, Senator Harrison A. Williams, Jr. (chairman of the subcommittee) presiding.

Present: Senators Williams, Riegle, and Javits.

The CHAIRMAN. We will come to order.

We will proceed with our final day of hearings on this series on S. 3060, the Federal Workers' Compensation Standards Act of 1978.

My opening remarks will be included in the record at this point.

[The opening statement of Senator Williams follows:]

OPENING STATEMENT OF SENATOR WILLIAMS

The CHAIRMAN. Good afternoon and welcome to this final day of hearings on S. 3060, the Federal Workers' Compensation Standards Act of 1978.

During the course of our hearings, we have explored the current state of the workers' compensation system. We have measured the progress of the States in updating their laws so that they meet the 19 recommendations which the National Commission, in 1972, said were essential if we were to adequately compensate injured or ill workers.

Progress has not been as great as we could have reasonably expected. Widely recognized industrial diseases still go largely uncompensated because State laws still impose totally unrealistic and artificial barriers.

Witnesses have told us of totally disabled workers who are forced to exist on benefits of $30 or $40 per week because State laws do not adequately adjust to modern inflationary pressures.

In as many as 12 States, the maximum benefit for a totally disabled worker is less than the officially recognized poverty level.

And worse yet, some State laws do not even provide complete medical benefits for injured or diseased workers.

We cannot, in good conscience, permit this shameful condition to continue.

The time has now come for effective revisions of our workers' compensation laws and S. 3060. The bill before us today in my opinion approaches these problems in a reasonable and realistic manner.

Based upon what we have learned during our hearings, it is my intention to subject S. 3060 to further scrutiny and consideration. We

must smooth out the rough spots and make every effort to insure that it provides the most efficient means of reforming our compensation system.

But we must move forward. It is therefore my intention to reintroduce legislation early in the 96th Congress, based on S. 3060, which reflects what we have learned at these hearings—a bill which will finally modernize our workers' compensation system.

It is my intention to make consideration and enactment of comprehensive workers' compensation reform a matter of the highest priority in the early months of the 96th Congress.

The task before us is great, and today's witnesses will help us on our way. We welcome them to these hearings, and we are thankful for the assistance which they bring.

I have asked my former colleague, Senator Robert Taft, Counsel for the Special Committee for Workplace Product Liability Reform, to lead off our testimony this afternoon.

We welcome you back Senator Taft. It is a happy sight to see you in this room again.

STATEMENT OF ROBERT TAFT, JR., GENERAL COUNSEL, SPECIAL COMMITTEE FOR WORKPLACE PRODUCT LIABILITY REFORM, ACCOMPANIED BY RICHARD H. HARRIS, PRESIDENT, AMERICAN TEXTILE MACHINERY ASSOCIATION, AND PROF. JEFFREY O'CONNELL, UNIVERSITY OF ILLINOIS COLLEGE OF LAW, CHAMPAIGN, ILL.

Mr. TAFT. Thank you very much, Mr. Chairman. It is very pleasant to be here, and I appreciate greatly, as I am sure the witnesses here with me also do and members of our group, the opportunity to appear.

I would like at the outset to introduce Richard Harris, who will testify a little later, and Professor O'Connell. Mr. Harris is from Worcester, Mass., a manufacturer there; and Professor O'Connell is from the University of Illinois Law School, well known for his experience in the insurance field.

I am Robert Taft, Jr., the general counsel of the Special Committee for Workplace Product Liability Reform. This is a nonprofit District of Columbia corporation, organized under section 501(c) of the Internal Revenue Code, by a group of some 15 trade associations. I have a list here of those associations that I would be happy to submit to the committee for its files.

The CHAIRMAN. Fine.

Mr. TAFT. The associations involved represent a wide spectrum of capital equipment manufacturers, distributors, and marketers, which includes approximately 7,000 companies, with an annual sales volume of $30 billion, and employing approximately 2 million employees in all 50 States.

Our committee is in general agreement with the benefit standards and enforcement mechanism contained in S. 3060, and we are prepared to support this bill if section 10 can be amended to make the increased benefits mandated thereunder the sole and exclusive remedy for workplace injuries.

We understand that your committee staff is preparing and the Labor Department is also working on preparing some definitive cost figures which should be available next year, and we look forward with interest to seeing those figures and would be pleased to cooperate in any way with the committee staff in their preparations.

The CHAIRMAN. We appreciate that.

Mr. TAFT. We believe that in adopting a Federal minimum standards workers' compensation bill, you have a unique opportunity to find a fair and practicable solution for the workplace product liability dilemma facing the capital equipment industry.

Today, I think we have a great deal of unfairness in the current system, but there is also an enormous adverse impact for U.S. business and labor in the current system. This has been recognized both by the Carter administration and the Interagency Task Force on Product Liability.

On July 20, 1978, the Carter administration announced its program for addressing the serious economic problems caused by the increasing uncertainty of product liability risk. The problem is twofold: Unpredictable awards, on the one hand, and high and often commercially unaffordable, or unavailable, even, insurance premiums charged for product liability insurance.

Speaking for the administration, Secretary of Commerce Kreps indicated that the Department of Commerce will propose a provision affording relief for product manufacturers as a part of the administration workers' compensation proposal.

The provision would insure that the manufacturer of a deficient product makes an appropriate contribution to pay for the worker's claim.

Mr. C. L. Haslam, general counsel of the Department, and Prof. Victor Schwartz, chairman of the Product Stability Task Force, stated in connection with that release of information that while the administration had not taken a position on Federal minimum standards for workers' compensation, it has made the decision that if it does decide to support such legislation, it will recommend that such benefits be the sole or exclusive remedy for all injuries in the workplace.

The proposed amendment that we are submitting with my testimony, attached as exhibit E, would take care of it. It would, in accordance with administration's proposal, resolve the problem facing workplace product manufacturers by providing that in return for the guarantee of Federal minimum standards, workers' compensation recovery would become the sole source remedy for workplace-related injuries, both as to the employer and as to all third parties.

Under the language of the proposed amendment, there would be an opportunity for the employer to join a third party in workers' compensation proceedings, so that if a third party such as the manufacturer of machinery is to any extent responsible for the injury, the third party would be required to share to the extent of his fault in the payment of the workers' compensation award.

This determination would be made after the worker's award had taken place and should not delay the payment of compensation.

The administration recognized this problem and proposed in its approach an alternative approach of a postaward arbitration between

the employer and the third party. Under either approach, the incentive for maintaining a safe workplace and safe products, both as to the employer and the manufacturer of the machinery, would be maintained, and yet the enormous overhead transaction costs—attorneys' fees and other litigation costs—would be eliminated.

The need for the sole source remedy arises out of development over the last 15 years of the strict liability theory with regard to industrial products.

In connection with these problems, it has been analyzed and the Insurance Services Office Closed Claim Survey of 1977 found that only 11 percent of the claims of workers injured on the job are product related, but that these claims result in almost 42 percent of the total amount of payments made on all product liability.

This situation has resulted in an enormous increase in insurance premiums. For instance, just in two industries of the group that we represent in this special committee, we find in the metal-cutting machinery industry, for instance, that in 1970, the average liability insurance premium was $1,900. In 1978, it was $139,200, an increase of 7,000 percent.

In the textile field for textile machinery, in 1972, the average paid was $6,800. By 1977, just 5 years later, it had gone up to $191,000—a total increase of over 2,700 percent.

Today, due to this lack of affordability, 36 percent of ATMA's, the Textile Manufacturers' Association, members are without product liability insurance at all, each risking bankruptcy should a large judgment be entered, with little incentive for keeping or expanding capital invested in their businesses.

This uninsured status also, of course, raises a question about the certainty of recovery for the injured worker who does obtain a judgment.

Additionally, we feel that the manufacturers may not in fact even have the option of selling out and ceasing to operate in the field if they cannot afford to do so, rather than risking bankruptcy, because the unfunded contingent liabilities on claims not yet filed makes it almost impossible to sell small companies in the machinery manufacturing business.

In a recent case, for instance, the *Trimper* case, which I have cited in my written testimony, it was found that liability can attach to a successor to certain assets of the original third party manufacturer of a machine which was involved in an injury, even though there had been two intervening sales of assets of the original company that had manufactured the machine.

As to the harmful effect of these economic conditions on the price picture, there has been a major increase in prices with an attendant ripple effect on sales, inflation, and the ability to compete with foreign sources.

The costs are ultimately passed on to the consumers in the form of high prices for products. Some companies even discontinue manufacturing; others are reluctant to develop and introduce new products.

To demonstrate the impact upon individual companies and comment further on these points, Mr. Richard Harris will testify very shortly.

The inequity of the present system, I think, is perfectly clear, and it is clear to us also, that workplace injuries and product liability are

inextricably interwoven with the inequities and injustices in the current system.

We have an inadequate compensation of victims of workplace injuries, and that is really, I think, why the problem has arisen. Almost all State workers' compensation statutes bar recovery or identification from the employer, no matter how negligent that employer is. This, of course, has an effect on safety.

The Insurance Services Office has indicated that as a result of its studies, they believe that about 54 percent of product liability bodily injury payment dollars paid involve cases where the employer was negligent.

The employer is the one, actually, who has the control over the safety of the workplace. He controls the equipment, maintenance, the use; he makes the decision as to whether the potential injuries outweigh the cost of preventive measures. And he should be responsible.

The final report of the task force reasoned that "the cost effectiveness and potential impact of the workers' compensation sole source remedy make it an attractive one for serious legislative consideration."

That conclusion is supported by the task force industry study, which assures the compensation for injured parties, and minimizes the total sum of accident costs, and places incentive on the party best able to implement preventive programs, and expedites the reparations process.

The facts developed by the industry study indicate that only one-half of 1 percent of product-related work injuries claims ever mature into a recovery substantially in excess of workers' compensation benefits.

Moreover, the worker will avoid having to pay 25 to 40 percent of his award to plaintiff's attorneys and the uncertainty, delay, and mental anguish of tort legislation.

The sole source provision would eliminate the costs of litigation for all parties, and reduce by 42 percent, the dollars paid out for product liability claims throughout the country, not for those who are injured, but to others.

The elimination of the negligent employer's right of subrogation would create an economic incentive for his maintaining a safe workplace. Manufacturers would retain an incentive to develop safe products because of their potential exposure for negligent actions through joinder in the workers' compensation proceeding or through the post-award arbitration.

I would like to mention for just a minute what the effect of the sole source remedy would be on employees' claims. We have tried to analyze this from the best figures that are available.

We have approximately 1,500,000 workers' compensation cases closed every year. That was the figure from 1974. And the closed case survey of the Interagency Task Force on workers' compensation found that based on a considerable sample, about 31,500, or 2.1 percent, involved third-party claims out of that 1,500,000 cases.

The Interagency Task Force on Product Liability and the ISO estimated that while there were no absolute statistics on closed claims, they were up between 60,000 and 70,000 product liability cases for 1976.

The American Trial Lawyers' Association had a different estimate, at about 38,450 in 1975, that being filed cases.

The ISO claim survey of 1977 found that workers injured on the job are involved in 11 percent of product liability cases. So that, if we take 11 percent of 70,000, we find there are only 8,000 cases filed annually in third-party claims. This would be only one-half of 1 percent of the 1,500,000 workers' compensation cases closed.

But whether it be 2.1 percent or 0.5 percent, the number affected is comparatively small and must be balanced against the increased and assured Federal minimum workers' compensation standards for all covered workers, some 67 million in the United States.

Moreover, the small percentage of those who do recover in excess of the workers' compensation benefits makes the imbalance even more evident.

The National Machine Tool Builders Association, which is one of our members that did a survey on this, found that of the claims filed, updated to 1978, 44 percent were dropped, 44 percent were settled out of court, with an average settlement of about $19,000, which probably would be about the average workers' comp settlement, and 12 percent only went to court.

Of the 12 percent that went to court, 75 percent were decided for the defendant, and only 25 percent for the plaintiff. But the average damages for the plaintiff awarded judgment was $206,000, and that is partly the explanation of the premium problem; but the premium problem is even more aggravated when you consider that the average cost of handling a workers' compensation case for the defense comes into a figure of about $25,000. This is another major factor going into the premiums that are being charged.

What these figures do show is that the odds against a third-party recovery substantially in excess of workers' compensation are greater than about 1,000 to 1. This is really a lottery, and nothing else. It is not taking care of those who are injured.

Workplace product manufacturers are still faced, then, with the two interlocking problems of unpredictability of awards and resultant high, often commercially unaffordable, premiums. Section 10 of the bill, as it is presently drafted, eliminates third-party liability of labor unions, employers, and fellow employees, and entitles other third parties to offset workers' compensation and eliminates subrogation.

But none of these go to really solving this problem. The effect we estimate on premiums would be a very minimal one, unless the sole remedy provision is added to this bill.

Subparagraph 10(b)(5) would overrule the *Skinner* case decision in Illinois, which was followed in a few other States, that seems to permit third-party defendants to seek contributions from employers based on a relative degree of fault today.

To do this, I would point out, would operate as a disincentive to a safe workplace, without providing any other incentive on the manufacturer. If you went the route that we are suggesting, the manufacturer would still have that incentive to have a safe workplace, because he would be exempted from liability only if it is shown that he is not at fault in the post-award proceeding in which he and the manufacturer of the equipment would take part.

We recognize that other approaches to solve the product liability problem may be suggested along the lines of tort reform, tax reserves, or otherwise, but the likelihood of their enactment on a basis broad enough to have any real impact in the foreseeable future is not great.

What is needed is a sole source provision, which the Carter administration proposes now, and which we ask the committee to recommend as a part of this legislation.

Based upon the information which is available to us at this time, our organization will support S. 3060 if the increased benefits mandated thereunder, are made the injured worker's sole source of recovery, thereby making S. 3060 a true and fair reform in the workers' compensation system.

Thank you very much.

The CHAIRMAN. Thank you very, very much, Senator Taft. That was from our standpoint, a worthwhile and helpful statement. You have given us a lot to think about.

I will say that there might not be time this afternoon to fully explore the issues you raise in your statement. I wonder if we could follow with written observations and questions to you?

Mr. TAFT. We would be most delighted to cooperate and meet with the staff.

[The prepared statement of Mr. Taft and Mr. Taft's subsequent communication with the Committee in response to the Chairman's additional questions follows:]

TESTIMONY OF ROBERT TAFT, JR.
ON BEHALF OF SPECIAL COMMITTEE FOR WORKPLACE PRODUCT LIABILITY REFORM

Before the Subcommittee on Labor
Committee on Human Resources

United States Senate
September 22, 1978

I am Robert Taft, Jr., General Counsel for the Special Committee for Workplace Product Liability Reform. This is a non-profit D. C. corporation organized under Section 501 (c)(6) of the Internal Revenue Code by a group of associations and concerned companies for the purpose of seeking a remedy to the product liability crisis in so far as workplace injuries are concerned. The associations involved represent a wide spectrum of capital equipment manufacturers, distributors, and marketers including approximately 7000 companies with a total annual sales volume in excess of $30 billion, employing approximately 2 million employees in all 50 states.

Our Committee is in general agreement with the benefit standards and enforcement mechanism contained in S. 3060, and we are prepared to support this bill if Section 10 is amended to make the increased benefits mandated thereunder the sole and exclusive remedy for workplace injuries. I am sure, however, that neither your Committee nor ours would support a piece of legislation, the cost of which would severly cripple the economy through inflation and contribute to unemployment. Our own studies indicate that S. 3060 would not do that, but we understand that your Committee staff is preparing some definitive cost figures which should be available early next year. We join you in awaiting these figures with great interest and would be pleased to work with your Committee staff in their preparation.

In adopting a Federal minimum standards workers' compensation bill, you have a unique opportunity to find a fair and practicable solution for the workplace product liability dilemma facing the capital equipment industry today and to correct the unfairness of the current system for compensating workplace injuries. This opportunity for meaningful reform has been recognized both by the Carter Administration and by the Interagency Task Force on Product Liability studies in their recommendation that any legislation establishing Federal minimum benefit standards for workers' compensation should include a provision that would render workers' compensation a sole source of monetary recovery for workers injured in product-related accidents.

CARTER ADMINISTRATION'S POSITION: SOLE SOURCE REMEDY

On July 20, 1978, the Carter Administration announced its program to address the serious economic problems caused by the increasing uncertainty of product liability risk. The problem is two-pronged: unpredictable awards and resultant high, often commercially unaffordable and/or unavailable, premiums charged for product liability insurance. Speaking for the Administration, Secretary of Commerce Juanita Kreps proposed several solutions, including a long-term remedy for the workplace product liability problem:

> Overall Worker Compensation proposals now being considered by the Labor Department provide an ideal climate for addressing the workplace product liability problem. The Department of Commerce will propose a provision affording relief for product manufacturers as a part of any Administration Worker Compensation legislation. The provision would insure, however, that the manufacturer of a deficient product makes an appropriate contribution to pay for the worker's claim.

The Administration concluded that an approach which combines Federal workers' compensation minimum standards and sole source remedy is the most viable solution to the workplace product liability problem. Mr. C. L. Haslam, General Counsel of the Department of Commerce, and Professor Victor Schwartz, Chairman of the Product Liability Task Force, stated that while the Administration has not taken a position on Federal minimum standards for workers' compensation, it has made the decision that if it does decide to support such legislation, it will recommend that such benefits be the sole source or exclusive remedy for all injuries in the workplace.

Federal minimum standards plus sole source grew out of an 18-month study conducted by the Interagency Task Force on Product Liability. That effort involved eleven Federal agencies, including the Department of Labor, the Department of Commerce, and the Office of Management and Budget, as well as independent contractors and representatives of consumers, labor, and business.1/

PROPOSED AMENDMENT INCORPORATING THE CARTER ADMINISTRATION POSITION

We are submitting with this testimony a proposed amendment to S. 3060, attached as Exhibit E, which incorporates the Carter Administration's position on sole source. The Administration would resolve the problems facing workplace product manufacturers by providing that, in return for the guarantee of Federal minimum standards, workers' compensation recovery will become the sole source

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1/ For underlying facts and reasoning, see: Interagency Task Force on Product Liability/Final Report at pp. VII-103 to VII-113 (Exhibit A attached hereto); Options Paper on Product Liability and Accident Compensation Issues, U. S. Department of Commerce (April 6, 1978) at pp. 20 - 21 and 47 - 48 (Exhibit B); U. S. Department of Commerce News Release Background Paper (July 20, 1978) (Exhibit C); U. S. Department of Commerce News Release (April 6, 1978) (Exhibit D).

remedy for workplace-related injuries, both as to the employer and as to all third parties. Thus, workers' strict liability tort claims will be eliminated and the workers' compensation benefits will be increased. Under the language set forth in the proposed amendment, there will be an opportunity for the employer to join a third party in the workers' compensation proceeding so that if a third party, such as a machinery manufacturer, is to any extent responsible for the injury, that third party will be required to share (to the extent of his fault) in the payment of the workers' compensation award. This determination should be after the worker's award and should not delay the payment of compensation to that injured worker. The Administration recognizes, as do we, an alternative approach to this third-party joinder: post-award arbitration between the employer and the third party. Under either approach, an incentive will be maintained both for a safer workplace and for safe products, yet enormous overhead transaction costs (attorneys' fees and other litigation costs) will be eliminated.

THE NEED FOR SOLE SOURCE REMEDY

The need for sole source remedy arises out of the development over the last 15 years of the strict liability theory as to industrial products, shifting the entire burden of workplace injuries over and above the cost of workers' compensation to third party manufacturers. While the number of recoveries on such claims is extremely small, the recoveries that do occur are substantial and the impact on insurance premiums, rightly or wrongly, has been overwhelming. The Insurance Services Office Closed Claim Survey of 1977 found that, although only 11% of the claims of workers injured on the job are product related, these claims result in 42% of the total amount of payments made on all product liability claims

(including both workplace and non-workplace). This situation has resulted in enormous increases in insurance premiums for manufacturers of workplace products.

The experiences of two industries which are represented by our Special Committee for Workplace Product Liability Reform graphically depict the problem which workplace product manufacturers are facing. The first of these is the metal cutting machinery industry. In 1970, the average liability insurance premium was $1,900; in 1978 it was $139,200, an increase of over 7000%, even for those companies with no loss experience. Members of the American Textile Machinery Association (the "ATMA") paid an average of $6,800 in insurance premiums in 1972 and an average of $191,000 in 1977, an increase of 2709%. Today, due to this lack of affordability and/or availability, 36% of ATMA's members are without product liability insurance at all, each risking bankruptcy should a large judgment be entered against it and providing little incentive for keeping or expanding capital invested in the business. Moreover, this uninsured status provides little certainty of recovery by an injured worker who obtains such a judgment. Additionally, the manufacturers may not in fact even have the option of selling out and ceasing to operate in the field rather than risking such bankruptcy, as unfunded contingent liability on claims not yet filed is making it difficult if not impossible to sell small companies in the machinery manufacturing and distribution field, even through a sale of assets. A recent case, James Allen Trimper, v. Bruno-Sherman Corporation et al., 436 F.Supp. 349 (E.D.-Mich. 1977), found that liability can attach to a successor to certain assets of the original third party manufacturer of a machine which was involved in an injury, even though there had been two intervening sales of assets of the original company. Fear of being "infected" with potential future claims through any interrelationship, no

matter how attenuated, leaves the manufacturer who cannot afford insurance unable even to sell his company or its assets.

The harmful effect of these economic conditions upon the capital equipment industry in the United States is hard to estimate exactly, but it clearly has had a major impact on increased prices with an attendant ripple effect on sales, inflation, and ability to compete with foreign sources. The costs are ultimately passed on to consumers in the form of high prices for products. Some companies will discontinue manufacturing those items that account for most product liability suits and thereby remove highly vulnerable, but possibly vital, industrial products. The Task Force also found that some firms are already reluctant to develop and introduce new products because of product liability risk. This trend could exacerbate the already serious problem of the United States' losing its competitive edge in technology.2/ High prices, removal of products, and stifled technological development will force American firms to choose between inefficient and aging U. S. equipment or cheaper and technologically superior foreign products. This will reduce domestic competition, increase balance of payments deficit, and cause many workers to lose their jobs.

To demonstrate the impact upon individual companies involved, we are pleased to have here today Mr. Richard H. Harris, President of the Curtis & Marble Corporation, who is also President of one of our member associations, the American Textile Machinery Association. Shortly he will testify on his company's experience.

2/ Washington Post, June 21, 1978, "Decline in U. S. Technological Superiority Studied".

THE INEQUITY OF THE PRESENT SYSTEM

Our organization and its members believe that workplace injuries and the product liability crisis are inextricably interwoven with the inequities and injustices inherent in our current system of compensating victims of workplace injuries. The Department of Commerce recognized this linkage in its Options Paper on Product Liability and Accident Compensation Issues which it prepared for President Carter and released to the public on April 6, 1978. That document points out that, under present law, almost all state workers' compensation statutes (and/or their court interpretation) bar recovery or indemnification from the employer by a workplace product manufacturer, no matter how negligent the employer may have been in failing properly to guard and maintain that product or in failing to instruct and monitor his employees on how to use it. This inequity is further compounded by the fact that, in most jurisdictions, the employer and/or his workers' compensation insurance carrier obtains a subrogation lien against third party recoveries even though the employer may have caused or contributed to the cause of the employee's injury. The Insurance Services Office (I.S.O.) study reveals that about 54% of product liability bodily injury payment dollars paid involve cases where the employer arguably was negligent. Thus, manufacturers of workplace products are, in effect, paying the entire cost of many industrial accidents, while users of the products are completely relieved of financial responsibility despite the fact that they may have been in a better position (or the only position) to prevent the accident from occurring. For example, it is the employer who has control over the equipment, its maintenance, and its use, and it is the employer who makes decisions determining whether potential injuries outweigh the cost of preventive measures. The injustice of insulating employers

from the effects of their negligence can be eliminated by adoption of the Carter Administration's proposal for making increased workers' compensation benefits the sole source of recovery for product-related workplace accidents.

The Final Report of the Task Force reasoned that "the cost effectiveness and potential impact of the workers' compensation sole source remedy make it an attractive one for serious legislative consideration. It would appear that it should be considered along with more general workers' compensation legislative reform." That conclusion is supported by the Task Force Industry Study which found that "the use of the Workers' Compensation system assures compensation to the injured parties, minimizes the total sum of accident costs, places incentives on the party best able to implement preventive programs, and expedites the reparations process." The Task Force Insurance Study reaches that same conclusion.

If the workers' compensation exclusive remedy approach is adopted, the American working men and women will benefit by the raising of state workers' compensation benefits standards to a Federal minimum level and will be sacrificing only a minimal chance of receiving a substantial award in excess of workers' compensation. The facts developed by the Industry Study indicate that only one-half of one percent of product-related work injury claims ever mature into a recovery substantially in excess of workers' compensation benefits. From the standpoint of public policy, the American working men and women will benefit more from this compromise proposal than under the present system. Moreover, the worker will avoid having to pay 25 - 40% of his award to plaintiff's attorneys and the uncertainty, delay, and mental anguish suffered during tort litigation. The sole source provision will preclude third party lawsuits arising out of workplace injuries, thereby eliminating the costs of litigation for all parties and reducing by 42% the dollars paid out for product liability claims throughout the

country. Elimination of the negligent employer's right to subrogation will create an economic incentive for his maintaining a safe workplace. Manufacturers will retain their incentive to develop safe products because of their potential exposure for negligent actions through joinder in the workers' compensation proceeding or through post-award arbitration.

EFFECT OF SOLE SOURCE REMEDY ON EMPLOYEES' CLAIMS

I know you will be interested in the figures on the likely effect of this proposal from the point of view of the number of employee claims that would be cut off. Three questions present themselves:

1. What is the number of all filed claims against a third party per year which are workplace injury related?

2. What is the number of recoveries on such claims by settlement or judgment?

3. What is the number of such recoveries in amounts substantially in excess of the workers' compensation recovery?

Unfortunately, the data available from the insurance industry or Government sources to answer these questions is not very satisfactory. The Committee knows that the insurance industry's position is that the problem is ameliorating or that S. 3060 as drafted will help. Neither claim is supported by the facts. The Small Business Committee's hearings revealed that affordable product liability insurance is simply not available to many small businesses. I will, however, summarize what information is available and draw what I believe to be reliable conclusions.

In 1970 there were 2,204,200[3/] disabling work injuries. This figure was about constant from 1966 - 1970, and is probably still more or less valid as employment and safety have both increased. From such injuries, approximately 1,500,000 workers' compensation cases were closed in 1974, of which the Closed Case Survey of the Inter-Agency Task Force on Workers Compensation found, based on a considerable sample, that 31,500 or 2.1%, involved third party claims.

The Interagency Task Force on Product Liability and the I.S.O. estimate that, while there were no absolute statistics on closed claims, there were between 60,000 and 70,000 product liability cases filed in 1976. These figures include workplace and non-workplace injuries and property claims, as well as personal injury. The American Trial Lawyers Association estimated 38,450 such cases filed in 1975.

The I.S.O. Closed Claim Survey of 1977 found that workers injured on the job are involved in 11% of product liability incidents resulting in claims, but that these claims result in 42% of total bodily injury payments in dollar amount. This would indicate only 8,000 or so (11% of 70,000) third party claims filed annually on account of workplace incidents. This would be only one-half of one percent of the 1,500,000 workers' compensation cases closed. But whether it be 2.1% or .5%, the number affected is comparatively small and must be balanced against the increased and assured Federal minimum workers' compensation standards for all covered workers (67,000,000 in 1975).

Moreover, if we consider the small percentage of those who recover in excess of workers' compensation benefits the imbalance is even more evident. A survey of 60 capital goods manufacturers by the National Machine Tool Builders

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3/ National Commission on State Workmen's Compensation Laws Compendium on Workmen's Compensation (1973).

Association in 1976 (Reported in the Interagency Task Force on Product Liability Industry Study, page VI-13), as updated in 1978, showed that of those claims filed 44% were dropped, 44% were settled out of court with an average settlement amount of $19,000 (frequently paid in a sizeable part to subrogated employer's insurance companies and their attorneys) and 12% went to court.

Of those going to court, 75% were decided for the defendant and 25% for the plaintiff. Average damages for plaintiffs awarded judgment was $206,000.

In other words, taking 31,500 claims as the worst case, and 8,000 claims as the I.S.O. case, only 25% of the 12%, or 3% of all such claimants, went to court and recovered substantially in excess of likely workers' compensation recoveries. This would be 945 "worst" case and 240 I.S.O. case plaintiffs so recovering nationwide.

Moreover, such figures do not take into account likely costs and attorneys' fees paid by plaintiffs, estimated by the Interagency Task Force on Product Liability at about 35%.

Relating these results to the original 1,500,000 claimants, and the benefits to covered workers generally, we hope you will agree that the soundness of the sole remedy approach should speak for itself. These figures show that the odds against a third party recovery substantially in excess of workers' compensation benefits are greater than a thousand to one, but when it does occur it may be so large as to be disastrous to the uninsured. It is this risk that has caused the enormous premium increases for all.

EFFECT OF SECTION 10 OF PROPOSED S. 3060

Section 10 of S. 3060 as introduced gives some recognition to the work-place product liability problem and adopts the general principle that the setting

of minimum Federal standards for benefits is logically tied to limitation of third party liability. However, the bill does not, in Section 10, resolve the problems facing manufacturers of workplace machinery and thus not only misses a unique opportunity to allocate equitably all of the interests involved but also opens itself to challenges as to the constitutionality of the limitations it does seek to establish.

Workplace product manufacturers are facing two interlocking problems: the unpredictability of awards and the resultant high, often commercially unaffordable premiums charged for product liability insurance, even for manufacturers with no prior product liability loss. Section 10 of the bill: eliminates third party liability of labor unions, employers and fellow employees; entitles other third parties, including manufacturers, to offset any workers' compensation recovery against any judgment; and eliminates subrogation of the employee's claim against the third party to the employer or the employer's insurer. However, it does not eliminate either of the two prongs which are the core of the workplace product liability problem. Under Section 10 of S. 3060, all third parties other than labor unions and fellow employees remain liable to the employee for claims over and above workers' compensation recoveries. By omitting workplace product manufacturers from the sole source remedy under Section 10, unpredictable liability judgments and concomitant sky-rocketing insurance rates, often up to 7000% in eight years, will continue to rise without relief. The economic hardship placed on American small business will become increasingly severe. Today, as many as 20 - 36% of various classes of capital equipment manufacturers "go bare" without any product liability insurance because it is either unaffordable or unavailable at any cost.

By this omission, Section 10 also becomes vulnerable to constitutional due process challenges on the basis that it eliminates the injured worker's right to sue his labor union and fellow employees without any quid pro quo in the form of participation in enhanced compensation payments by union or fellow employee contributions.

Subparagraph (b)(5) of Section 10 overrules the decision of the Supreme Court of Illinois in Skinner v. Reed-Prentice Division Package Machinery Co., ____ Ill. ____, ____N.E. 2d____(Docket No. 48757, Dec., 1977) and similar cases which in a few states would permit third party defendants to seek contribution from employers based upon relative degree of fault which contributed to the cause of the plaintiff-employee's injuries. This Section 10 will increase the severity of the product liability problem by eliminating this right of the third party against negligent employers. It also operates as a disincentive to such an employer to maintain, or a union to require, a safe workplace because they are relieved of this exposure to damages for injuries which may arise out of their negligence.

In 1976, I offered legislation which would have codified the thrust of the Skinner case into Federal law, because I felt very strongly that the current system in most states operates both as a disincentive to emoloyee safety and unfairly shifts the cost of many workplace injuries to the manufacturers, often as to overage equipment. Subsequently, compromise language was worked out with your Committee's staff, and this compromise was introduced by Congressman Sarasin in the Fall of 1976. The proposal we submit today will most equitably allocate the cost of workplace injuries without seriously affecting the rights of 99.94% of workers' compensation claimants. In our judgment, Section 10, without our sole source amendment, would be a step in the wrong direction.

It should also be noted that the bill, as drafted, contains no permanent partial injury provision. We believe it is essential that it do so, both from the point of view of worker protection and from that of third party relief.

CONCLUSION

We agree with the Administration that the results of the Task Force and the conslusions and recommendations of the Options Paper establish a strong case for workers' compensation being made the sole source remedy for all injuries occurring in the workplace. We hope in view of the facts, the equities and the economics of the problem involved, the Committee will, in action on this legislation, include a provision for a sole source remedy. It would be a fair and effective method of handling a most troublesome and debilitating problem and we believe it would add in a most favorable way to the content of the bill. It might also be pointed out that, because of the constitutional questions related to the sole source approach, inclusion in the Federal minimum standards legislation is the first and only opportunity to solve the problem.

We recognize that other approaches to solve the product liability problem may be suggested along the lines of tort reform, tax reserves, or otherwise, but the likelihood of their enactment on a basis broad enough to have any real impact in the foreseeable future is not great. What is needed is the sole source provision which the Carter Administration proposes now and which we ask the Committee to recommend as part of the legislation. Based upon the information which is available to us at this time, our organization will support S. 3060 if the increased benefits mandated thereunder are made the injured worker's sole source of recovery, thereby making S. 3060 a true and fair reform of the workers' compensation system.

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December 13, 1978

COMMITTEE ON
1978 DEC 14 PM 4:29

The Honorable Harrison A. Williams, Jr.
Chairman
Human Resources Committee
United States Senate
Washington, D. C. 20510

Dear Pete:

Thank you for your letter of November 21, enclosing the written questions with respect to my testimony on the National Workers' Compensation Standards bill, S. 3060. I have prepared some further comments and specific replies in answer to those questions. We felt that they raised some key issues and are delighted to have the opportunity to provide what we believe are comprehensive replies as to why a sole remedy approach as suggested by the Administration is the best way to handle the problem from the point of view of all concerned.

I am sure that machine builders and suppliers all over the country deeply appreciate your interest and understanding of the problem. We look forward to continuing to work with you and your staff toward successful passage of such legislation.

Most sincerely,

Robert Taft, Jr.

RTJr:roc
Enclosure

cc: Jacob K. Javits

1978 DEC 14 PM 12:19

Response of Robert Taft, Jr.

to questions regarding his testimony before the
Subcommittee on Labor of the Committee on Human Resources of the
United States Senate on September 22, 1978

I appreciate having had the opportunity to testify before the Labor Subcommittee on September 22, 1978, at its hearings on S. 3060. I am also pleased to respond to the eight written questions which were forwarded to me by Chairman Harrison Williams.

These written questions and the questions raised at the hearings make it clear to me that the Committee is well aware of the severity of the product liability problem in the workplace as it affects third party manufacturers or suppliers of workplace products. It is equally clear that the Committee recognizes the "miniscule" number of workers who ever benefit from the current system which creates this problem. Section 10 of S. 3060 gives some recognition to the workplace product liability problem and adopts the general principle that the setting of minimum Federal standards for benefits is logically tied to limitation of third party liability. Unfortunately, Section 10, as it is written, does not resolve the interlocking problems of the unpredictability of awards and the resultant high, often commercially unaffordable premiums charged for product liability insurance. The Special Committee for Workplace Product Liability Reform supports the Administration's position that the increased benefits mandated under legislation such as S. 3060 should be a predicate for workers foregoing their right to sue product manufacturers. By making the increased Federal minimum benefit standards for workers' compensation the sole source of monetary recovery for workers injured in product-related accidents, the Committee would reach a fair and practicable solution for the workplace product liability dilemma facing the capital equipment industry today. We are hopeful that the Committee will accept the Administration's proposal which will replace the inequities of the current product liability in the workplace lottery with a universal "no fault" reparations approach for such injuries.

The Committee is to be commended for recognizing that the current system for compensating those workers who are injured in the workplace is nothing more than a lottery in which a miniscule number of plaintiffs recover

in excess of workers' compensation and that the wrong party is generally paying the bill for an extremely unfair and wasteful system. Chairman Williams has correctly described this current system as "a haven for litigation." In my testimony, I pointed out that the present litigation system is inequitable in that the manufacturers of workplace products are, in effect, paying the entire cost of many industrial accidents, while users of the products and their insurers are completely relieved of financial responsibility beyond workers' compensation despite the fact that they may have been in a better position (or the only position) to prevent the accident from occurring. For example, it is the employer who has control over the equipment, its maintenance, and its use, and it is the employer who makes decisions determining whether potential injuries outweigh the cost of preventive measures. The injustice of insulating employers through the workers' compensation shield from the effects of their negligence can be eliminated by adoption of the Carter Administration's sole source proposal.

The unfairness of the current system has been documented in the 1976 survey of the National Machine Tool Builders Association where it was found that in only 13% of the workplace product-related accidents could a case be made that the accidents were caused by some sort of mechanical failure of the machine itself. Almost half of the machines involved were over 20 years old. Most of the machines had been modified one or more times by the employer and/or the person or persons from whom he bought the machine. The study shows that 18% of the machines were poorly maintained by the employer.

Sixty-three percent of the time it could be argued that the accident occurred because the employer failed to properly guard the machine. Thirteen percent of the accidents occurred where the employer was claimed to have failed to make sure that his employees had used the appropriate safety device. Sixty-five percent of the injured employees did not receive the appropriate training from their employer on how to properly and safely operate the machine. These statistics are verified by a study conducted by the Insurance Services Office (I.S.O.) which reveals that in excess of 54% of workplace product liability injury payment dollars involved cases where the employer may have been wholly or partially responsible for the accident. What all this adds up to is a situation in which unsafe workplace practices and unsafe workplaces, maintained by unsafe employers, are causing working men and women to loose fingers and hands or worse, and the equipment suppliers are paying for it.

In our testimony, Richard Harris and I demonstrated the economic impact which the workplace product liability problem has had on individual companies as well as on the entire capital equipment industry. Due to the lack of affordability and/or availability of product liability insurance, many companies are going without any insurance at all, each risking bankruptcy should a large judgment be entered against it. This provides little or no incentive for keeping or expanding capital invested in the business. As this trend increases, even the handful of plaintiffs who succeed in product liability cases will be affected by the uncertainty of collecting a judgment against a company which is "going bare." The harmful effect of these economic conditions in a capital industry has a ripple effect throughout the entire economy through higher prices, stifled technological development, worse trade and balance of payments deficits, and loss of jobs.

The statistics indicate that the workplace product liability problem is indeed grave and that we are plagued by an unfair, costly and wasteful system from which less than half a percent of claimants ever benefit. We urge the Committee to eliminate this long-odds lottery and the serious economic problems which it creates for the entire capital goods industry and for our nation's economy. By making the increased benefits under S. 3060 the sole source remedy, all workers would benefit through increased minimum Federal standards for benefits and only a few would be giving up a minimal chance to succeed in gambling in the product liability game of chance. The sole surce remedy proposed by the Administration will most equitably allocate the cost of workplace injuries without seriously affecting the rights of 99.94% of workers' compensation claimants. If the increased benefits mandated under S. 3060 are made the injured workers' sole source or recovery, S. 3060 would then be a true and fair reform of the workers' compensation system.

I believe that the foregoing has effectively answered all eight of the questions which were posed. However, in the following paragraphs I will specifically respond to each question individually.

Question 1.

Under your product liability proposal, the employer could seek to recover part of the compensation he pays an injured worker if he can show that the negligence of the manufacturer of the machine which injured the worker contributed to the injury.

Since workers' compensation is essentially a no-fault system, are you troubled with the injection of this "fault" finding into the determination of who shall pay compensation benefits?

Reply

At the outset, it must be recognized that the current total reparations system for compensating victims of workplace injuries is based on fault, since law suits against third parties are encouraged and subrogation is allowed. As pointed out in my testimony, under the current system the manufacturers of workplace products are, in effect, paying the entire excess cost of many industrial accidents while users of the products are completely relieved of this financial responsibility because almost all state workers' compensation statutes bar recovery for indemnification from the employer by workplace product manufacturers, no matter how negligent the employer may have been. This inequity is further compounded by the fact that, in most jurisdictions, the employer and/or his workers' compensation insurance carrier obtains a subrogation lien against the third party recovery, even though the employer may have caused or contributed to the cause of the employee's injury. Thus, the determination of fault in the courtroom against a manufacturer becomes the basis upon which compensation is paid under the current system.

The sole source remedy proposal of the Administration would create a true "no fault" reparations system for injuries occurring in the workplace. The current system and certainly the remedy proposed in the current Section 10 of S. 3060 continue to make fault a central issue.

Under the Aministration proposal, compensation for workplace injuries would be increased by way of Federally mandated minimum benefit standards and the payment of that compensation would be fairly allocated between those parties responsible. Under this proposal, the right party will be paying the bill. The worker will be paid immediately regardless of the later determination of

fault between the employer and manufacturer. If the manufacturer is found to be at fault, he would be paying for the increased benefits which will be received by the worker. If the employer's fault contributed to the injury, he will bear the appropriate cost of compensating the injured worker. Our proposal, therefore, within the "no fault" recovery limit, provides incentives for both the employer and the manufacturer to eliminate or at least reduce injuries arising in the workplace. At the same time the injured party would benefit at a fair level from a "no fault" recovery procedure with minimum delay and transaction costs, and without the uncertainty, delay, and mental anguish suffered during tort litigation.

Question 2.

You pointed out in your testimony that only a very small number of employees who suffer workplace injuries even bring third party suits. The number of such suits which are successful for the plaintiff is, in turn, really miniscule. You suggested that the number of ultimately successful plaintiffs could be as low as 240 per year out of a total of 2,204,200 work-related disabling injuries annually. (0.01%).

Your conclusion, apparently, is that the sole source solution which you propose would really cut off only a small number of workers from potential third party recoveries.

But, couldn't we also argue, from these same figures, that the problem really isn't so grave as to warrant such a drastic revision of the compensation laws and the tort laws?

Reply

I believe that the gravity of the product liability problem in the workplace is fully documented in the testimony of Richard H. Harris and myself. The Insurance Services Office (I.S.O.) calculates that, of the total dollars paid out on all product liability claims, 42% of the payment goes to those who were injured in the workplace. A fair reading of the reports prepared by the Interagency Task Force on Product Liability reveals the strong impression that claims based on workplace products play a very important part in the overall product liability problem, and that the Administration has determined to remedy the problem through the sole source proposal.

Unfortunately, the figures on the small number of successful plaintiffs who recover substantially in excess of workers' compensation benefits have little or no relationship to the skyrocketing costs of insurance premiums nor the cost of handling and litigating the claims. For example, the transaction costs (attorneys fees, investigation, expert witnesses, etc.) for handling claims is estimated by the I.S.O. to be at an average of $3,500 per claim out of court and about $25,000 per claim if the case ends up in court, even if there is no payment to the plaintiff. In the Product Liability Closed Claims Survey of the I.S.O., it was found that "for every dollar paid for claims, insurers incur in defense costs an additional 35 cents where bodily injury is claimed and 48 cents where property damage is claimed, no matter who wins the case."

The insurance industry claims that it must charge the increasingly higher and higher premiums to protect itself against potentially huge losses. The insurance industry also claims that unlimited liabilities for unlimited claims make product liability insurance actuarially unsound and unpredictable. Whether or not the premium increases are justified by these considerations, there is no doubt that in the minimal number of cases where the plaintiff succeeds, the jury verdicts and the transaction costs have been on a sharp upward trend with no end in sight. The potential liability of an insurer runs several years into the future because of the time lag between the date of the injury and the final resolution of the claim. The costs of product liability insurance coverage continue to rise dramatically and the prospects are that they will continue to do so. Those companies which have deductibles are being asked to retain an ever increasing portion of their liability. Some companies have been unable to obtain product liability insurance either because they cannot afford the high cost of premiums or because they cannot obtain coverage at any price. In light of the gravity of the workplace product liability problem, it is understandable that the Administration chose the sole source remedy as a fair and equitable means of resolving this problem. When coupled with the increased benefit standards of S. 3060, the Administration's sole source proposal will inure to the benefit of all Americans.

Question 3.

In view of the truly small number of third party claims arising out of work-related injuries, and the truly miniscule number of those suits which are successful, it would seem to me that the huge product liability premium increases are largely the result of potential suits, not real ones, and the result of the fact that a large number of these suits have nuisance value--that is, it is often cheaper to settle than it is to litigate.

Do you agree with this analysis?

If so, then wouldn't it be a viable solution to try to eliminate the nuisance suits, and the potential suits, rather than to try to eliminate all suits?

Reply

Subject to what I have said above, it is true that some claims might be classified as "nuisance" suits, but it would be extemely difficult to classify which. To restrict or eliminate these suits in a constitutional way would present very serious difficulties, especially at the Federal level. With regard to either Federal or state legislation, the tort reform approach would affect all product liability claims, not merely workplace injuries, thus multiplying the impact by a factor of about nine and raising many objections and questions of principle not involved by the "no fault" sole remedy approach of the Administration's proposal. In cases where there is no workers' compensation, changes in tort law, such as the so called "statute of repose" (cutting off all liability for injury from products eight or ten years after sale), might eliminate the only remedy to the injured party.

To repeat my testimony, "The I.S.O. Closed Claim Survey of 1977 found that workers injured on the job are involved in 11% of product liability incidents resulting in claims, but that these claims result in 42% of total bodily injury payments in dollar amount." As these statistics indicate, the real problem is not that third party defendants lose a lot of cases in court, but rather that a lot of claims are filed and that insurance companies are exposed to unlimited liability on unlimited claims in the future. The insurance industry claims that this makes product liability insurance actuarially unsound

and unpredictable. Any attempt to deal with "nuisance" suits would have very little impact upon the overall workplace product liability problem. The only real and effective method of resolving that problem would be the elimination of litigation and product liability claims through a true "no fault" sole source workers' compensation system which would end the lottery and greatly diminish transaction costs.

Question 4.

> In our view, Section 10 of S. 3060 should eliminate the nuisance suits and discourage the large numbers of potential suits which are driving up insurance premiums for equipment manufacturers. We eliminate any possibility that the employer will be able to recover his compensation costs from the plaintiff's award. We discourage pure nuisance suits by requiring that any recovery be reduced by the value of the compensation which the claimant receives. It seems to me that the only suits left are the truly serious, major ones, where the plaintiff has a good chance of recovering enough so that after his compensation, his attorney's fees, his court costs, and the like are subtracted, there will be enough left over to make years of litigation worth his while.
>
> Why does not this solution really address the bulk of the problem confronted by the machine manufacturers?

Reply

Section 10 of S. 3060 as introduced gives some recognition to the workplace product liability problem and adopts the general principle that the setting of minimum Federal standards for benefits is logically tied to limitation of third party liability. We commend the Committee for recognizing that subrogation has generated the filing of some third party product liability claims and that it has discouraged prompt and fair disposal of others. However, Section 10, as drafted, does not address the bulk of the problem of third party liability for workplace injuries, as my discussion above points out. The insurers have uniformly refused to agree that merely eliminating subrogation would lower premiums appreciably. The Task Force reached the same conclusion. This is because the risk of very large awards and the unpredictability of claims would not be eliminated. There is no limit on the extent or size of liability or the number of law suits. Section 10 does not lend predictability to the unlimited risk to which product manufacturers and insurers are exposed.

Therefore, it will have no impact on the ominous trend to policy cancellations and rapidly increasing product liability insurance premiums. The American Insurance Association has drafted and supported legislative proposals similar to S. 3060's Section 10. Its members would continue to collect substantial, if not excessive, product liability premiums from suppliers of workplace equipment. This would terminate under the Administration's proposal.

As you pointed out in question 3, only a small number of third party claims arise out of work-related injuries, and only a tiny number of those suits are ever successful in that the injured worker improves his or her recovery in excess of workers' compensation benefits.

It would seem to be in the interest of public policy to adopt the sole source remedy proposed by the Administration which would result in the effective elimination of the workplace product liability problem and benefit all the working men and women of America through the quid pro quo of increased, Federally-mandated benefit standards.

Question 5.

You indicate in your statement that one of the shortcomings of the provisions of section 10 is that it precludes any indemnification action by the third party defendant against the negligent employer. Yet, in your statement, you indicate that nearly all states bar such indemnification.

In how many states is an indemnification possible now?

Reply

Some degree of indemnification of or sharing with the third party defendant by the employer is now possible on varying theories of law and to varying degrees in California, Minnesota, North Carolina, Pennsylvania, New York, and Illinois. There seems to be a growing trend in the cases, because of the inequity in the current reparations system, toward allowing claims against employers beyond workers' compensation recoveries. If this trend continues to grow it could undermine the workers' compensation system by making workers' compensation premiums as actuarially unsound and unpredictable as product liability premiums are today with the resultant unaffordability and

unavailability of insurance coverage. We do not advocate that this be the solution, since it tends to break down the "no fault" principle of workers' compensation in which we believe. We do say that it is highly inequitable to put all the burden of the injury cost on the third party supplier when the party principally at fault was the employer. Rather, we advocate eliminating supplier or manufacturer suits against the employer entirely and handling the burden by proper workers' compensation benefits and allocation of their cost in part or in total against the third party where the fault is his. This can be done by allowing the employer to seek sharing of the burden, to the extent of the fault, for workplace injuries covered by the Act. For a discussion of state law regarding indemnity and contribution see Interagency Task Force on Product Liability: Final Report of the Legal Study, Vol. VI, at 9-36 (1977).

Question 6.

Your proposal would insulate the manufacturer from potential suits by injured employees who had already received workers' compensation awards. But, it would encourage the employers who paid those awards to seek to recoup part or all of his compensation loss from the manufacturer.

Aren't you just substituting one kind of litigation for another? Why do you think this litigation would be any less expensive, time consuming, and wasteful?

Reply

This right would not be a substitution of litigation. After the worker's award, the determination of fault between a manufacturer and employer would be made either in an arbitration proceeding or by a state workers' compensation tribunal.

Under subparagraph (c)(2) of the amendment which we propose, the employer's contributory fault would be a defense for the manufacturer. It is not likely that the employer will be raising the issue of the manufacturer's fault and incurring the expense of pursuing that claim if the employer's fault contributed to the injury. According to the I.S.O. Study, in excess of 57% of the product liability bodily injury payment dollars now paid involve cases where the employer was possibly negligent.

Limited, as the recovery would be, to the workers' compensation award, the risk would be insurable at affordable premium rates (which would not be true under Section 10 of S. 3060). Moreover, with this limitation, the incentive of the employer, the insurance carrier, and the contingent-fee-compensated attorney to sue would be immeasurably reduced, especially where the employer was partly or wholly at fault. Moreover, if the issue ever reached the courts or a jury, they would be dealing in a climate where, since the injured party's recovery would not be affected, a fair allocation of costs could be made without the emotional factors attendant to today's plaintiff's suing corporate suppliers of workplace equipment. This would greatly reduce litigation and make the litigation that did occur less time consuming and wasteful.

Question 7.

It seems to me that your proposal, allowing employers to recoup compensation losses from the manufacturer would in fact increase litigation.

Isn't it reasonable to suppose that instead of a few liability actions by a small percentage of injured workers, you would see employers seeking contribution from the manufacturer in a large number of compensation cases?

Wouldn't manufacturers be more likely to settle in suits brought by their customers than they would be to settle suits brought by their customers' employees, with whom they have no business relationships?

Reply

Supplementing my reply under question 6 just given, I do not believe manufacturers would be as likely to settle under our proposal as under Section 10 of S. 3060. The manufacturer's liability would be a limited one and in most cases an insured one. If business relationships should lead to settlements of burden-sharing for such injuries, isn't society benefited? In fact, this very consideration may well lead to contractual burden-sharing in advance and to improved warranties and standards of safety for both parties.

As indicated in my previous discussion, the employer involved may not be a customer of the manufacturer. The 1976 survey of the National Machine Tool Builders Association indicated that almost half of the machines involved were 20 years old, many of them having been sold, resold, and modified once or more by the employer or a dealer and placed in operation in the plant of the employer of the person who was unfortunate enough to get himself or herself injured. That survey also indicated that most claims involved substantial employer culpability. Thus under subparagraph (c)(2) of our proposed amendment the employer's own contributory fault and the lack of fault of the manufacturer would discourage the employer from seeking contribution from the manufacturer in the great majority of compensation cases.

Question 8.

It seems to me that potential workers' compensation liability encourages an employer to maintain a safe and healthful work place. Similarly, potential tort liability encourages manufacturers to make every effort to insure that their machines, or chemicals, or whatever, are as safe as humanly possible.

Your proposal, it seems to me, by eliminating the tort suit, and having the employer and the manufacturer share the compensation liability would reduce the inducement for safety on the part of both the employer and the manufacturer.

Do you agree with this analysis?

Reply

We do not agree with your analysis. The employer's only incentive to safety (other than OSHA and state safety regulations) under Section 10 of S. 3060 would be to keep his workers' compensation costs down. Once he is paying the maximum (as would happen to high risk or poor safety record employers), there would be no more incentive. Under our proposal he would continue to have the safety incentive so as to be able to pass all or part of the burden of his rate to a third party who is at fault. Under either Section 10 of the bill or our proposal the manufacturer, it is true, might not have as serious a threat as he

has today, but knowledge that the employer could cause him to share or carry the workers' compensation burden to the extent of his fault would still be an extremely potent incentive for safe products. In addition, competition in the marketplace is always an incentive to manufacturers to produce a safe product. Customers will not buy a machine which is not safe. They do not want their employees injured and they do not want their workers' compensation premiums increased. There would also be a climate and premium level established under which further investment in the business, proper insurance coverage rather than "going bare", safety research, and new improved products would be encouraged, rather than discouraged by the bottomless risk faced today, a risk that would still exist almost totally unrelieved under Section 10 of S. 3060.

The CHAIRMAN. OK. Now, Mr. Harris?

Mr. HARRIS. Good afternoon.

I am Richard Harris, president of Curtis & Marble Corp., a small manufacturer of capital goods primarily for the textile industry, and I am currently involved also as president of the American Textile Machinery Association; and third, vice chairman of the Special Committee for Workplace Product Liability Reform.

One of my chief reasons for appearing here today is to point out the disastrous impact of the crisis in products liability risk now being borne by small and medium-size manufacturers of capital equipment.

If numbers sometimes present a confusing picture of reality, in this instance, they present a grim and quite accurate account of soaring costs, inequitable burdens and inadequate or nonexistent liability protection.

Four years ago, my company was paying $300 a year for general liability insurance, including product coverage, and about $500 a year for the umbrella coverage. This year, we pay $20,000 for general liability insurance, and $50,000 for umbrella coverage.

That, in round figures, is an increase of 100 times. And we have not yet had the first court judgment against us in a product liability case.

The results of a 1977 ATMA survey echo the same story or worse, throughout our industry. One member firm that in 1972 was paying just over $10,000 for primary and umbrella coverage, paid more than $250,000 for comparable coverage in 1977—an increase of 2,400 percent in 5 years. In the single year from 1976 to 1977, this company's premiums increased by $170,000. We are talking about very small companies, gentlemen.

Another considerably smaller firm experienced an increase in premiums during the same 5-year period from $2,400 to $17,000 which, in view of the industry's average experience, represents a rather mild rise of 600-and-some percent.

Overall, ATMA members, according to our survey, paid an average of $6,800 in 1972 and $191,000 in 1977, a 2,700-percent increase.

Umbrella coverage during that same span rose in cost by 1,900 percent, while the limits of that coverage only rose modestly, 150 percent.

In one critical sense, these figures tell the story of only the more fortunate firms, those that were able to obtain coverage and therefore submit these comparable figures.

Of the 50 responding firms in the survey, 18, or better than one-third, were wholly without product liability insurance because of total unavailability or unaffordable rates being offered.

And since our survey, the situation has deteriorated substantially.

I would like to shift gears now. My main message deals with the impact of products liability risk on technological progress.

Many of the consequences attendant to this upward spiral in liability premiums have been amply discussed by other people in other forum. One has not—and I think it has a consequence that carries with it very broad and ominous implications for our economy and our society, as a whole. Simply put, the mounting costs and growing unavailability of product liability insurance are stifling engineering progress in new product development, and are threatening to drive small and technologically innovative employers out of business.

Ironically, workplace safety often suffers most because new products and devices designed to enhance safety and efficiency, are frequently those that invite the most damaging litigation, and take product liability coverage out of the realm of affordability.

Allow me to give you a few examples from my own company and my own industry.

About a year ago at Curtis & Marble, we began examining our product line for product liability exposure. We quickly decided that one of our worst exposures was a safety device produced by our instrument division.

This device has a very simple purpose: To tell a crane operator when his boom is approaching an unsafe angle. Now, we call it a boom angle indicator, very obviously. It has bells and whistles that call attention to the approach of unsafe conditions.

We sold this little black box for just a few hundred dollars to go on giant cranes used in construction, sometimes worth tens of thousands of dollars.

If a crane were to malfunction and cause injury, our instrument, almost surely, would be included in any suit regardless of the circumstances. So what did we do? Of course, we made the only sensible decision: Took the product off the market.

Our instrument division went on to record earnings in 1977, without the help of this product, enjoyed a product liability premium rate less than one-twentieth of that for our machinery division, and the marketplace was deprived of an innovative product designed to improve workplace safety.

I can assure you this is not an isolated nor an unrepresentative case. In discussions with other manufacturers, I have heard many variations on the same theme with regard to such things as new braking systems for house trailers, improved gages for applications as diverse as underwater diving and medical equipment, an entirely innovative and more effective method for introducing medications into patients.

We are all aware of the Secretary of Transportation stating earlier this year that a major corporation abandoned its development and production of vehicle air bags in part because of its grave liability concerns.

The obvious result of this phenomenon is that new and often safer products that have been technically denied entry into the marketplace or are being withdrawn from the marketplace.

More importantly, this penalty is not paid solely out of corporate earnings; it is the consumers and workers who are suffering directly in these cases.

Statistics bear out these observations. The Interagency Task Force on Product Liability found that 26, or 8 percent, of the 337 firms it surveyed stated that they had delayed or canceled the introduction of new products because of product liability problems.

A similar number of surveyed firms reported decisions to discontinue production of existing products during 1975 and 1976. Another 13 firms, 4 percent, said that they were considering the discontinuation of one or more products.

These findings were confirmed during personal interviews by the industry contractor with a select number of manufacturers, in which

30 percent of the firms interviewed stated that their product lines were constrained or subject to reduction because of product liability considerations.

The National Federation of Independent Business, in another survey, found that 12.8 percent of the nearly 1,300 firms which were surveyed reported similar constraints in the development of new products. But these statistics and others like them only reveal part of the picture. What they do not show is exactly why this has come to pass.

However, the 1976 product liability closed claim survey issued by the Insurance Services Office may shed some light. That study notes that the allegation involved in the greatest number of payment dollars is faulty design—56 percent of the paid claims. I find that a very sobering statistic.

This choking off of technological development and innovation is, in short, one of the highest costs in economic and human terms that we all pay for the prices in products liability risks.

I would like to depart from my written testimony and shorten it, simply by saying that I think the committee and the Senate as a whole and the legislative process as a whole has an absolutely vital and truly unique opportunity of bringing together a variety of diverse interests—the interests which are interested fundamentally in the Federal minimum standards aspects of the workers' compensation bill, the capital goods and other manufacturers, must find a quick way of being relieved of this totally unfair and unjust burden which they are bearing, that bears no relationship to fault or negligence on their part, in most cases, and interests of unions, of working people, of almost any business involved segment of our society. These interests come together quite uniquely in the bill under consideration if that bill is properly amended as recommended by Senator Taft.

And we are here today urging very serious consideration of this whole remedy amendment as rather a remarkable opportunity that simply must not slip out of our grasp through accident or neglect.

The CHAIRMAN. You make a very powerful case. I see many problems with our approaches here. One, we are dealing in this bill only with compensation for cases of death on total disability. And we are proceeding on a basis that benefits for injury or disease, will be adequate under these standards. But again, this bill only reaches part, and probably the smallest part, of compensation cases, the death and total disability cases, not the partial disability cases.

If we proceed the way you suggest, with exclusive remedy in this area, we would not be ready, I would think, in justice, to proceed to make compensation the exclusive remedy in cases, such as partial disability, that this bill does not deal with. We are addressing the product liability problem here because of the generally held belief that compensation benefits under the current system are inadequate, and that the inadequate benefits are in part, creating the product liability pressure. We feel comfortable in addressing the product liability question in the context of improved compensation benefits. But, where the bill does not deal with an area of compensation, I am concerned about the fairness of limiting product liability actions. This is one of our problems.

Another matter concerns me—and Senator Taft, if you could think about this, and when you are in town, we could talk about it—we are

dealing here with tort liability in this part of the discussion. I think we have a clear jurisdiction within our committee here to deal with the worker and the worker's compensation which is now statutory, but that part that is not, that is common law, basically, I wonder about. I do not want to raise too many questions about sequentials and all of that, at this point. But you know our problems here on what we have authority to deal with. And if you could think about that, then we could talk. While you were here, you were one of the most knowledgeable of our rules, in fact.

Mr. TAFT. We have given quite a lot of thought to that. And I would not say that I think the only reason for our differing from the Carter administration recommendation on the post-award proceeding was based on that, but it certainly is a factor to consider; if you talk about having a post-award proceeding between the manufacturer and the employer, as to the comparative fault or degree of fault, to share in the burden of the workmen's compensation payment, the higher payment, and you do it in the workers' compensation proceeding, I believe that a very good case could be made that that is well within the jurisdiction of this committee. If you go to a post-award arbitration approach, as the Carter administration did, you may face some other questions in the jurisdictional area, as I well realize.

Our bill does attempt to take care of this, as I indicated, and our amendment proposed is attached as exhibit E to the testimony.

The CHAIRMAN. On the question of the administration position, I know that the Department of Commerce, as you accurately reported, has come to this conclusion. The Department of Labor has not yet been heard from, and neither has the White House as I understand it.

Mr. TAFT. Well, now, that is not entirely correct. As I indicated in my statement, the Department of Commerce position was cleared, with the 11 agencies involved, including the Office of Management and Budget. And the statement made by Secretary Kreps was made with White House approval.

The CHAIRMAN. I missed that, and I am glad to be corrected.

Mr. TAFT. The distinction is that the administration has not taken any position on minimum standard for workers' compensation, I think because of the figure questions involved, which they are working on.

But insofar as sole source on product liability, they have taken a position.

The CHAIRMAN. Thank you.

Now, to Professor O'Connell.

Mr. TAFT. Yes. I just want to introduce Professor O'Connell. I did not say one thing in mentioning originally in my introduction, and that is that Professor O'Connell is here totally independently on his own. He is not in anyway connected, officially or unofficially, with the special committee that I represent and that Mr. Harris is speaking as a member of.

The CHAIRMAN. Professor O'Connell, we are very pleased.

Professor O'CONNELL. Senator, about 100 years ago, Bismark, who was not exactly the greatest liberal of his day, perceived that the common law tort liability system 100 years ago was a disaster.

Bismark's perception of how bad it was rapidly spread throughout the world. It would seem that it was very counterproductive to have

an injured employee forced to make a claim against his employer based on who was at fault, with all the dilatory, arbitrary, adversary, acrimonious dispute that common law trials meant.

And indeed, in a relatively short time, in an age which was a very repressive age from the point of view of social legislation, workers' compensation passed throughout the industrialized world.

In the United States by 1920—not, as I say, a progressive era, the first 20 years of this century, for purposes of social legislation—every industrial State in the United States had workers' compensation, because it was perceived how disastrous the tort system was as a means of compensating injured employees.

Now, the workers' compensation system is by no means perfect. It has its problems. But what is often overlooked is that with all its inadequacies, it is incomparably the best insurance mechanism in the United States, widely applicable to our populace.

No other insurance mechanism provides unlimited benefits medically, including rehabilitation, to so many people. No system provides unlimited wage loss in duration, admittedly with oftentimes very adequate caps, per week, but unlimited in duration in most States.

But I will grant you, as we are all agreed, and as you have emphasized, the benefits are still too low. They are much too low in many States and too low in others.

What has happened through the years for a variety of reasons is that this system has been supplemented by the very inadequate system is was designed to replace. The tort system was perceived by those who enacted workers' compensation to be a disaster, and we are now supplementing workers' compensation by that very system that workers' compensation rejected—namely, the cumbersome, dilatory, wasteful, arbitrary lawsuit method.

And product liability suits are probably even worse than the old employer-employee suits. I have figures in my written testimony showing how long is the delay in payment, how few people are paid, how much of the insurance dollar is chewed up in insurance overhead and legal fees, such that much less than 50 cents, I figure, on figures that others have agreed are probably in the ballpark, that about 37½ cents of the product liability dollar gets through to injured victims—and that only to a few, as Senator Taft has suggested, and only after a long delay.

Think of it this way. Workers' compensation is a fringe benefit, not an adequate fringe benefit, but compared to a lot, a very welcome one. It is not adequate, and we are now supplementing it by another fringe benefit, namely, the product liability system, which is about the worst fringe benefit we could possibly design, if we sat down to try to do it.

And what I am suggesting, and what others have suggested, is a unique opportunity to accomplish what workers' compensation accomplished originally, and what other reforms, such as no-fault auto insurance, have tried to accomplish, namely, to take the moneys that are presently being wasted, savagely wasted, in common lawsuits, and use them to pay promptly, expeditiously, injured people when they are injured, without an argument over whether somebody slipped on an oil slick, or made some momentary mistake, which most accidents involve.

Senator JAVITS. Mr. Chairman, may I ask one question?

I noticed with great interest—and I have talked with Senator Taft about this matter before, and I am very interested in it, and I ask only so that the whole case may be expressed in the record—and I have not been able to read through the whole thing; I have been on the floor in the foreign policy debate, and it is very difficult—but anyway, I noticed the one thing Juanita Kreps was involved with was that the provision would insure the manufacturer of a deficient product makes "an appropriate contribution" to pay for the workers' claim.

Professor O'CONNELL. Yes.

Senator JAVITS. What I wish you would analyze for us in your testimony, and in due time, whenever you want to, is what will you do for workers' compensation. In other words, if all you are going to get is a ride for product liability, and you and the employer are going to decide how much of the bill he is going to pay and how much of the bill you are going to pay, and all you do is go along with the same workers' compensation that he would have gotten anyway—there is no product liability. That is one thing. I am not saying it is right or wrong. I am only saying that it is one way of looking at the case.

If, on the other hand, product liability is going to add something to the award, even in the same proceedings, it is still another case.

So I hope whatever you can, if it is not included in your presentation, you will deal with that subject; if it is, I will be listening closely.

Professor O'CONNELL. Indeed, that is precisely the point I was going to make, but perhaps Senator Taft wants to expand on it before I do.

Senator JAVITS. Well, I would like to hear you. Bob and I are old friends.

Mr. TAFT. I would be glad to defer.

Professor O'CONNELL. I am saying, sir, that the product liability system today is a disastrous supplement to workers' compensation. And what I am saying is that if we want to supplement workers' compensation, we should increase those benefits such that they are more adequate and make them the sole remedy of the injured employee.

There is definitely a quid pro quo. It would be in my view unconscionable simply to take away the common law remedy, as arbitrary, as capricious as it is, and not to substitute anything for injured people.

What I am saying is we should increase the workers' compensation benefits and in substantial measure, pay for those increases by freeing management from the burden of product liability suits which are in addition to workers' compensation.

In other words, we up workers' compensation and downgrade product liability, and we substitute a relatively prompt—workers' comp has its faults, as you know better than I—but it is much better than common law tort liability, as our forefathers saw, 60, 70 years ago—and that the mistake that we have made is to supplement it with the very system they rejected.

And I am suggesting a relatively efficient means of doing away with those product liability suits and using those dollars which are presently being misspent to supplement workers' compensation.

I would still, as Senator Taft suggests, burden the faulty manufacturer of goods with a contribution to the workers' compensation benefits dependent on his fault, and now the argument as to fault would be between two insurance carriers or two sophisticated com-

mercial institutions, so that the injured worker is not waiting months and years for his payment.

The matter as to the contribution of his payment is worked out at their leisure, if they wish, by large institutions who can afford, unlike the working man, to wait.

Let me just say that Paul Samuelson once said there are some things society does so badly, everybody benefits by change. And this is one of those occasions. Everybody benefits by change here. The workingman gets better, faster, more expeditious payment. Management gets released from product liability claims, but not to the point that they can with impunity produce a defective product. And the workers' compensation employer gets the relief that he is increasingly facing from the backlash of third party liability suits in the form of being asked to contribute.

Let me say something, if I can, about the group that will not benefit from this. I speak of the trial bar. What is not commonly recognized in the United States is that the trial bar, the personal injury bar of the United States, although it is often looked down on by the blue chip law firms, by the Wall Street firms, by the probate lawyers, by the corporation lawyers, personal injury lawyers are incomparably the wealthiest lawyers in the United States today. They are making much more money on the average than any other kind of lawyer. It is not typical in small towns, medium-size cities to have personal injury lawyers making $300,000, $400,000, $800,000, $1 million a year out of personal injury suits.

Let me make very clear that I do not condemn the personal injury bar. Given the present system, they operate within the law, they are overwhelmingly honest, they are decent, they are able. But we have a system that is rewarding people disproportionately to any rational allocation of precious funds.

The personal injury bar fought workers' compensation very bitterly when it was enacted, for the very reason they will fight this change.

But I return to the point; everybody except them will benefit. And it is not very often, I think, Senator Javits, when a coalition of so many interests will benefit from what is essentially a rather simple statutory change.

That is all I have, sir.

Senator JAVITS. Thank you very much, Professor. That is fascinating and interesting.

Now, Senator Taft has presented an amendment. May we turn to you now, if it would not tax you to much, and ask that you present an amendment?

Professor O'CONNELL. I would be delighted to draft an amendment, and I will submit it to you.

Senator JAVITS. Would you do that, because you leave a number of open questions.

Professor O'CONNELL. Yes.

Senator JAVITS. But I do not want to cross-examine you on those. I would rather see what is the proposal you can give us.

Professor O'CONNELL. Well, I will be delighted to draft it, and I am delighted to get your questions.

Senator JAVITS. Thank you so much. We would like to have your draft of how you would approach it, what you recommend. And I

hope you will make a clear distinction between whether the award will go to the worker or whether the award will go into some common pool for improving workers' compensation.

Now, gentlemen, we have a rollcall. I have about 5 minutes more before I have to go and vote, and the same is true of the other Senators.

Would you like to ask questions, Senator Riegle?

Senator RIEGLE. I have no questions of this particular panel.

Senator JAVITS. Well, that is what I would I would like to say to you. We need a finite definition of what you have in mind. And if you have in mind what I think you have in mind, you are really suggesting only a procedural consolidation of the two actions. But if you have in mind some other broader design of contributions, for example, to a general fund, or something like that, of course, then it would be another matter.

Other than that, certainly a consolidation of actions in one proceeding has a lot to commend it. I want to consider that very, very seriously.

Professor O'CONNELL. Can I say, sir, that I do not think it is simply a consolidation. I think it is important to realize that the—and this is a trade that those who are proposing the change must be fair in making clear—the injured employee will be called on, as he was under the original Workers' Compensation Act, to give up his claim for pain and suffering, in return for having a greater assurance of having his out-of-pocket loss paid. That is the heart of the proposal.

Senator JAVITS. Well, all right. We will do the rest, whatever we think ought to be done about pain and suffering. But I would like to have yours of record, like we have had of Senator Taft.

Professor O'CONNELL. I will be delighted to do it.

Senator JAVITS. Well, gentlemen, if that is all of your testimony, we thank you very much.

Mr. TAFT. Senator, the only thing, if I might, I would like to say is that I think under the amendment as we have drafted the proposal that we have made, that the manufacturer in effect is going to be contributing. The consideration that will occur here is the higher benefits that will result from the legislation that is coming along. And the manufacturer and the employer in many cases really will be bearing this burden jointly. There is a postaward determination of the degree of fault between the two parties, and therefore, the total burden that would be borne will come out that way. There will be a payment by the manufacturer if he is found at fault, to the degree of the determination of that fault.

Senator JAVITS. Thank you very much, Senator.

[The prepared statements of Mr. Harris and Professor O'Connell follow:]

STATEMENT OF
RICHARD H. HARRIS
PRESIDENT, CURTIS & MARBLE CORPORATION
PRESIDENT, AMERICAN TEXTILE MACHINERY ASSOCIATION
VICE CHAIRMAN, SPECIAL COMMITTEE FOR WORKPLACE
PRODUCT LIABILITY REFORM
ON S. 3060
BEFORE THE
SUBCOMMITTEE ON LABOR
COMMITTEE ON HUMAN RESOURCES
UNITED STATES SENATE
SEPTEMBER 22, 1978

Good morning. I am Richard H. Harris, President of the Curtis & Marble Corporation, a small manufacturer of capital goods primarily for the textile industry, and current President of the American Textile Machinery Association (ATMA). I additionally serve as Vice Chairman of the Special Committee for Workplace Product Liability Reform. As the Special Committee's able general counsel, Robert Taft, said a short while ago, one of my chief reasons for appearing here today is to point out the disastrous impact of the crisis in product liability insurance now being borne by small- and medium-size manufacturers of capital equipment.

IMPACT ON CAPITAL GOODS MANUFACTURERS

If numbers sometimes present a confusing picture of reality, in this instance they present a grim and quite accurate account of soaring costs, inequitable burdens, and inadequate or nonexistent liability protection. Four years ago,

my company was paying $300 dollars a year for general liability insurance, including product coverage, and about $500 a year for umbrella coverage. This year our company will pay $20,000 for general liability insurance and $50,000 for umbrella coverage. That, in round figures, represents an increase by a factor of 100, and we have not had our first judgment in court against us.

The results of a 1977 ATMA survey echo the same story -- or worse -- throughout our industry. One member firm that, in 1972, was paying just over $10,000 for primary and umbrella coverage paid more than $250,000 for comparable coverage in 1977 -- an increase of 2,400 percent in five years. In the single year from 1976 to 1977, the same company's premiums increased by $170,000. We're talking about very small companies. Another, considerably smaller firm experienced an increase in premiums during the same five-year period from $2,400 to $17,000, which, in view of the industry's average experience, represents an uncharacteristically mild rise of 600 and some percent. Overall, ATMA members, according to our survey, paid an average of $6,800 in 1972 from primary product liability insurance in 1972 and $191,000 in 1977, a 2,700 percent increase. Umbrella coverage during the same span rose in cost by 1,900 percent, while the limits of that coverage increased by only 150 percent.

In one critical sense, these figures tell the story of only the more fortunate firms: those that were able to obtain coverage at all, or to bear its costs once a commitment to insure had been obtained. Of the 50 responding firms, 18 -- or better than one-third -- were wholly without product liability insurance of any sort.

PRODUCT LIABILITY AND TECHNOLOGICAL PROGRESS

Many of the consequences attendant to this dizzying upward spiral in liability premiums have been amply discussed by other members of this panel. One has not, and it is a consequence that carries with it broad and ominous implications for the economy and the society as a whole. Simply put, the mounting costs and growing unavailibility of product liability insurance are stifling engineering progress and new product development, and are threatening to drive small, technologically innovative employers out of business. Ironically, workplace safety often suffers most, because new products and devices designed to enhance safety and efficiency are frequently those that invite the most damaging litigation and take product liability coverage out of the realm of the possible.

Allow me, first, to give you an example from my own company. About a year ago at Curtis & Marble, we began examining our product line for for product liability exposure, and we

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quickly decided that one of our worse exposures was a safety device produced by our instrument division. This device has a very simple purpose -- to tell a crane operator when his boom is approaching unsafe angles. We call it a boom-angle indicator. It has bells and whistles that call attention to the approach of unsafe conditions. We sold this little black box for just a few hundred dollars to go on giant cranes sometimes worth tens of thousands of dollars.

If a crane were to malfunction and cause injury, our instrument almost surely would be included in any suit regardless of the circumstances. So what did we do? Of course we made the only sensible decision, and took the product off the market. Our instrument division went on to record earnings in 1977, enjoyed a product liability premium rate less than one-twentieth of that for our machinery division, and the marketplace was deprived of a quite innovative product designed to improve workplace safety.

I can assure you that this is not an isolated or unrepresentative case. In discussions with other manufacturers, I have heard variations on the same theme with regard to new braking systems for house trailers, improved gauges for applications as diverse as underwater diving and medical equipment, and an entirely innovative and more effective method for intro-

ducing prescribed medications into patients. We are all aware, as the Secretary of Transportation stated earlier this year, that a major corporation abandoned its development and production of vehicle air bags because of its grave product liability concerns. The obvious result of this phenomenon is that new, and often safer, products have been effectively denied entry into the marketplace or have been withdrawn from the marketplace. More importantly, this penalty is not paid solely out of corporate earnings. It is the consumers and workers who suffer most directly.

Statistics bear out my observations. The Interagency Task Force on Product Liability found that 26, or 8 percent, of the 337 firms it surveyed stated that they had delayed or cancelled the introduction of new products because of product liability problems. A similar number of surveyed firms reported decisions to discontinue production of existing products during 1975 and 1976. Another 13 firms, or 4 percent, said that they were considering the discontinuation of one or more products. These finding were confirmed during personal interviews by the industry contractor with a selected number of manufacturers, in which 30 percent of the firms interviewed stated that their product lines were constrained or subject to reduction because of products liability considerations.

The National Federation of Independent Business, in another survey, found that 12.8 percent of the nearly 1,300 firms which were surveyed reported similar constraints in the development of new products. But these statistics and others like them reveal only part of the picture. What they do not show is exactly why this has come to pass.

However, the 1976 "Product Liability Closed Claim Survey" issued by the Insurance Services Office may shed some light. That study notes that the allegation involved in the greatest number of payment dollars is faulty design -- 56 percent of paid claims. I find that a very sobering statistic.

The threat -- and the demonstrated success -- of faulty design allegations strikes at the heart of research and development efforts and tends to choke off technological improvment. It is an easy matter to understand manufacturers' reluctance to introduce new products given their special vulnerability to challenges based on design defects. More importantly, they are often unable to turn to the courts for any authoritative guidance on precisely what their legal responsibilities are with respect to product design. One legal commentator has observed: "The most significant obstacle [in the pursuit of a new order of product liability] is the totally unacceptable vagueness surrounding the issue of defect." The

Interagency Task Force has stated that:

> "courts have failed completely in their attempt to establish the standard which manufacturers must meet in the design of their products. While most would concur that the responsibility of the manufacturer is to design a product which is not "devective," no satisfactory definition of the term "defect" has been articulated that has not attracted widespread criticism."

The problem is not improved by federally mandated safety standards. While mandatory safety standards are often required by law to be "performance" standards and not "design" standards, as a practical matter, it is often found that adequate performance language and tests cannot be written. The result is to create design-restrictive standards to which ordinarily cautious manufacturers will conform their products. Venturing into unknown areas -- which, after all, is what technological innovation is all about -- is effectively discouraged or cut off by standards language that says, in effect, that one design or technological approach is approved, and all others are presumed not to be approved.

This choking of technological development and innovation is, in short, one of the highest costs in economic and human terms that we all pay for the crisis in product liability. S. 3060, and bills like it, must be evaluated for its potential to treat this issue and to resolve or temper the more general problems.

WORKERS' COMPENSATION AS SOLE REMEDY

The case for establishing workers' compensation as the exclusive source of recovery for injuries in the workplace has already been made effectively this morning. Because S. 3060 fails to incorporate this necessary provision, my comments on the bill, and particularly section 10 thereof, can be quickly if bluntly stated.

S. 3060 in its present form is entirely inadequate to the challenges facing manufacturers, employers and workers. Because the bill neither eliminates third-party suits nor extends no-fault principles to the workers' compensation system, it has virtually no bearing on the cost or availability of product liability insurance. Moreover, the precipitous rise in premiums, as we have noted today, appears to be based essentially on the threat of suits, and the transaction costs involved in settling or defending such suits, rather than on the amount of judgments actually awarded against manufacturers. Thus, the provision of section 10(b)(3), which would reduce a judgment against a third party by an amount equal to a workers' recovery through his state compensation system, will be plainly ineffective in damping the pressures for still greater premium increases in the future.

The bill equally fails to shift by operation of law an equitable portion of the burden to employers to ensure workplace safety or to provide any cost incentive for them to accept that burden voluntarily. In states that have similarly deficient compensation statutes, I suspect that the same lack of balance between the duties of manufacturers and employers has given rise to the growing judicial trend to require contribution or indemnification from negligent employers despite statutory prohibitions against allocation of fault, as recent cases in Illinois, Minnesota and New York reveal.*/

Finally, S. 3060 apparently fails to address the real problems of fraud and abuse in the workers' compensation system -- those that now exist and those that will come about if this bill were to be enacted in its present form. As the Interagency Task Force Final Report correctly observed, raising workers' compensation levels to 100 percent of a worker's actual income loss might well encourage malingering. Clearly, reasonable caps on compensation must be set to make injured employees whole without providing windfalls or other-

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*/ See, e.g., Skinner v. Reed-Prentice Div. Packaging Mach. Co., No. 48757 (Ill. S. Ct., Dec. 12, 1977); Carlson v. Smogard, 298 Minn. 362, 215 N.W.2d 615 (1974); Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

wise inviting the continuation of the abuses that now exist. S. 3060 will inevitably have to deal with this problem, so that neither legitimately injured workers or manufacturers are penalized for the excesses of a few.

We have other substantial reservations about S. 3060 in its present draft, as you have heard this morning. But, in sum, they boil down to this: our support for this measure must be based on its future recognition of the need for an exclusive remedy provision. Without the incorporation of this provision in the bill, we are certain that the product liability fires will only be fanned with more damaging consequences in succeeding years. Your initial efforts to respond to a major problem afflicting the society are reflected in the very presence of section 10 in the bill, and we commend the first step. More, assuredly, remains to be done. We urge you to amend S. 3060 in order to establish workers' compensation as the employee's exclusive source of recovery for workplace injuries, to restore a measure of equity to state compensation systems, and to stem the worsening crisis in product liability insurance.

FOR RELEASE: Friday, September 22, 1978, A.M.

For further information, contact Michael Goldberg, Majority Counsel, Labor Subcommittee, Committee on Human Resources, U.S. Senate, Room G 237 Dirksen Senate Office Building, Washington, D.C., tel: 202/224-3674.

Testimony of Professor Jeffrey O'Connell, University of Illinois College of Law, Champaign, IL. before Labor Subcommittee of the U.S. Senate Committee on Human Resources, Friday, September 22, 1978 at 9:00 A.M.

Professor O'Connell was co-author with Professor Robert E. Keeton of Harvard Law School of the principal work that proposed no-fault auto insurance. His latest work, scheduled for publication in 1979 by The Free Press, a division of Macmillan Publishing Co., proposes no-fault insurance for all kinds of accidents, including not only auto accidents but those now covered by medical malpractice and products liability insurance.

Shortly after the turn of the century (1905-15), enlightened forces in business, labor and government banded together to pass no-fault workers' compensation acts throughout the United States. Convinced of the tragedy of requiring injured employees to sue their employers in cumbersome litigation based on who was at fault in the accident, these forces overcame the bitter opposition of, among others, trial lawyers, and passed laws enabling any employee injured in the course of employment to be paid his medical expense and wage loss without regard to fault. In return the employee gave up his right to sue his employer based on fault for pain and suffering.

Workers' Compensation Acts were the first major and effective piece of social legislation enacted in the United States. And they were largely enacted in an age generally hostile to reform or social legislation of any kind.

It is sometimes fashionable today to deride workers' compensation, but it remains uncomparably the broadest and best scheme of insurance widely applicable in the United States today. For all its inadequacies, it provides in most

states unlimited medical benefits (including rehabilitation - rarely provided under most health insurance) and wage loss benefits of unlimited duration (often with a ceiling of, say, $150 or $200 a week).

Through the years, lawyers, knowing that injured workers were receiving workers' compensation benefits from employers who were therefore exempt from suit, have aggressively sought to sue third parties who were liable based on fault or for a product defect in causing the accident and not exempt from suit. Typically the third party would be a supplier of machinery to the employer. Especially in the last 20 years, with judicial encouragement, these "third party" suits have mushroomed.

Like the old employee-employer suits, these product liability suits ill serve everyone involved except maybe the lawyers on both sides who prosecute and defend such cases. According to the report of the National Commission of Product Safety, so technical are the issues involved, "In the best of circumstances, a products case is . . . a bruising, frequently heartbreaking, always onerous undertaking for client and lawyer." "To advise a battered [victim]. . . to sue," says the Commission, "may simply

add insult to injury."

Product liability claims are indeed the classic instance of the operation of the common law tort liability system in its traditionally cumbersome, wasteful and cruel manner. Proof that a product is defective, a prerequisite to payment, is most often a technical, demanding, expensive task for both plaintiffs and defendants.

So expensive are products liability claims to prepare and try that plaintiffs' lawyers are unwilling to take a case unless the damages in question exceed around $15,000 or more. Of claims pursued to a court verdict, claimants receive absolutely nothing in about seventy-two percent of the cases, and of claims both settled and adjudicated, no payment is made about thirty percent of the time. Any payment, even in settled cases, is long delayed. Claims representing thirty-six percent of bodily injury payment dollars still have not been processed through the tort system four years after the first report of injury.

Some years ago Professor Robert E. Keeton of the Harvard Law School calculated how the premium dollar paid for automobile bodily injury liability

insurance was spent. He determined that 56 cents went for insurance overhead and legal fees. Of the remaining 44 cents going to victims, only 14.5 cents went to pay for economic losses (for example wage loss and medical bills) not paid from some other source, such as sick leave or Blue Cross.

Extrapolating (conservatively) from Professor Keeton's figures, plus recently developed figures for medical malpractice, I arrive at the following breakdown of the bodily injury product liability insurance premium dollar.

General Overhead		30 cents	
Claims Administration Cost			
Defense Side	18.5 cents		
Claimants' Side	14 cents		
Total Claims Administration Cost		32.5 cents	
Total Overhead			62.5 cents
Net Amount Paid to Victims Above Losses (in theory for Pain and Suffering)		16 cents	
Paid to Compensate for Losses Also Compensated from Other Sources		7.5 cents	
Paid to Compensate for Losses Not Compensated from Other Sources		14 cents	
Net Paid to Victims Altogether			37.5 cents
			100 cents

For all the expense and agony caused by the tort system we find that it returns only 37.5 cents of the premium dollar to injured victims, and of that, only 14 cents reimburses victims of malfunctioning products for dollar losses not otherwise compensated.

Increasingly recognized is the degree to which product liability claims are dominated by claimants who are already covered by workers' compensation. This phenomenon was confirmed by a recent survey conducted by the Insurance Services Office (ISO), a statistical insurance group organized for ratemaking purposes. The survey disclosed that although product liability claimants with

work-related injuries constituted only eleven percent of the group of bodily injured product liability claimants who received payment, claimants with work-related injuries received forty-two percent of the total payments made to the bodily injured.

Admittedly, the reason so many workers' compensation beneficiaries pursue their third-party tort rights is the inadequacy of workers' compensation benefits. For years workers' compensation benefits failed to keep pace with inflation - and were often scandalously low. Recently, under the threat of imposition of federal standards, substantial improvements in benefits have been enacted in state after state, but even with those improvements benefits often remain inadequate.

Even so, the insurance costs of products liability suits, as well as the failure of such suits to compensate adequately most claimants, draws into sharp question the wisdom of supplementing workers' compensation benefits by reliance on largely insufficient products liability law.

As a better means of augmenting workers' compensation benefits than reliance on the product liability law, a sole remedy statute should be passed under

which workers' compensation benefits would be raised in return for making workers' compensation the sole remedy for industrial accident victims. In order to avoid "externalities," however, employers paying workers' compensation would, to the extent of benefits paid, be allowed a right over against third parties otherwise liable to the worker. Thus, an injured employee would retain his absolute right to workers' compensation benefits, but he would lose his common-law claim against both his employer and any third-party supplier to his employer. At the same time, the employer is allowed to recoup any workers' compensation payment from any third-party who would have been liable to the worker under common law. This proposal would eliminate from product liability claims the most expensive and litigable elements. As T. Lawrence Jones, President of the American Insurance Association, has explained, "[A]wards for subrogation of the workers' compensation insurer are not a large part of the problem facing [manufacturers of machinery in third-party suits]" Rather, the larger part is the "huge awards given to victims [for pain and suffering]."

Although this proposal requires the employer and the third party to litigate the cumbersome issue of fault, such litigation, because it would take place only between commercial establishments, would probably be handled expeditiously. If the parties could not reach a settlement, they could readily resort to arbitration, neither party being in a position to exploit sympathy from a jury. The parties might well resort to even more ambitious contractual arrangements, designed to dispose of matters en masse. Rather than litigate cases one by one, the parties might agree, for example, either at the time of sale of the product or on an annual basis, on a rough calculation of employers' compensation premiums allocable to the third party's machinery. In this way, the highly wasteful common law tort system, with its need to litigate case by case both the issues of fault and pain and suffering, would be by-passed.

In addition, a sole remedy statute could provide that if negligence attributable to the employer had also contributed to the accident, the employer's recovery against the third party would be reduced on a comparative negligence basis. For example, if the employer's fault were 30 per cent and the third

party's 70 per cent, the third party would be required to reimburse the employer for 70 per cent of the workers' compensation benefits.

The type of sole remedy statute here proposed would result in benefits to all parties concerned - employees, employers, third-party suppliers of capital goods, and insurers. Although individual employees would lose their fault-based tort claims, employees as a group would lose very little because, in any given case, there is such little likelihood of payment and because of the delay and waste accompanying any payment. And for the little that employees lose, they will be recompensed by an increase in more certain and therefore more valuable workers' compensation benefits. This trade-off will also make courts more likely to uphold the constitutionality of such a sole remedy law.

The employer, under this sole remedy system, gains too in that he no longer has to bear indirectly the costs of products liability while bearing directly the cost of workers' compensation, as he now must do. This double obligation runs contrary to the bargain that employers were promised when workers' compensation acts were passed early in the century. Under the present system, manufacturers of capital goods naturally try to include in the price

of their equipment the cost of product liability insurance necessary to cover claims made by persons already paid from workers' compensation. This proposal also operates greatly to the advantage of such capital goods manufacturers. Under the proposed sole remedy provision capital goods manufacturers escape exposure to common law products liability. They are not, however, permitted to evade responsibility for all losses attributable to their products, as would be the case under a simple sole remedy bill where the employer would bear the total cost of injuries to his employees caused by defective products. Finally, the insurance industry plagued by the uncertainties of the product liability market to such a point that many insurers are shying away from the market - should welcome a change that will restore more stable conditions to product liability coverage.

At this point, particular mention should be made of the opposition to such legislation likely to come from the trial bar, whose members derive enormous income from the personal injury system and who consequently have substantial investment in the status quo. Personal injury lawyers, at least those who represent plaintiffs, are, like criminal and divorce lawyers, often

looked down upon by blue chip law firms doing corporate, commercial, or probate work. Personal injury work has, however, become imcomparably the richest area of law practice in the United States. When President Carter appointed him as Secretary of State, Cyrus Vance, a member of the prestigious Wall Street firm of Simpson, Thatcher & Bartlett, was earning $250,444 per year and, as reported in the New York Times, "not many did better than he, according to lawyers on Wall Street." According to the same report, however, Wall Street lawyers, although the highest paid corporate lawyers in the country, do worse now than personal injury lawyers. It is not only the few nationally known personal injury "stars" such as Melvin Belli who earn very high incomes from personal injury work. A recent report on a thiree-partner firm in Marshall, Texas (population 29,000) indicated that the firm's 1975 fees were around $1.6 million, which was derived from personal injury settlements and verdicts of $4.5 million. Nor are nationally unsung lawyers who gain huge fees all that rate. All this places in perspective Ralph Nader's comment that Joseph Califano, Jr.'s 1976 income of $505,490 earned while he was a name partner of Edward Bennett Williams, was "a figure which surprised

every lawyer we interviewed." If Califano had been a personal injury lawyer, no one would have had cause for surprise.

With many lawyers throughout the United States having such a substantial stake in the personal injury system, perhaps the difficulty of achieving reform by legislation should not surprise us. Trial lawyers exist in every community of any size. As one insurance official explained: "They're affluent, active and articulate. . . .Also, in terms of relative zeal, they have something now that [no-fault reform]. . .would take away, and that gives them a whole different mental set than the rest of us." Legislative reform of the workers' compensation system and the concomitant abolition of third-party product liability claims by injured workers is perhaps particularly likely to be frustrated because union lawyers will probably dampen the support otherwise expected from the unions for such consumer-oriented reform. It is commonplace in the United States for lawyers to practice labor law work for local unions at a cut rate in return for the right to represent union members in accident cases. As a result, union lawyers - to whom the union may turn

for advice on legislative proposals for reform - are precisely those with the biggest investment in the status quo.

Given the interstate nature of the problem, only a federal "sole remedy" statute, such as here proposed,would be effective. But note such a statute requires no federal bureaucracy or federal expenditure. At a stroke it would allow - as did original workers' compensation statutes - vast sums formerly chewed up in frustrating and wasteful tort litigation to be paid promptly and efficiently to injured workers without the frustrations of tort litigation. Business, labor, and the government should all support such a move - just as they did the original workers' compensation acts. In doing so they will support legislation - also like the original workers' compensation acts - that advantages everyone - except trial lawyers.

Senator JAVITS. Our next witness will be Dr. John Burton of Cornell University, and the committee will stand in recess until 3 o'clock.

[Brief recess.]

The CHAIRMAN. Professor Burton?

STATEMENT OF JOHN F. BURTON, JR., VISITING PROFESSOR, NEW YORK STATE SCHOOL OF INDUSTRIAL AND LABOR RELATIONS, CORNELL UNIVERSITY

Professor BURTON. Thank you, Mr. Chairman.

The National Commission on State Workmen's Compensation Laws in its 1972 report recommended that Federal standards be enacted for workers' compensation in 1975 if States had not substantially improved their laws by then.

The reasons offered by the National Commission for Federal action are worth reviewing.

The National Commission said in its report:

> We believe that the threat of or, if necessary, the enactment of Federal mandates will remove from each State the main barrier to effective workmen's compensation reform: the fear that compensation costs may drive employers to move away to markets where protection for disabled workers is inadequate but less expensive.

This emphasis in the National Commission report on interstate cost differences helps explain the choice of recommendations designated as essential by the National Commission.

Most of the essential recommendations pertain to benefit levels, benefit duration, and coverage, the elements of a State workers' compensation program most likely to translate into cost differences. By putting a floor under these aspects of State workers' compensation programs, the National Commission hoped to insure that progress in other areas, such as administration, could proceed unimpeded by an overshadowing concern that benefit levels were so far out of line with those in other States that the State's competitive position was jeopardized.

Let me make a few remarks about what has happened at the State level since the report of the National Commission was submitted.

In testimony in 1976, I reviewed the progress of the States through 1975. As of July 1, 1975, the average State was in full compliance with only 11 of the 19 essential recommendations.

The Department of Labor has just made available an evaluation of State compliance with the 19 essential recommendations as of July 1, 1978.

This year, the 51 jurisdictions are on average in compliance with slightly less than 12 of the 19 essential recommendations.

The record between 1975 and 1978 indicates a significant slowdown in the rate of improvement.

Another aspect of the developments of State workers' compensation programs since 1972 is worth noting. I have prepared an analysis of the changes in workers' compensation costs between 1972 and 1975, and the differences among the States in the employers' cost of workers' compensation widened during this period.

These various developments since 1972—the impressive but generally inadequate spurt of State reform from 1972 to 1975, and the virtual

stagnation of reform since then, plus the widening of cost differences among the States—make the case for Federal standards for State workers' compensation programs even more compelling now than in 1972.

The States have now received twice the amount of time recommended by the National Commission to allow them to make their laws adequate and equitable.

I no longer believe it is possible to maintain the pretense that the States can solve the deficiencies in their laws without Federal assistance.

The key aspect of Federal reform efforts has been the enforcement methods used for the standards. There are a variety of methods available, each with advantages and disadvantages, and major portion of my testimony reviews these enforcement methods, since the controversies surrounding this topic have been a major obstacle to workers' compensation reform.

Mr. Chairman, I am going to skip over much of the written testimony with the pros and cons on these enforcement mechanisms. I will simply mention a few high points concerning the various methods.

One enforcement that was used was preemption, the essence of which is that unless a State program meets certain Federal standards, the Federal government takes over the area and displaces both the State rules and administrative machinery, including State personnel.

Overall, I believe the disadvantages of a preemption approach far outweigh any advantages and most observers agree.

It is noteworthy that S. 3060, the National Workers' Compensation Standards Act of 1978, does not use preemption as an enforcement method. I believe this is a major advance in the bill over its predecessors.

Another enforcement method is the "as if" approach, which represents an attempt to regulate the substance of State laws while leaving the administration largely under State control.

Under the approach, workers have entitlements to the standards contained in the Federal law, which mandates that the States treat the standards as if they were part of the State law.

The "as if" approach was contained in S. 2018 as the enforcement method for most substantive standards. At the time, I thought the approach was a good idea, but the constitutional and other objections since raised have made me change my mind.

Indeed, most persons probably feel that the avoidance of the "as if" approach in S. 3060 is a major advance over its predecessor.

A third enforcement method is what S. 3060 terms supplemental compensation. This approach provides another way to blend Federal standards for certain substantive areas with State control of other substantive areas and of State control of administration.

The Federal statute contains standards that override State provisions when there is an inconsistency. The obligation to meet the Federal standards is not placed on the State agency or courts, however, as in the "as if" approach. The obligation, rather, is on the employer. Where, for example, the State law contains a benefit maximum that is below the Federal standard, the employer has an obligation to provide supplemental compensation that fills the gap between the State law and the Federal standard.

The supplemental compensation approach is one of the enforcement methods used in S. 3060. The bill contains a certification procedure, and when the Secretary of Labor finds a State not in compliance with the section 4 standards, employers in the State are responsible for meeting these standards.

Many of the standards in section 4 can be enforced by a summary hearing before the Benefit Review Board, which meets the essential definition of simple supplemental compensation.

However, because only a limited range of issues can be handled with the simple supplemental compensation approach, S. 3060 also uses a more complex form of supplemental compensation, which is described in the paper. This approach in S. 3060 is used to enforce a number of standards, including those dealing with coverage of employees and of work-related diseases. The complex supplemental compensation approach has one overriding advantage compared to the simple approach, namely, that it can be used for a much larger number of standards.

Although there are some disadvantages of the complex supplemental approach compared with the simple supplemental approach, overall, I think the S. 3060 use of the complex supplemental compensation approach is desirable.

Still another enforcement mechanism is employer fines, which can be assessed against individual employers who are not in compliance with Federal mandates. This approach is also used to some degree in S. 3060.

A final enforcement method that I want to mention today is the use of tax incentives. Employers in a State could be subject to a tax if the State were not in compliance with the standards. The prototype for this approach in the social insurance field is the unemployment insurance program, which imposes a tax on a State's employers that is largely offset if the State unemployment insurance law meets certain minimum Federal requirements.

The tax incentive approach has not been included in any workers' compensation bill introduced in Congress, including S. 3060, but has been mentioned as a possible enforcement mechanism in several recent speeches by Donald Elisburg, Assistant Secretary for Employment Standards in the U.S. Department of Labor.

There are some distinct advantages to the tax approach, and I believe the tax incentive enforcement mechanism deserves serious consideration by this subcommittee as it considers possible revisions of S. 3060.

One advantage of the approach, especially in comparison to the supplemental compensation approach, is that all types of Federal standards can be enforced by the mechanism, including standards mandating acceptable performance on administrative matters by State agencies.

Allow me to conclude this discussion of enforcement mechanisms. A considerable evolution has occurred in the enforcement methods used in the Federal standards bills introduced in the 93d, 94th, and 95th sessions of Congress.

The enforcement methods included in S. 2008 and S. 2018, namely preemption and the "as if" approach, have been abandoned in S. 3060. Moreover, the enforcement mechanisms in S. 3060 are not the most intrusive into State affairs.

The current bill reflects a degree of moderation that is to be commended, and I hope the new approach to enforcement mechanisms will help secure enactment of Federal standards legislation.

I want to make a few additional observations on other aspects of S. 3060. Although I believe that the enforcement mechanism aspect is the critical one, I do have some comments on some other matters.

Section 4 of the bill contains the standards that State workers' compensation programs must meet. It is possible to disagree with some of the specific standards. But what impresses me most about the S. 3060 standards is that, in contrast to S. 2008 and S. 2018, the list in S. 3060 is not overwhelming in size or in concern for matters of secondary importance.

I view S. 3060 as representing a considered judgment of which of the 19 essential recommendations of the national commission are worth incorporating into Federal legislation and what additional standards are also necessary and appropriate.

I believe the package of standards in S. 3060 is much more realistic and defensible than the overreaching set of standards included in the earlier Senate bills.

Although there will be some objections to the number of standards included in S. 3060, paradoxically, one of the criticisms that is likely to be leveled against the bill, as it was against the earlier Senate bills, is that no effort is made to deal with permanent partial disability benefits.

On this matter, I believe the drafters of S. 3060 made the right decision. I believe that a serious reform effort in the permanent partial disability area is necessary and likely to occur in the next decade, but in this part of the workers' compensation program, we need much more experimentation at the State level before Federal standards are appropriate.

Some argue that the inability to establish Federal standards in the permanent partial disability area means that we should have no standards for other aspects of the program. There is some merit to that argument, but my judgment is that there are some aspects of State workers' compensation programs that can be improved without having to solve the permanent partial disability problem or without aggravating the problem.

For example, there is no reason why the inadequate coverage of workers in some States should be ignored at the Federal level until we have a solution to the permanent partial disability problem.

My final observation pertains to the cost of complying with the Federal standards included in S. 3060. Considerable concern is expressed about the cost consequences of such legislation, partially because the reform that has taken place in recent years at the State level has been associated with rapid increases in the employers' cost of workers' compensation.

I believe these cost increases must be put in proper perspective. The higher costs of workers' compensation are in part a reflection of general economic developments that have affected all components of the social insurance system.

First, there has been an unprecedented amount of inflation that has driven the cost of the social insurance programs up at an especially rapid pace. In workers' compensation, approximately one-third of all

benefit payments are for medical care, and the unanticipated inflation in this area has been a significant cause of the escalating costs.

Second, the average unemployment rate so far in the decade of the 1970's is the second highest decade average for the 20th century.

The sparse employment opportunities have undoubtedly been an important factor in explaining the adverse cost experience under workers' compensation as well as the other social insurance programs.

Thus, much of the adverse cost experience in the 1970's in workers' compensation ought not to be attributed to the reforms that have taken place but to other forces.

It is important that we not exaggerate the cost of the reforms that have already taken place in workers' compensation. Likewise, it is equally important that we not exaggerate the cost of complying with S. 3060. The cost consequences for the program resulting from inflation and slack labor markets are going to occur whether or not S. 3060 is enacted, and these inevitable cost increases ought not to be used as a basis for opposing the bill.

Mr. Chairman, I do not want the detailed nature of my remarks on enforcement mechanisms and some other particulars of the bill to obscure the main thrust of my attitude toward S. 3060.

I believe the bill is a substantial improvement over S. 2008 and S. 2018, both of which I strongly opposed, and I believe that S. 3060 should be enacted.

Although I have some reservations about the enforcement mechanisms and some of the standards, and I hope that before the bill is reintroduced in the 96th session, some changes can be made, I want to stress that my reservations are secondary to my general support for S. 3060.

I hope my remarks have conveyed to you and to others concerned with workers' compensation reform that this bill is substantially different from earlier Senate efforts and that it deserves careful attention and widespread support.

The Members of the Senate and their staff are to be commended for the significant improvements that have been made in the proposed legislation.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Professor Burton.

Your statement is excellent, most useful, and in conclusion, very encouraging. We are grateful and we appreciate it.

[The prepared statement of Mr. Burton follows:]

STATEMENT OF JOHN F. BURTON, JR. ON S.3060, THE "NATIONAL WORKERS' COMPENSATION STANDARDS ACT OF 1978," BEFORE THE LABOR SUBCOMMITTEE OF THE SENATE COMMITTEE ON HUMAN RESOURCES

September 22, 1978

Mr. Chairman, my name is John F. Burton, Jr. I am a Visiting Professor in the New York State School of Industrial and Labor Relations at Cornell University. I formerly was Chairman of the National Commission on State Workmen's Compensation Laws.

The National Commission, in its 1972 report, recommended that federal standards be enacted for workers' compensation in 1975 if states had not substantially improved their laws by then. I believe the states' response to the challenge laid down by the National Commission has been insufficient and that appropriate legislation to establish minimum federal standards for state workers' compensation programs is warranted. I also believe that S.3060, the "National Workers' Compensation Standards Act of 1978," is an appropriate form of federal legislation. Although some portions of the bill would benefit from revisions, nonetheless for the first time a workers' compensation bill has been introduced in Congress that deserves to be enacted.

I. The Report of the National Commission

The National Commission on State Workmen's Compensation Laws was created by the Occupational Safety and Health Act of 1970. The 18 members included representatives of all the important interest groups involved in workers' compensation. After a year of hearings and deliberations, the National Commission submitted its report to the President and to the Congress on July 31, 1972.

The Commission, after reviewing the laws then in effect, concluded that "State workmen's compensation laws are in general neither adequate nor equitable." In order to overcome these deficiencies, the report included 84 specific recommendations for a modern workers' compensation program. The National Commission recognized that mere promulgation of a set of recommendations would not guarantee their adoption. Therefore, the National Commission designated 19 of the recommendations as essential and urged the states to incorporate these recommendations into their workers' compensation programs as soon as possible. The Commission felt that these 19 recommendations were "so feasible and essential that every jurisdiction can be expected reasonably to adopt them within three years." With three dissenters (who called for immediate Congressional action), the Commission urged "that compliance of the States with these essential recommendations should be evaluated on July 1, 1975, and, if necessary, Congress with no further delay in the effective date should guarantee compliance."

The reasons offered by the National Commission for Federal action are worth reviewing. The National Commission noted that its recommendations were "not fundamentally different from those of earlier investigations; yet previous recommendations have won no strong support." The National Commission reviewed several reasons for the indifferent response to previous reform proposals. In addition to the lack of interest in or understanding of workers' compensation, and the resistance to reform offered by various interest groups, the report noted that "State legislators and officials, even when they have been genuinely interested in reform, have too often been disuaded by the irrational fear that the resulting increase in costs would induce employers to transfer business to States with less generous benefits and lower costs."

This fear of interstate competition for employers by suppressing workers' compensation costs was again seized upon in a passage explaining why federal standards might be necessary. "The Commission was unanimous in concluding that congressional intervention may be necessary to bring about the reforms essential to survival of the State workmen's compensation system. We believe that the threat of or, if necessary, the enactment of Federal mandates will remove from each State the main barrier to effective workmen's compensation reform: the fear that compensation costs may drive employers to move away to markets where protection for disabled workers is inadequate but less expensive."

This emphasis in the National Commission report on interstate cost differences helps explain the choice of recommendations designated as essential. Most of the essential recommendations pertain to benefit levels, benefit duration, and coverage, the elements of a state workers' compensation program most likely to translate into cost differences. By putting a floor under these aspects of state workers' compensation programs, the National Commission hoped to insure that progress in other areas, such as administration, could proceed unimpeded by an overshadowing concern that benefit levels were so far out of line with those in other states that the state's competitive position was jeopardized.

II. The Record of State Compliance with the 19 essential recommendations

In testimony in 1976 on S.2018, the "National Workers' Compensation Act of 1975," I reviewed the progress of the states through 1975. I indicated that the states had made substantial improvements in their laws since 1972 and indeed, there appeared to have been more progress in four years than in the preceeding twenty years. Nonetheless, as of July 1, 1975, the average state was in full compliance with only 11 of the 19

essential recommendations. Moreover, there were serious problems of inequity among the states, with the range of the compliance scores from 1 1/2 to 18. I concluded that state workers' compensation laws as of July 1, 1975, were in general still inadequate and inequitable, and that Congress should therefore guarantee compliance with the essential recommendations of the National Commission.

The Department of Labor has recently made available an evaluation of state compliance with the 19 essential recommendations as of July 1, 1978. This year, the 51 jurisdictions (the 50 states plus the District of Columbia) are on average in compliance with slightly less than 12 of the 19 essential recommendations. Moreover, several states are well below the average for the 51 jurisdictions, including Oklahoma, Tennessee, Mississippi, and Florida--all in compliance with 7 1/2 or fewer of the 19 essential recommendations. The record between 1975 and 1978 indicates a significant slow down in the rate of improvement.

Another aspect of the developments of state workers' compensation programs since 1972 is worth noting. As described in the previous section, a primary motivating factor for the National Commission's support for federal standards was a conclusion that the concern over interstate differences in workers' compensation costs was jeopardizing state-by-state reform efforts. I have prepared an analysis of the changes in workers' compensation costs between 1972 and July 1, 1975, and the differences among the states in the employers' cost of workers' compensation widened during this period.[1/] Thus, the initial spurt of improvement in state workers' compensation laws in the first three years after the National Commission's report did not, as one might have expected, tend to reduce the interstate disparaties in workers' compensation costs but

actually widened them. Moreover some states, such as Indiana, are now actively promoting low workers' compensation costs as a way to attract business, a practice likely to deter workers' compensation reform in other states.[2/]

These various developments since 1972--the impressive but generally inadequate spurt of state reform from 1972 to 1975 and the virtual stagnation of reform since then, plus the widening of cost differences among the states--make the case for federal standards for state workers' compensation programs even more compelling now than in 1972. The states have now received twice the amount of time recommended by the National Commission to allow them to make their laws adequate and equitable. I no longer believe it is possible to maintain the pretense that the states can solve the deficiencies in their laws without federal assistance.

III. Enforcement of Federal Standards

There are a variety of methods available to enforce federal standards, each with advantages and disadvantages. I will devote a major portion of my testimony to a review of enforcement methods since the controversies surrounding this topic have been a major obstacle to workers' compensation reform. The opponents of federal workers' compensation legislation tend to lump all these enforcement methods together under the pejorative term "federalization". However, there are important differences among these enforcement methods, and the various Congressional proposals since 1972 have varied significantly in this area.

1. Preemption. The essence of the preemption approach is that unless a state program meets the federal standards, the federal government takes over the area and displaces both the state substantive rules and administrative machinery, including state personnel.

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There are some advantages to the preemption approach. Where there is a national problem for which there is no basis for state-to-state variations in the solutions, the preemption approach guarantees uniformity among the states. Moreover, the preemption approach effectively deals with recalcitrant states. Further, the preemption approach can be used for all types of standards, and thus in the workers' compensation area could be used to establish not only standards for coverage and benefits but also for administrative procedures.

There are also disadvantages to the preemption approach. The concept of a federal system with shared federal-state authority is virtually destroyed, especially if the preemption option is exercised by the federal government. Also, the use of the preemption option dictates a degree of uniformity for the states that may be inappropriate for some matters, such as administration. In addition, state personnel with expertise in running the program are displaced, and particularly in workers' compensation, there is no reason to believe that the federal administrators who would replace the state administrators are likely to do a better job. Finally, one overriding disadvantage of the preemption approach is its lack of popularity among most interest groups, which represents a serious impediment to the enactment of federal standards legislation.

Overall, I believe the disadvantages of the preemption approach far outweigh any advantages, and most observers agree. The National Commission on State Workmen's Compensation laws reached a unanimous agreement on the possible use of federal standards only by agreeing that the federal preemption approach to enforcement would not be utilized. Although the objections to preemption seem persuasive, nonetheless the enforcement approach was used in S.2008 (the "National Workers' Compen-

sation Standards Act of 1973," introduced in the 93rd Congress). If the states did not comply with the S.2008 standards, the Secretary of Labor was authorized to hire personnel to administer a federal program that was substantively based on the provision of the Longshoremen's and Harbor Workers' Compensation Act. Also, preemption was the method used to enforce the administrative requirements contained in S.2018, (the "National Workers' Compensation Act of 1975," introduced in the 94th Congress). S.2018 did use a different enforcement mechanism for standards other than administration.

It is noteworthy that S.3060, the National Workers' Compensation Standards Act of 1978, does not use preemption as an enforcement method. I believe this is a major advance in this bill over its predecessors.

2. The "As If" Approach. The "as if" approach represents an attempt to regulate the substance of state workers' compensation programs while leaving the administration largely under state control. Under the approach, workers have entitlements to the standards contained in the federal law, which mandates that the states treat the standards "as if" they were part of the state law. Thus, a state workers' compensation agency or court would have to grant benefits consistent with the federal standard even though the state law provided lower benefits. To insure state compliance with the entitlements approach, federal district courts or another federal agency would be available to review the state decisions.

The "as if" approach has as its primary virtue the possibility of blending federal standards for certain substantive matters (for example benefit maximums) with state control over other substantive matters (for example the definition of "work-related") and with state control over administrative procedures. The main disadvantages are the possible unconstitutionality of the "as if" approach and the strenuous objections

to the approach shown by state officials. The approach also is limited in the range of standards that can be enforced, since matters such as administrative procedure do not easily lend themselves to federal court review.

The "as if" approach was contained in S.2018 as the enforcement method for most substantive standards. At the time, I thought the approach was a good idea, but the constitutional and other objections since rasied have made me change my view. Indeed, most persons probably feel that the avoidance of the "as if" approach S.3060 is a major advance over its predecessor.

3. Simple Supplemental Compensation. The supplemental compensation approach provides another way to blend federal standards for certain substantive areas with state control of other substantive areas and of administration. The federal statute contains standards that overrid state provisions when there is an inconsistancy. The obligation to meet the federal standards is not placed on the state agency or courts, however, as in the "as if" approach, but on the employer. Where, for example, the state law contains a benefit maximum that is below the federal standard, the employer has an obligation to provide supplemental compensation that fills the gap between the state law and the federal standard.

Administration of simple supplemental compensation involves three steps. First, the employee must obtain some benefits under the state law, either by virtue of the employer voluntarily paying benefits or as a result of a claim filed with the state agency. If and only if the employee establishes his eligibility for benefits prescribed by the state law does the second step occur, namely that the employer is then obliged to pay any supplements required by the federal law. Third, to insure

compliance, the employee can have the case reviewed by a federal district court (or federal agency), with the review confined to a determination of whether the employer has complied with the federal standards. Matters decided by the state agency or court, such as whether the injury was work-related and the extent of disability, would not be subject to review by the federal court. The approach is labelled simple supplemental compensation because in all cases reviewed at the federal level, the employee's eligibility for some workers' compensation benefits is already established, thus eliminating most of the difficult issues in the case from the federal review.

The simple supplemental compensation approach was contained in the "State Workers' Compensation Program Improvement Act of 1976," an extremely private bill introduced into testimony before the Senate Labor Subcommittee in March 1976 by John Lewis and me. The Burton-Lewis bill, as it is commonly known by its authors and a few close friends, uses the simple supplemental compensation approach together with an additional device to reduce the amount of federal involvement. This device requires a proposed National Workers' Compensation Commission to certify each state's compliance with each standard in the Burton-Lewis bill, and an employer would only be obliged to provide supplemental compensation for those standards for which the state was not in compliance. Thus, if the state were certified as in compliance with all of the standards, the employers in the state would have no further obligations under the bill. In contrast, in a state with partial or total noncompliance, the employers would be liable for supplemental compensation for one or more of the standards.

The simple supplemental compensation approach has several advantages. It appears to be constitutional, so long as the employers upon whom the

obligation is placed are in the private sector. Moreover, the approach does not require or even permit the substitution of federal employees for state employees as under the preemption approach. The approach also leaves states in control of most aspects of the case, including supervision of rehabilitation and medical care. Finally, the federal review is limited to a narrow range of issues, most of which are subject to summary disposition.

There are, however, some disadvantages of the simple supplemental compensation approach. Most notable is that the approach does not permit cases found noncompensable under state law to benefit from the federal standards. Thus, if a state has inadequate coverage, a worker entirely outside the state program would not benefit from the simple supplementary compensation approach since he could not establish his eligibility for at least some state benefits, which, as outlined above, is the crucial first step in the three-stage procedure used to provide the supplements.

The simple supplemental compensation approach is one of the enforcement methods used in S.3060. The bill contains a certification procedure, and when the Secretary of Labor finds a state not in compliance with the Section 4 standards, employers in the state are responsible for meeting these standards. Many of the standards in Section 4 can be enforced by a summary hearing before the Benefit Review Board, which meets the essential definition of simple supplemental compensation. However, because of the limited range of issues over which the simple supplemental compensation approach can be used, S.3060 also uses complex supplemental compensation as an enforcement mechanism.

4. Complex Supplemental Compensation. The supplemental compensation approach can be extended beyond the simple version--where the only workers who can use the approach are those who establish their eligibility for at

least some workers' compensation benefits under the state law--to a complex version--where even workers denied any workers' compensation benefits by the state are eligible for the supplements. In this approach, the federal statute contains standards that override state provisions when there is an inconsistency and the employer has an obligation to provide supplementary benefits that fill any gap between the state law and the federal standards.

The administration of the complex supplemental compensation approach involves three steps. First, the employee applies for benefits under the state law and is denied compensation. (If the employer voluntarily pays benefits or the state finds the worker eligible for benefits, the case is an example of simple supplemental compensation.) Among the reasons why the worker might be denied compensation are that the worker is employed by a firm not covered by the state law or that the worker experiences a work-related disease not compensible under the state's law. Second, if the employee is denied compensation under the state law because the law is not in compliance with a federal standard, then the employer is obliged to provide workers' compensation benefits consistent with the standard. In this instance, the supplementary compensation in effect becomes the entire benefit received by the worker. Third, to insure compliance with the federal standards by the employer, the employee can initiate legal action in a federal court (or in a federal agency). In this proceeding, the full range of issues that occur in a workers' compensation case would be resolved if necessary, including whether the worker was an employee or an independent contractor, whether the injury or disease met the appropriate work-related test, what the employee's preinjury wages were, what the extent of the workers' disability is, whether the worker had dependents, and any other matter necessary to

provide benefits. To the extent these issues were not covered by the federal standards, the federal court or agency presumably would use the applicable state law. The approach is labelled complex because of the potential range of issues that may need to be resolved by the federal court or agency.

The complex supplemental compensation approach is used in S.3060 to enforce a number of the standards, including those dealing with coverage of employees and of work-related diseases. As previously discussed, the bill contains a certification procedure that makes employers responsible for providing the supplemental compensation only when the Secretary of Labor finds the state is not in compliance with the standards in Section 4.

The complex supplemental compensation approach has one overriding advantage compared to the simple approach, namely that it can be used for a much larger number of standards. In particular, coverage deficiencies of state laws can be dealt with by the complex supplemental compensation approach, whereby the simple supplements approach must ignore coverage deficiencies since the approach only works when the state has accepted jurisdiction over the case and granted at least some benefits. The main disadvantage of the complex approach is that the potential amount of federal review activity is greatly expanded, since the federal agency or court now deal with many issues. Another problem with the approach, particularly with the S.3060 variant, is that those workers who receive workers' compensation benefits solely because of federal involvement by the Benefits Review Board or administrative law judges appointed by the Board will not receive the assistance in rehabilitation and medical care that a modern workers' compensation agency should provide. However, since many of these workers are receiving no protection under state workers' compensation laws, they are better off with the S.3060 protection than without.

Although the disadvantages of the complex supplements approach compared with the simple supplements approach are important, overall I think the S.3060 use of the complex supplemental compensation approach is desireable. In particular, I have been convinced that the advantage of providing an enforcement mechanism to deal with the coverage topics--including coverage of workers and of diseases--more than offsets any disadvantages. That the approach may involve more federal involvement than under the simple supplements approach is not particularly disturbing, since there is an obvious solution to the increased federal involvement within the framework of S.3060: states need only bring their laws into compliance with the standards of the bill and the possibility of enforcement by federal actions is eliminated.

5. Employer Fines. Another enforcement mechanism is to assess fines against individual employers who are not in compliance with federal mandates. This method has particular relevance for those situations where the employer has the ability to overcome a deficiency in a state law. Probably the best example involves employers who are not required by the state law to provide workers' compensation benefits to their employees, but are permitted by the law to elect coverage. The enforcement mechanism would fine the employer unless the optional coverage were selected.

S.3060 uses the employer fines approach in Section 11(c) to induce employer election of coverage. The fines approach presumably could also be used to enforce the Section 11(b) requirement that each employer secure payment of the supplemental compensation required by Section 8 by either purchasing insurance or by qualifying as a self-insurer. Employers who did not make the proper security arrangements could be subject to fines.[3/]

The main advantage of the fines approach is the ability to induce employers to overcome deficiencies in state laws even when state

legislatures cannot be persuaded to remedy the shortcomings. The main disadvantage is that the remedy is incomplete in itself. If an employer persists in not complying with the standard, the worker is left without effective protection. Also, while the fines approach works well for some standards where a once-and-for-all employer action is required (such as election of coverage or purchase of insurance), the approach does not have a particular advantage for standards such as benefit maximums where the federal requirement must be applied on a case-by-case basis. When this type of enforcement is necessary, the supplemental compensation approach seems much more appropriate.

6. The Deemed Insurance Contract. Another enforcement mechanism is a provision in federal law stating that insurance contracts are deemed to include specified federal standards. This approach is used in S.3060 in Sections 11(d) and (e) for workers' compensation insurance contracts and personal liability policies as a method of insuring compliance with the Section 4 minimum standards.

The deemed insurance contract approach presumably has some advantages, but I am more persuaded by the limits of the approach. For self-insuring employers, there is no insurance contract to which the deemed standards can be attached. For employers who buy insurance from state insurance funds, the federally mandated revision of the insurance contract is of doubtful constitutional validity. For those employers who purchase insurance from private carriers, there are also problems. If an employee tries to assert his Section 4 rights before a state court or state agency by virtue of the Section 11 (d) and (e) provisions, this appears to be in effect a variation of the "as if" approach that is in general disfavor because of constitutional and political considerations. If on the other

hand an employee tries to assert his Section 4 rights before a federal court or agency by virtue of the Section 11 (b) and (e) provisions, it is not obvious that he gains anything beyond what he already has under the Section 8 enforcement procedure.

Unless there is more to the Section 11 (d) and (e) requirements than meet my eye, I would drop this enforcement mechanism. It seems ineffective at worst and duplicate of other enforcement mechanisms already in the bill at best.

7. Tax Incentives. Still another enforcement mechanism uses tax incentives to encourage compliance with federal standards. Employers in a state would be subject to the tax if the state were not in compliance with the standards. The prototype for this approach in the social insurance field is the unemployment insurance program, which imposes a tax on a state's employers that is largely offset if the state unemployment insurance law meets certain minimum federal requirements.

The tax incentive approach has not been included in any workers' compensation bill introduced in Congress, including S.3060, but has been mentioned as a possible enforcement mechanism in several recent speeches by Donald Elisburg, Assistant Secretary for Employment Standards in the U.S. Department of Labor.[4/] As I understand the Elisburg viewpoint, the federal workers' compensation standards would be grouped into a few categories (for example five) and a particular tax rate (for example, one percent) would be assessed if the state did not comply with all of the standards in a particular category. Thus if a state complied with none of the five categories, a five percent payroll tax would be assessed on all employers in the state, while state compliance with the standards in some or all of the five categories would mean that the tax rate could range between zero and four percent.

There are some distinct advantages to the differential tax approach. Unlike the unemployment insurance program, an all-or-nothing judgment on state compliance is not required. Also a state can choose to comply with some but not all of the federal standards and yet not be liable for the entire tax liability. On the other hand, the approach can be adjusted by the federal government to virtually insure compliance on any standard deemed critical. If, for example, the one percent tax rate per category does not induce full compliance for a particular important standard, a two percent or four percent or even higher rate could be used. Indeed, the effectiveness of the approach seems to be the main objection that some commentators have to the Elisburg proposal. Most notably, Professor Arthur Larson of Duke University has denounced the tax mechanism, and to a large extent Larson's objections seem to reduce to a complaint that the approach is just too powerful.

Despite Professor Larson's objections, I believe the tax incentive enforcement mechanism deserves serious consideration by this Subcommittee as it considers possible revisions in S.3060. One advantage of the approach, especially in comparison to the supplemental compensation approach, is that all types of federal standards can be enforced by the mechanism, including standards mandating acceptable performance on administrative matters by state agencies.

There are other variations on tax incentives that also deserve consideration. For example, expenditures by employers on workers' compensation insurance or workers' compensation benefits could be disallowed as income tax deductions unless the employer is operating in a state certified as being in full compliance with the federal standards. Alternatively, employer tax deductions could be denied for workers'

compensation expenses if the employer is operating in a noncomplying state and fails to secure the payment of supplemental compensation as required by Section 11 (b) of S.3060. Or, in a more positive fashion, employers could be given an extra tax credit if they purchase insurance or otherwise secure payment on all of the benefits required by S.3060, even if some of those standards are not required by the state law.

8. Grants. The final enforcement mechanism thatI will review involves the payment of grants or bonuses by the federal government when a federal standard is met. The most likely candidates for the receipt of such grants in the workers' compensation area are state workers' compensation agencies, which can be encouraged to comply with certain administrative requirements by financial inducements. S.3060 uses the grants approach in Section 12 to encourage desireable administrative practices, such as the establishment of disability evaluation units. Also, Section 13 encourages states to improve their data systems and makes Section 12 grants available for this purpose.

The grants approach has as a virtue the ability to encourage administrative improvements, a difficult task under some of the other enforcement approaches, such as fines against employers or supplemental compensation. The main drawback is that the number of standards for which the grants approach will work seems limited unless the amount of the grants are enormous. It seems unlikely, for example, that states with low maximum benefits would increase the maximums substantially because of grants unless the proferred amounts were prodigious.

Conclusions on Enforcement Methods. The previous discussion reviews the advantages and disadvantages of several of the enforcement mechanisms that have been suggested as possible ways to insure state compliance with federal workers' compensation standards. The discussion is not meant to

be definitive: the reviewed approaches have other consequences, other approaches are available, and approaches can be combined in a variety of ways. Nonetheless, I hope the discussion provides at least an overview of the important enforcement methods that have received serious attention at the federal level in recent years.

A considerable evolution has occurred in the enforcement methods used in the federal standards bills introduced in the 93rd, 94th, 95th sessions of Congress. The enforcement methods included in S.2008 and S.2018, namely preemption and the "as if" approach, have been abandoned in S.3060. Moreover, the enforcement mechanisms in S.3060 are not the most intrusive into state affairs. The current bill reflects a degree of moderation that is to be commended, and I hope the new approach to enforcement mechanisms will help secure enactment of federal standards legislation.

IV. Additional Observations on S.3060

The main thrust of my remarks has been to discuss possible enforcement mechanism since I believe enforcement is the key to the development and enactment of an appropriate federal standards bill. I do, however, want to make a few comments on other aspects of S.3060.

Section 4 of the bill contains the standards that state workers' compensation programs must meet. It is possible to disagree with some of the specific standards, but what impresses me most about the S.3060 standards is that, in contrast to S.2008 and S.2018, the list is not overwhelming in size or in concern for matters of secondary importance. As a generalization, S.2008 and S.2018 not only contained almost all of the 19 essential recommendations, the bills also contained a number of the other recommendations of the National Commission plus some standards that never occurred to the National Commission. In contrast, S.3060, while

it has a few standards that are of peripheral relevance to workers' compensation, on balance is not inconsistent with the degree of federal involvement envisaged by the National Commission when it framed its 19 essential recommendations. Section 4 does contain several standards not included in the 19 essential recommendations, but there are also some of the 19 essential recommendations not encompassed by the Section 4 standards. I view S.3060 as representing a considered judgment of which of the 19 essential recommendations were worth incorporating into federal legislation and what additional standards are also necessary and appropriate. I believe the package of standards in S.3060 is much more realistic and defensible than the overreaching set of standards included in the earlier Senate bills.

Although there will be some objections to the number of standards included in S.3060, paradoxically one of the criticisms that is likely to be leveled against the bill, as it was against the earlier Seante bills, is that no effort is made to deal with permanent partial disability benefits. On this matter, I believe the drafters of S.3060 made the right decision. I am involved in a research project that is examining the handling of permanent partial disability benefits in various states. The research has convinced me that the diversity among the states in this area is tremendous and unmatched in other areas of workers' compensation. This diversity complicates any efforts to define a minimum federal standard. Moreover, unlike most other aspects of workers' compensation where there is general agreement about the desired way to improve state programs, in the permanent partial disability area there is no obvious or generally accepted solution. In most jurisdictions, permanent partial disability benefits are the source of most of the administrative difficulties, including excessive litigation.

Moreover, even in those few jurisdictions that have avoided the litigation problem, permanent partial disability benefits have a serious equity problem. That is, the states we have examined in our reserach are doing a poor job of matching the permanent partial disability benefits with the wage losses experienced by workers with permanent disabilities. I believe that a serious reform effort in the permanent partial disability area is necessary and likely to occur in the next decade, but in this part of the workers' compensation program we need much more experimentation at the state level before federal standards are appropriate. Some argue that the inability to establish federal standards in the permanent partial disability area means that we should have no standards for other aspects of the program, and there is some merit to that argument. Nonetheless, my judgment is that there are some aspects of state workers' compensation programs that can be improved without having to solve the permanent partial disability problem or without aggravating the problem. For example, there is no reason why the inadequate coverage of workers in some states should be ignored at the federal level until we have a solution to the permanent partial disability problem.

My final observation pertains to the cost of complying with the federal standards included in S.3060. Considerable concern is expressed about the cost consequences of such legislation, partially because the reform that has taken place in recent years at the state level has been associated with rapid increases in the employers' costs of workers' compensation. I believe these cost increases must be put in proper perspective. The higher costs of workers' compensation are in part a reflection of general economic developments that have affected all components of the social insurance system. For example, workers' compensation as well as the unemployment insurance program and the disability insurance

component of OASDHI have had especially adverse cost experience during the 1970's, reflecting in large part developments that have nothing to do with the pace of reform in the programs. First, there has been an unprecedented amount of inflation that has driven the cost of the programs up at an especially rapid pace. In workers' compensation approximately 1/3 of all benefit payments are for medical care, and the unanticipated inflation in this area has been a significant cause of the escalating costs. Second, the average unemployment rate in the 1970's is the second highest decade average for the 20th century. The sparse employment opportunities have undoubtedly been an important factor in explaining the adverse cost experience under workers' compensation as well as the other social insurance programs. Thus, much of the adverse cost experience in the 1970's in workers' compensation ought not to be attributed to the reforms that have taken place but to other forces. It is important that we not exaggerate the cost of the reforms that have already taken place in the workers' compensation program. Likewise, it is equally important that we not exaggerate the cost of complying with S.3060. The cost consequences for the program resulting from inflation and slack labor markets are going to occur whether or not S.3060 is enacted, and these inevitable cost increases ought not to be used as a basis for opposing the bill.

V. Conclusions

Mr. Chairman, I do not want the detailed nature of my remarks on enforcement mechanisms to obscure the main thrust of my attitude towards S.3060. I believe the bill is a substantial improvement over S.2008 and S.2018 and should be enacted. Although I have some reservations about the enforcement mechanisms and some of the standards, and I hope that

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before the bill is reintroduced in the 96th session some changes can be made, I want to stress that my reservations are secondary to my general support for S.3060. I hope my remarks have conveyed to you and to others concerned with workers' compensation reform that this bill is substantially different from earlier Senate efforts and that it deserves careful attention and widespread support. The members of the Senate and their staff are to be commended for the significant improvements that have been made in the proposed legislation.

Footnotes

1/ John F. Burton, Jr., "Workers' Compensation Costs for Employers," in John H. Noble and Ronald W. Conley, eds., Research Studies for the Interdepartmental Workers' Compensation Task Force (tentative title), scheduled for publication in 1978.

2/ The Indiana Department of Commerce has recently advertised that workmen's compensation and unemployment insurance taxes are often the toughest dragons a business has to face--except in Indiana, where rates are among the lowest in the country. Wall Street Journal (midwest ed.), August 16, 1976, p. 6.

3/ S.3060 contains no apparent enforcement mechanism for the Section 11 (b) requirement. Section 8 already makes the employer liable for the supplemental compensation, but unless employers are required to secure their supplemental compensation as soon as the federal standards are applicable to them, some employers may be insolvent or otherwise uncollectible by the time the Section 8 proceedings are completed. Thus, if the Section 11 (b) requirement is to have any practical meaning, it should be enforced by a fine against the employer or some other means independent of the Section 8 proceedings.

4/ Donald Elisburg, "Remarks by Assistant Secretary of Labor for Employment Standards," The Forum (ABA), Vol. XIII (No. 2), Winter 1978, pp. 457-463.

The CHAIRMAN. Just a couple of questions—although there will be other questions that will arise, as we deliberate between now and the introduction of the bill next year, I wonder if we have some questions and observations, if we could communicate with you——

Professor BURTON. I would be glad to assist on that matter.

The CHAIRMAN. All right. As you know, there is a conservative attitude here that while this bill deals with minimum standards and basically retains State control and operation of workers' compensation consistent with those minimum standards, there are those that feel this approach is just really the camel's nose under the tent. The fear has been expressed that if this should pass, more Federal demand would be put on the system, and ultimately, we would perhaps get into a Federal preemption or a Federal control of workers' compensation.

I just wonder whether you feel that we have in our bill really protected against Federal preemption. Our bill keeps jurisdictional elements within the States, and subject to State law, and the Federal role is limited to the establishing and insuring compliance with the minimum standards. Are you afraid preemption will follow inexorably from this action if it should be enacted?

Professor BURTON. No. I believe that the prospects for a complete Federal takeover of the workers' compensation system are increased if there is not some minimal intervention of the sort contained in this bill.

The National Commission had a lot of soul searching on this issue, as to whether a limited number of Federal standards was an inevitable first step toward a complete displacement of the States, or whether it was a necessary protection against the collapse of the system.

And after our deliberations, we came to the conclusion that—paradoxical as it may sound—the best way to save the State system was some limited Federal intervention. In a sense, it is a gambit. That is, in chess, you sacrifice a piece to take a temporary loss for a longer run gain. And I think that is the attitude I would take toward this bill. I think this bill represents the kind of moderate intervention that in the long run can very well be the salvation of the State system.

The CHAIRMAN. I appreciate that. Could we have further understanding of your viewpoint on using taxation as a method of enforcement and how effective it could be.

Professor BURTON. I think the tax mechanism can be a very effective device to insure State compliance. As you know, in the unemployment insurance area, there was in effect a proposition put to the States that either they pass laws meeting certain minimum standards or the tax that was charged against employers was not forgiven. And every State within a period of 18 or 24 months did enact an unemployment insurance law consistent with the Federal standards.

To be sure, there are not very many standards there, but I think the analogy suggests that if you design the tax mechanism properly and have a realistic set of standards, you can induce State compliance—there is no absolute guarantee, but I think it can be done.

One way to do this is to identify certain critical areas and indicate that if the State does not pass a law meeting certain standards as certified by the Secretary of Labor, you impose a payroll tax very similar to the U.I. tax.

I believe it could be effective. Indeed, as I note in my testimony, I think the main objection that has been made to the approach by Professor Larson is that it seems to be too effective. I do not happen to agree with Professor Larson's assessment of the usefulness of the approach; I think it is worth considering.

However, I would say, Senator, that if I were given a choice at the moment between a bill with a tax approach and the approach you have taken here, I would use the S. 3060 approach. But I think the other approach is worth considering, because it does enable the Federal Government to put some pressure on administrative standards, and I do not think the supplemental compensation approach lends itself to that task.

The CHAIRMAN. The tax approach is by far the strongest medicine to realize the objective, I would suggest.

Professor BURTON. I think it is not quite as strong as preemption, but otherwise, it would certainly be a very strong method.

The CHAIRMAN. I think the rest of the questions we will, Professor Burton, put to you in written form, if we could.

We appreciate it. I know you have been here a long time, and you came a long way.

Professor BURTON. Six years is all.

The CHAIRMAN. Thank you.

If the National Association of Manufacturers would come forward, please. Mr. Adams, do you want to introduce your associates, and we will be under way.

STATEMENT OF RALPH R. ADAMS, DIRECTOR, UNEMPLOYMENT AND WORKERS' COMPENSATION ACTIVITY, GENERAL MOTORS CO., DETROIT; JON L. SHEBLE, PRESIDENT, ASSOCIATED INDUSTRIES OF FLORIDA, TALLAHASSEE, FLA.; JOHN G. THODIS, PRESIDENT, MICHIGAN MANUFACTURERS ASSOCIATION, LANSING, MICH., A PANEL OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. ADAMS. Thank you.

Mr. Chairman, my name is Ralph Adams, and I am director of the unemployment and workers' compensation activity for General Motors Corp. in Detroit, Mich.

I am here today as chairman of the National Association of Manufacturers Subcommittee on Workers' Compensation.

Accompanying me are Jon Sheble, president of Associated Industries of Florida, who serves as vice chairman of the National Industrial Council's State Group Advisory Committee on Workers' Compensation, and John Thodis, president of the Michigan Manufacturers' Association.

The various members of the National Industrial Council which endorse this statement are listed as appendix A on our statement, submitted into the record. We welcome and appreciate this opportunity to appear before this subcommittee today.

Mr. Sheble and Mr. Thodis will discuss S. 3060 as it would impact State workers' compensation systems in general, and their State pro-

grams in particular. They will also review the progress and problems in the workers' compensation systems in Florida and Michigan.

I will discuss the NAM's long-standing policy of support for State-administered workers' compensation programs.

S. 3060 is not substantially different from its predecessors in the last two Congresses, S. 2008 and S. 2018. The objectives are the same, and the final result would be the same.

The bill would, in effect, federalize the workers' compensation system by creating a dual authority—a comprehensive Federal law administered by State agencies.

The NAM has testified before congressional committees on several occasions, citing our specific objections to these bills. Thus, I need not go over this bill point by point.

Our objection is to the concept—not to the idea of reform. The NAM has long supported State reform of workers' compensation systems and we continue to do so today.

Federalization of the workers' compensation system is not the best approach, for reasons we have outlined in previous testimony.

The Federal Government's performance in the area of compensation programs has not been successful. The Federal Longshoreman's and Harbor Workers Act, the black lung provisions of the Mine Safety Act, and the Federal Employees' Compensation Act, have shown the inefficiencies that can result from Federal intervention in compensation programs.

During both sessions of the 95th Congress, the House Subcommittee on Compensation, Health and Safety held extensive oversight hearings on Federal compensation programs. The problems with these programs have been fully examined and are now part of that hearing record.

We will not outline the entire results of those hearings, but we would suggest that the subcommittee closely examine the entire proceedings, which illustrate what the difficulties can be in administering workers' compensation programs.

Any Federal standards bill should be accompanied by an ecoonmic impact statement which addresses the affordability of adopting new standards. The inflationary effects of S. 3060 should be of primary concern to this panel.

At this time, we are not aware of any accurate cost estimates or inflationary impact statements pertaining to the bill. We strongly urge the subcommittee staff to consider a variety of resources in obtaining highly accurate cost estimates and a reliable inflationary impact statement.

Abuses in the present system must be brought under control before a new, more expensive program becomes a matter of serious consideration before this subcommittee.

Although many proponents of Federal standards for workers' compensation believe the businessman always complains about increased costs in Federal legislation, there is strong evidence that the cost of workers' compensation for some employers is truly reaching a level of nonaffordability.

Since 1972, the States have made good progress in reforming their workers' compensation systems and must continue to do so.

This substantial progress made by the States should not be ignored. State legislative activity during 1976, saw 153 amendments enacted.

During 1977, 300 new bills became public law with a majority of these new proposals upgrading coverage, benefits, rehabilitation, medical cases, and improved administration.

Over the past 7 years, the States have enacted more than 1,750 workers' compensation bills. As of January 1 of 1978, substantial compliance by the States with the 19 essential recommendations averaged almost 80 percent.

The American Insurance Association statistics indicate that full compliance was almost 70 percent, as of the same date.

In testimony before this subcommittee on March 3 of 1976, the NAM expressed its opposition to S. 2018 and the implementation of its objectives.

We still believe that continued Federal involvement in the form of encouragement and technical assistance to the States is the best means of obtaining a fair and equitable method of compensating workplace injuries.

Mr. Chairman, we believe S. 3060 represents more than a minimum Federal standards bill for workers' compensation. The legislation addresses a far broader range of issues than the 19 essential recommendations issued by the National Commission on State Workers' Compensation Laws in July 1972.

These recommendations were the guidelines the Commission believed to be necessary in order to insure an adequate and equitable workers' compensation system.

At a time when the States have shown marked improvement in upgrading their workers' compensation laws and are intensely studying the more difficult problems, the proposal for Federal standards represents a complete reshaping of the State systems.

Recently, there has been some deceleration of State accomplishment toward enactment of the 19 essentials. We believe this is understandable. Many States are engaged in serious, time-consuming efforts to reform their total workers' compensation systems—not merely the portions directly affected by the 19 essentials.

Existing provisions in State laws which have created inequities, promoted excessive litigation, or led to costly abuses, for example, must not continue uncorrected in the haste to measure up to the 19 essentials.

These States should be encouraged to continue such total reform effort. We believe the enactment of S. 3060 would have the opposite effect, as it would stifle State incentive.

State legislators must retain legislative authority over all aspects of their State systems if they are realistically expected to achieve total reform.

John Thodis?

Mr. THODIS. Mr. Chairman, my name is John G. Thodis, and I am president of the Michigan Manufacturers' Association. We included in our membership over 2,400 industrial and business enterprises, operating at approximately 4,000 locations within the State of Michigan and employing approximately 1 million of Michigan's industrial workers.

On behalf of the association and its membership, I appreciate the opportunity to appear before you today to express our very serious concerns and opinions.

I must begin by stating something that may be somewhat obvious, that the NAM and its members, firmly believe in the concept and basic principles embodied in workers' compensation laws.

The workers' compensation system has played a vital role in replacing lost wages and providing medical treatment to workers who have sustained occupational injuries or contracted occupational diseases.

Michigan employers have always been willing to accept, and pay for, wage replacement provided that statutory assurances are given that the money available for the program would be wisely and prudently spent and then, only in ways which are consistent with, and which advance the humanitarian and equitable objectives of the law.

In order to assist you in your deliberations of S. 3060, I want to acquaint you with the workers' compensation reform efforts underway in Michigan and the impact this legislation would have, if enacted, on those efforts.

It is generally recognized by all parties in Michigan that our workers' compensation system is badly in need of total reform, and an intensive effort to obtain total reform has been underway for the past 4 or 5 years.

Organized labor, the business community, practicing attorneys, the insurance industry, both houses of the legislature, and the Governor's office, have all been actively involved.

Representatives of the various interests also recognize the significance and costliness of our problems. Numerous workers' compensation bills have been introduced and public hearings have been held. Considerable progress has been made by the parties involved in reaching a consensus on general concepts.

This delay in reform has not been without accomplishment. In a large part, it has been a data-gathering period and a learning process for all the parties.

Just recently, for example, after repeated attempts, credible cost estimates were developed in order to properly evaluate many of the reforms being considered.

Reforms such as Michigan is attempting is, as you must know, a slow and tenuous process. Our legislature is attempting to strike a balance of the issues.

If we continue at the present trend without outside interference, I am confident that we will reach our goal in the very near future. It will be a goal in which Michigan will measure well against the 19 essentials, and we will have eliminated much of the waste caused by abuses of the system.

The blunt fact of the matter is that S. 3060 would have a profound negative impact on the economy of the State of Michigan. Michigan's employers, large and small, cannot afford to be further burdened with greatly increased workers' compensation costs while costly and wasteful abuses are not eliminated, but, in fact, may be enhanced because of a greater financial incentive.

The most visible and blatant abuse in Michigan costs over $100 million a year. This problem, perhaps unique to our State, will be further compounded by Federal standards as contemplated in S. 3060.

What makes Michigan so unique among the States, and why will this bill have such an adverse impact on our economy? The answer is simple. Over $100 million per year in workers' compensation is paid to retirees who have, for the most part, voluntarily left the labor market and, if disabled at all, suffer from disabilities more normally associated with the aging process—not occupationally or work induced. S. 3060 will not correct this serious abuse.

We are greatly concerned with the needs of the legitimately injured worker. However, the substantial benefit increases in this bill would have a serious impact on the industrial climate and economic welfare of the State of Michigan.

It is ironical that Michigan's workers' compensation program would be plagued by this retiree abuse, because Michigan is one of the purest examples of a wage-loss State.

However, our program has grown from a simple and effective voluntary payment procedure to what now is a complex, cumbersome, and adversary-ridden system. The system fosters a misapplication of benefits by permitting a disproportionate amount to go to workers who are claiming impairment caused in reality, by degenerative diseases of life.

S. 3060 will not solve that problem for us. It will, however, with its greatly increased benefit standards, further compound the problem.

The misapplication by the courts and uncorrected by our legislature of the wage-loss theory in the case of retirees, has created a terribly expensive and wasteful program in Michigan. Many retirees receive greater income in retirement through a combination of private pension, social security, and workers' compensation benefits, than they had when they were working. That is illustrated in an exhibit to my testimony.

It is not only a concern for employers, but one in which the public has a vital interest. When the accumulation of social and privately provided benefits rewards idleness with a greater total income than lost wages, it should be of grave concern to the public as a whole. The very fiber of our economic system, as we know, is eroded.

The duplication of benefits has a pernicious and pervasive impact on the entire workers' compensation system in Michigan. It has provided a lucrative field for the practice of law, has led to high levels of litigation, and perverts the system. In our view, 3060 will compound the problem; it will not solve it.

A short illustration. A Michigan's average weekly wage is approximately $254 a week. Our current workers' compensation benefit maximum is $142 for a single person.

S. 3060 would require $116 per week increases in benefits and eventually could reach to $400 per week increase in the maximum. These amounts are staggering, even if our system were not wrought with inequities such as the retiree abuse.

The standards in 3060 would simply heap larger costs on an already overburdened system which now costs Michigan's employers nearly $1 billion a year, including a recent 25-percent increase in insurance premiums.

What, then, is our position? We respectfully request that you and the Congress not tamper with State workers' compensation systems.

Previous speakers have explained logically why the interests of all concerned can best be served if the workers' compensation system continues to be administered without Federal standards at the State level.

We cannot afford in Michigan to lose our tenuous grasp on our opportunity to reform our system. Neither S. 3060 nor any of its predecessors contemplate solving our abuse problems. We must hammer them out at the State level, or everyone loses—the legitimately injured worker who should be receiving higher benefits in our State—no doubt about it—and the already overburdened Michigan employer who pays the bill.

Workers' compensation is the greatest disincentive to creating jobs in Michigan. It is the major problem to be confronted if we are ever going to improve our business climate and thus provide jobs for our citizens. Only we can solve the Michigan problem because it is peculiar to Michigan.

And should anyone doubt that statement—with which the Governor, the Speaker of the House, and all leaders agree—permit me to give you just a sample of the responses we received from surveying our membership early this year.

A thousand companies responded. Three-quarters were small companies, that employed less than 100 people. Eighty-eight percent of all of them said costs were rising faster in Michigan than elsewhere, and 87 percent of them cited workers' compensation as the primary reason.

Therefore, there is no doubt that workers' compensation is a serious impediment to creating jobs in Michigan. I can assure you that employers are in constant fear that the situation will worsen if Federal standards are adopted, because it would expand the cost disparity—not close it—between Michigan and other States.

So in conclusion, we strongly urge you to not act upon S. 3060. Your absence of action will enable us to continue working to return the workers' compensation system in Michigan to one free of costly abuses and one which adequately provides for those unfortunate individuals whose disability or illness is job-induced—and one which protects the economic climate of our State.

Thank you.

I would like to introduce Jon Sheble from the Associated Industries of Florida.

The CHAIRMAN. I might as well, before you start, go over and take care of the rollcall vote and come back.

[Brief recess.]

The CHAIRMAN. Mr. Sheble, please continue.

Mr. SHEBLE. Mr. Chairman, my name is Jon L. Sheble, and I am privileged to serve as president of Associated Industries of Florida.

The association is a statewide organization whose members employ over 40 percent of the private-sector work force in our State.

Since 1920, the association has been the spokesman for Florida businessmen, particularly since 1935, in the area of workmen's compensation.

We have testified in past years on Senate bill 2008 and Senate bill 2018, before this subcommittee and committees of the House.

From the outset, I would like to observe that, in the opinion of our association, the existing workers' compensation system in Florida has been highly successful in achieving its intended purpose.

It is our position that the State law in Florida meets the five objectives for a modern workers' compensation program as defined by the National Commission on State Workers' Compensation Laws.

This is not to say that we do not have problems within our law, because we certainly do, and the legislature recognized this by repealing the entire Florida workers' compensation law effective next year. In essence, the legislature put itself on notice that major revisions must be made in our law during the 1979 session, which convenes in April next year and placed a gun to its own head by actually repealing the entire statute effective the last day of the next session.

If I might, I would like to use Florida as an example of what has been done since 1972. During the 1973 session which met shortly after the National Commission report was available, the legislature increased the maximum weekly benefit amount from a then level of $66 to $80 and increased the death benefit from $15,000 to $25,000.

And, Mr. Chairman, I appeared before your subcommittee, I think, the day after that bill passed the Florida legislature, in Jacksonville, Fla., and I was glad it passed the day before because I knew you were going to get on me if we did not get it up there.

Since that time, we have made significant strides. The 1974 session of the legislature further increased the maximum weekly benefit amount from $80 to 66⅔ percent of the statewide average weekly wage to comply with the National Commission report.

This formula in that year alone put the $80 maximum benefit to $105 overnight, with the resultant increases in premiums which followed shortly thereafter.

Today, because of the formula, the maximum weekly benefit amount in Florida is $126 a week. The 1974 session also increased the death benefit from $25,000 to $50,000. And we brought up to date those people who had been injured sometime before our increases by giving them a 5-percent adjustment to bring them up to date, and that affected 2,200 permanent totals.

Further, in 1974, the legislature in response to the National Commission report, eliminated the numerical exemption and extended coverage to all workers in the State, with a few exceptions in the domestic and farm labor area under certain conditions.

The 1974 bill provided that a severely injured worker would receive 80 percent of his average weekly wage until he had completed training in the use of artificial limbs or appliances and completed training or education in a rehabilitative program not to exceed 6 months and further placed the maximum benefit at $400 a week.

Fines were provided in the amount of up to $100 by the 1974 session, to be levied against carriers and employers who were late in filing any and all reports. And last session, Mr. Chairman, we went to the legislature and asked that any time an employer or carrier is fined for a late report, that that money not go into the administrative trust fund, but be given in a direct payment to the claimant, and that is the law in Florida today also.

The bill further took the judges of industrial claims out of politics in 1974 as much as possible and insured their retention if they had

done a good job by placing them under the Judicial Nominating Commission of the various appellate districts.

In addition, the bill amended the special disability trust fund in such a way as to accrue to the benefit of the injured workers and the employers who hire workers with pre-existing injuries.

We encourage all our employers to hire previously injured workers and show to them where it is to their financial advantage to do so.

Florida and many of the States have made tremendous strides since 1972, and these accomplishments have been quite costly to employers and the public through increased workmen's compensation premiums.

We are advised by the National Council on Compensation Insurance that Florida has the distinction of being the second highest workers' compensation benefits paying State in the Nation.

In 1971, the year before the National Commission report was rendered, the workers' compensation premium volume in Florida was $190 million. The year ending 1977 calendar year, the premium volume amounted to $656 million.

While Florida paid out the second highest amount of benefits in the United States, exceeded only by Alaska, its maximum weekly benefit amount is 37th in the Nation.

Florida, like many States, is basically a State of small employers, 51.7 percent of all the employers in the State of Florida—189,000 of them who pay the unemployment compensation tax—employ three or less people.

Since the 1974 workers' compensation revision in Florida, the numbers of purchasing workers' compensation has decreased from roughly 135,000 to 116,000 for the year ending 1977.

I would like to point out, Mr. Chairman, that we have got 189,000 employers paying the unemployment compensation tax, and we have only got 116 who have workmen's compensation coverage.

Certainly this decrease in the number of employers in Florida cannot totally be attributed to the high cost of workers' compensation since, as you are aware, we went through a very drastic recession during the period of decrease.

However, I can assure you that the high cost of workers' compensation to the small employer, 40 percent of whom are in the assigned risk pool, which means in addition to their premium volume, they pay an add-on 8 percent for the privilege of being insured—40 percent of all our employers in that category—it has had the effect of driving many of our small employers totally out of business.

S. 3060 adds costs to the workers' compensation program but does not speak to the real problem in Florida. The real problem in the Florida workers' compensation program is not the level of benefits paid to the permanently and totally injured workers and death cases, but rather in the area of the permanent partial disability.

As you are aware, a permanent partial disability is defined as one where the injured worker after reaching maximum medical improvement, continues to have some earnings or retain some proportion of their preinjury earning capacity.

In Florida, their benefits are calculated by statute by determining the diminution of wage loss capacity. At best, this system is a "guesstimate." We have been working diligently in Florida during the past

year to change this system to one which bases compensation on actual wage loss, such as Mr. Thodis mentioned they have in Michigan.

We sincerely feel that by moving in this direction, we can significantly increase the benefits paid to the validly and severely injured workers by decreasing the benefits paid to workers with minor injuries where such worker has no actual wage loss.

From the inception of workers' compensation, benefits paid to workers were never intended to enable the worker to have a net financial gain from his injury. The system in Florida and many other States has come to the point where workers are actually being compensated with benefits where they have little or no actual wage loss and thereby the worker derives a net gain from his injury.

The workers' compensation system can no longer support this type payment. Of the 412,000 claims in Florida in 1977, only 2 percent involved the permanent partial disability area, and 89 percent of these permanent partial cases involved bodily disability ratings of less than 10 percent. However, this is where the bulk of the money was paid out to claimants.

The 1979 session of the Florida legislature will address the permanent partial area, and we feel that by going to a determination based on actual wage loss, we will take a gigantic step in the right direction to redistribute the benefits in workers' compensation which will accrue to the benefit of the permanent total and death cases in a much more logical and realistic way than the approach attempted in Senate Bill 3060. As a matter of fact, the standards as contained in S. 3060 would destroy the initiative in Florida to reform its own law.

Workers' compensation in Florida and in many States has risen from a posture of having little attention paid to being one of the key issues when the legislature convenes and even in races for Governor such as presently is happening in Florida today.

Progress is being made and will continue to be made in the future. Now, more than ever before, there is less need for Federal standards or Federal intervention in the workmen's compensation area.

The National Commission and the interdepartmental task force have both advised against such intervention and progress continues to be made, which should indicate to you that Federal intervention is less appropriate today than at any time in the past.

I respectfully submit that the passage of S. 3060 or any measure which imposes Federal standards could have exactly the opposite effect which advocates might expect.

If Florida employers feel they would sustain increased costs due to the standards without any attention to the problems inherent in the programs, they will be less likely to continue investigating revisions to the State laws because all legislators are elected and, in a political sunset, it would be in their best interest to lay the blame on the Congress for the continued increased premiums in workmen's compensation.

If the introduction and consideration of S. 3060 is to remind the States that unless they continue to make progress, Federal standards may become a reality, then I feel Senate bill 3060 is a good idea.

However, if the Congress is going to seriously consider passage of Federal standards, this could work to the detriment of injured workers and the employers of our Nation.

We appreciate the opportunity to appear today, Mr. Chairman, and we would be glad to answer any questions.

The CHAIRMAN. Thank you very much.

Your posture with respect to State law is unique. You are at this time under sunset?

Mr. SHEBLE. Yes, sir.

The CHAIRMAN. And when does the sun set on this—anytime during next year?

Mr. SHEBLE. Yes, sir. The sun sets the last day of the 1979 session. They have a whole session to work on it. We have a select committee working on it, we have a joint committee of both houses working on it now, and we have had select committees in each house for the past 3 years. We had a Governor's committee shortly after your subcommittee was in Jacksonville, Fla. The chairman of that was the chairman of the board of our association, and the vice chairman was the president of the Florida AFL-CIO, and they recommended the changes that were made in recent years.

The CHAIRMAN. What are your most difficult problems in compensation in the State—permanent partial?

Mr. SHEBLE. Yes, sir, they definitely are. We have a provision in our law that is called section U. It says "Other." And in effect, it says if everything else, the scheduled injuries and everything else, does not add up to enough, then you go ahead and try to work it out. And that is the problem, because we have a high lawyer involvement. We paid $41 million last year in attorneys' fees and workmen's compensation to both sides. The attorneys work it out, and it just is not on any real scheduled basis.

The CHAIRMAN. Mr. Thodis did leave, didn't he?

Mr. ADAMS. Mr. Thodis had to catch a plane, Mr. Chairman. He would be glad to respond in writing, if you have specific questions for him.

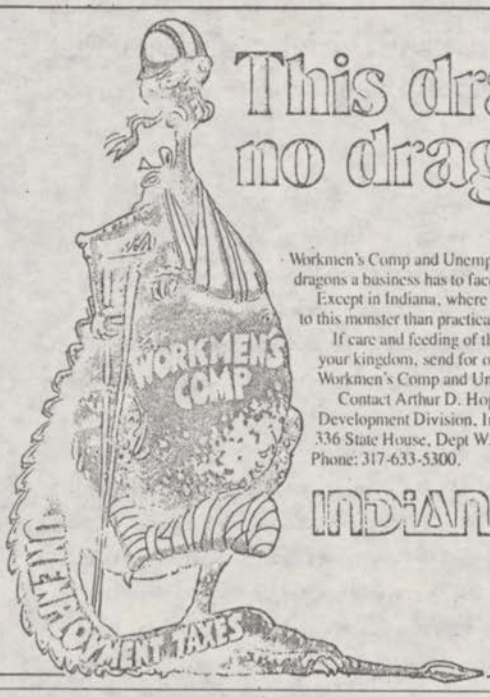
The CHAIRMAN. All right. We will have to do that. There is another vote. I missed the last one; I had better make this one.

I did want to ask him about Michigan's situation. Maybe you could help me. I do have the comparative workers' compensation insurance rates for Michigan and surrounding States, and it is clear indeed that the compensation insurance rates in Michigan are considerably above those in the neighboring States.

I will include in the record something brought to our attention by Professor Burton, in the footnotes to his statement, which is a quotation from the Wall Street Journal, August 16, 1976.

[The following was received for the record:]

[From the Wall Street Journal, August 16, 1976]



This dragon's no drag.

Workmen's Comp and Unemployment Taxes are often the toughest dragons a business has to face.

Except in Indiana, where business enjoys lower rates of tribute to this monster than practically anywhere else in the country.

If care and feeding of this pest has become a problem in your kingdom, send for our brochure on Indiana's *sensible* Workmen's Comp and Unemployment Taxes.

Contact Arthur D. Hopkins, Director, Industrial Development Division, Indiana Department of Commerce, 336 State House, Dept WJ, Indianapolis, Indiana 46204. Phone: 317-633-5300.

INDIANA

Indiana Department of Commerce
Lt. Governor Robert D. Orr, Director

NEWS RELEASE

INDIANA DEPARTMENT of COMMERCE

LIEUTENANT GOVERNOR ROBERT D. ORR, DIRECTOR · ROOM 336 STATE HOUSE · INDIANAPOLIS 46204

DATE OF RELEASE: August 15, 1978

CONTACT: CHUCK STONEHILL
317/633-7066

"In the State of Indiana, we have 'slain' some of the major problems business and industry must fight today, workmen's and unemployment compensation, product liability, state debt and property taxes," says Lieutenant Governor Robert D. Orr.

The Lieutenant Governor made the comment as he announced the state has placed a series of ads on Indiana's attractive business climate in the August 16th, midwest edition of the Wall Street Journal and the September issues of three trade magazines, Area Development, Site Selection Handbook and American Industrial Properties Report.

"Indiana is one of the states with the lowest rates employers must pay for workmen's and unemployment compensation," Orr commented. "We are also one of the first industrial states that has legislated and passed product liability protection for businesses. The product liability legislation passed by the 1978 General Assembly established four defenses to product liability actions and set a ten year statute of limitations on all actions."

"State debt and deficit spending were eliminated during 1851 in Indiana," Orr continued. "The constitution adopted that year prohibits the state from incurring debts."

The ads follow the theme of the successful 'dragon' ad placed in the July 19, 1978 national edition of the Wall Street Journal. The Indiana Department of Commerce Industrial Development Division has received very positive statewide and national response to the ad which illustrated the State of Indiana as a knight standing atop a slain dragon representing property taxes.

The 'dragon' advertising program is a new phase of the existing program supported by the General Assembly to attract business and industry to Indiana. Total cost of the ad space is $4,726.64.

An industrial development conference, Hoosier Hospitality Days, will coincide with the publication of the final ad. Hoosier Hospitality Days will be held in French Lick, Indiana, September 26-28, 1978. The conference will be attended by out-of-state business and industrial prospects.

-30-

The CHAIRMAN. The Wall Street Journal says this:

> The Indiana Department of Commerce has recently advertised that workmen's compensation and unemployment insurance taxes are often the toughest dragons a business has to face, except in Indiana, where rates are among the lowest in the country.

It would seem to me, just on that business of attractiveness to industry, this is the wrong place to be competitive. And if we have minimum standards that are required, while preserving the State system of administering workers' compensation, a State like Michigan would find their neighbors not competing in this unfortunate way. Mr. Sheble is shaking his head, "No."

It seems clear on its face. Now, what is not obvious?

Mr. SHEBLE. Mr. Chairman, if I might, that very point is one that we have to wrestle with with the States of Alabama and Georgia.

The problem is when you get into——

The CHAIRMAN. I am afraid I am going to have to make this vote. So if you have anything further on that, would you put it in writing. And Mr. Adams, do you have any comment on that competitive business?

Mr. ADAMS. I do.

The CHAIRMAN. All right. I will return as soon as I can to hear the self-insurers.

Thank you very much, gentlemen.

[The joint prepared statement of Mr. Adams, Mr. Thodis, and Mr. Shebel follows:]



National Association of Manufacturers

Testimony
on Behalf of
The National Association of Manufacturers
on
S. 3060, The "National Workers' Compensation Standards Act of 1978"
Before The
Subcommittee on Labor
Committee on Human Resources
United States Senate

September 22, 1978



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SUMMARY
of the
National Association of Manufacturers'
Testimony on S. 3060
The "National Workers' Compensation Standards Act of 1978"

I. The NAM continues to oppose any attempt to federalize the workers' compensation system. We do not support a comprehensive federal law administered by state agencies.

II. The unique characteristics of each state denotes the need for geographic variations in the workers' compensation programs. Minimum federal standards for workers' compensation would not impact uniformly on various state systems which have developed independently over a 60-year period.

III. The federal government's performance in the area of compensation programs has not enjoyed a great degree of success. The Federal Longshoremen's and Harbor Workers' Compensation Act, the black lung provisions of the Federal Coal Mine Health and Safety Act and the Federal Employees' Compensation Act have shown the inefficiencies that can result from federal intervention in compensation programs.

IV. Any federal standards bill should be accompanied by an economic impact statement which addresses the affordability and inflationary potential of S. 3060. At this time, there is no accurate cost estimates or inflationary impact statement which accompanies this proposal.

V. Since 1972, the individual states have made tremendous progress in improving their workers' compensation laws. Over the past seven years the states have enacted more than 1,750 workers' compensation bills.

VI. S. 3060 represents more than a minimum federal standards bill for workers' compensation. The legislation addresses a far broader range of issues than the 19 essential recommendations issued by the National

mission on State Workmen's Compensation Laws in July of 1972. S. 3060, as a proposal to federalize the workers' compensation system represents a complete reshaping of the existing state systems at a time when the states have shown marked improvement in upgrading their workers' compensation laws and are intensely studying the more difficult problems.

VII. Any attempts to reform the existing workers' compensation system must proceed on the realization that the system, generally speaking, has been highly successful in achieving its intended purpose. Federal involvement, in the form of encouragement and technical assistance to the states, is the best means of obtaining a fair and equitable methods of compensating workplace injuries.

Testimony
on Behalf of
The National Association of Manufacturers
on
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September 22, 1978

Good Morning, Mr. Chairman,

My name is Ralph R. Adams and I am Director of the Unemployment and Workers Compensation Activity for the General Motors Corporation, Detroit, Michigan. I am here today as chairman of the National Association of Manufacturers Subcommittee on Workers' Compensation. Accompanying me are Jon Sheble, President, Associated Industries of Florida, who serves as a vice chairman of the National Industrial Council's State Group Advisory Committee on Workers' Compensation and John G. Thodis, President, Michigan Manufacturers Association.

We welcome and appreciate this opportunity to appear before the Subcommittee this morning to present the views of these organizations on the "National Workers' Compensation Standards Act of 1978."

At the request of the subcommittee staff, we will present our oral statement within the designated time limit. We would encourage the members of the subcommittee to thoroughly review our statement submitted for the record.

Mr. Sheble and Mr. Thodis will discuss S. 3060 as it would impact state workers' compensation systems in general, and their state programs in particular. They will also review the progress and problems in the workers' compensation systems in Florida and Michigan. I will discuss the NAM's long standing policy of support for state-administered workers' compensation programs.

S. 3060 is not substantially different from its predecessors in the last two Congresses, S. 2008 and S. 2018. The objectives are the same and the final result would be the same. The bill would, in effect, federalize the workers' compensation system by creating a dual authority -- a comprehensive federal law administered by state agencies.

The NAM has testified before congressional committees on several occasions, citing our specific objections to these bills. Thus, I need not go over this bill point by point. Our objective is to the concept -- not to the idea of reform. The NAM has long supported state reform of workers' compensation systems, and we continue to do so today.

Federalization of the workers' compensation system is not the best approach for reasons we have outlined in previous testimony.

The Federal government's performance in the area of compensation programs has not been successful. The Federal Longshoremen's and Harbor Workers Act, the black lung provisions of the Mine Safety Act and the Federal Employes' Compensation Act (FECA) have shown the inefficiencies that can result from federal intervention in compensation programs.

During both sessions of the 95th Congress, the House Subcommittee on Compensation, Health and Safety held extensive oversight hearings on federal compensation programs. The problems with these programs have been fully examined and are now part of that hearing record. We will not outline the results of those hearings, but we would suggest that the subcommittee closely examine the entire proceedings, which illustrate what the difficulties can be in administering workers' compensation programs.

Any federal standards bill should be accompanied by an economic impact statement which addresses the affordability of adopting new standards. The inflationary effects of S. 3060 should be of primary concern to this panel. At this time, we are not aware of any accurate cost estimates or inflationary impact statements pertaining to this bill.

We strongly urge the subcommittee staff to consider a variety of resources in obtaining highly accurate cost estimates and a reliable inflationary impact statement.

Abuses in the present system must be brought under control before a new, more expensive program becomes a matter of serious consideration before this subcommittee. Although many proponents of federal standards for workers' compensation believe the businessman always complains about increased costs in federal legislation, there is strong evidence that the cost of workers' compensation for some employers is reaching a level of non-affordability.

Since 1972, the states have made good progress in reforming their workers' compensation systems and must continue to do so. This substantial progress made by the states should not be ignored. State legislative activity during 1976 saw 153 amendments anacted. During 1977, 300 new bills became public law with a majority of these new proposals upgrading coverage, benefits, medical cases, rehabilitation, and improved administration. Over the past 7 years, the states have enacted more than 1,750 workers' compensation bills. As of January 1, 1978, substantial compliance by the states with the 19 essential recommendations average almost 80%. The American Insurance Association statistics indicate that full compliance was almost 70% as of the same date.

In testimony before this subcommittee on March 3, 1976, the NAM expressed its opposition to S. 2018 and the implementation of its objectives. We still believe that continued federal involvement in the form of encouragement and technical assistance to the states is the best means of obtaining a fair and equitable method of compensating workplace injuries.

Mr. Chairman, we believe S. 3060 represents more than a minimum federal standards bill for workers' compensation. The legislation addresses a far broader range of issues than the 19 essential recommendations issued by the National Commission on State Workmen's Compensation Laws in July of 1972. These recommendations were the guidelines the Commission believed to be necessary in order to ensure an adequate and equitable workers' compensation system. At a time when the states have shown marked improvement in upgrading their workers' compensation laws and are intensely studying the more difficult problems, the proposal for federal standards represents a complete reshaping of the state systems.

Recently, there has been some deceleration of state accomplishment toward enactment of the 19 essentials. We believe this is understandable. Many states are engaged in serious, time-consuming efforts to reform their total workers' compensation systems -- not merely the portions directly affected by the 19 essentials.

Existing provisions to state laws which have created inequities, promoted excessive litigation or led to costly abuses, for example, must not continue uncorrected in the haste to measure up to the 19 essentials.

These states should be encouraged to continue such total reform effort. We believe the enactment of S. 3060 would have the opposite

effect as it would stifle state incentive. State legislators must retain legislative authority over all aspects of their state systems if they are realistically expected to achieve total reform.

* * * *

My name is John G. Thodis and I am President of the Michigan Manufacturers Association. We include in our membership over 2,400 industrial and business enterprises, operating at approximately 4,00 locations within the State of Michigan and employing approximately 1,000,000 of Michigan's industrial workers. On behalf of the Association and its members, I appreciate the opportunity to appear at this hearing to express our very serious concerns and opinions.

I must begin by stating that the NAM and its members firmly believe in the concept and basic principles embodied in workers' compensation laws. The workers' compensation system has filled a vital role in replacing lost wages and providing medical treatment to workers who have sustained occupational injuries or contracted occupational diseases.

Michigan employers have always been willing to accept and pay for wage replacement provided that statutory assurances are given that the money available for the program would be wisely and prudently spent and, then, only in ways which are consistent with and which advance the humanitarian and equitable objectives of the law.

In order to assist you in your deliberations of S. 3060, I want to acquaint you with the workers' compensation reform efforts underway in Michigan and the impact that S. 3060, if enacted, would have on those efforts. It is generally recognized by all parties in Michigan that our workers' compensation system is badly in need of total reform and an intensive effort to obtain total reform has been underway for the past four or five years. Organized labor, the business community, practicing attorneys, the insurance industry, both houses of the Legislature and the Governor's office have all been actively involved. Representatives of the various interests also recognize the significance and costliness of our problems.

Numerous workers' compensation bills have been introduced and public hearings have been held. Considerable progress has been made by the parties involved in reaching a consensus on general concepts.

The delay in reform has not been without accomplishment. In a large part it has been a data gathering period and a learning process for all parties. Just recently, for example, after repeated attempts, credible cost estimates were developed in order to properly evaluate many of the reforms being considered.

Reform, such as Michigan is attempting, is, as you must know, a slow and tenuous process. Our Legislature is attempting to strike a balance of the issues. If we continue at the present trend without outside interference, I am confident that we will reach our goal in the very near future. It will be a goal in which Michigan will measure well against the 19 essentials and we will have eliminated much of the waste caused by abuses of the system.

Gentlemen, the blunt fact of the matter is that S. 3060 would have a profound negative impact on the economy of the State of Michigan. Michigan's employers, small and large, cannot afford to be further burdened with greatly increased workers' compensation costs while costly and wasteful abuses are not eliminated but may be enhanced because of a greater financial incentive.

The most visible and blatant abuse in Michigan costs over $100 million a year. This problem, perhaps unique to our State, will further compounded by federal standards as contemplated in S. 3060. What makes Michigan so unique among the states and why will S. 3060 have such an adverse impact on our economy? The answer is simple: Over $100 million per year in workers' compensation is paid to RETIREES who have, for the

most part, voluntarily left the labor market and, if disabled at all, suffer fror disabilities more normally associated with the aging process -- not occupationally or work induced. S. 3066 will not correct this serious abuse.

We are greatly concerned with the needs of the legitimately injured worker. However, the substantial benefit increases in S. 3060 would have a serious impact on the industrial climate and economic welfare of the State of Michigan. It is ironical that Michigan's workers' compensation system would be plagued by the "retiree abuse" because Michigan is one of the purest examples of a wage-loss state. However, Michigan's program has grown from a simple and effective voluntary payment procedure to what now is a complex, cumbersome and adversary-ridden system. The system fosters a misapplication of benefits by permitting a disproportionate amount to go to workers who are claiming impairment caused, in reality, by degenerative diseases of life. S. 3060 will not solve that problem -- it will, with its greatly increased benefit standards, further compound the problem.

The misapplication (by the Courts and uncorrected by the Legislature) of the wage loss theory in the case of retirees has created a terribly expensive and wasteful program in Michigan. Many retirees receive greater income in retirement through a combination of private pension, social security and workers' compensation benefits than they had when working. (See Exhibit A)

It is not only a concern for employers, but one in which the public also has a vital interest. When the accumulation of social and privately provided benefits rewards idleness with a greater total income than lost wages, it should be of grave concern to the public as a whole. The very fiber of our economic system, as we know it, is greatly eroded.

The duplication of benefits has a pernicious and pervasive impact on the entire workers' compensation system in Michigan. It has provided a lucrative field for the practice of law, led to high levels of litigation and perverts the system. In our view, S. 3060 will compound our problem -- it will not solve it.

A short illustration . . . Michigan's AWW is approximately $254.00 per week. Our current workers' compensation benefit maximum is $142.00 for a single person. S. 3060 would require an approximate $116.00 per week increase in benefits and eventually could reach nearly $400.00 per week increase in the maximum. These amounts are staggering even if our system were not wrought with inequities such as the "retiree abuse". The standards in S. 3060 would simply heap larger costs upon an already overburdened system which now costs Michigan's employers nearly $1 billion a year, including a recent 25 percent increase in premiums.

What, then, is our position? We respectfully request that the Congress not tamper with state workers' compensation system. Previous speakers have explained logically why the interests of all concerned can best be served if the workers' compensation system continues to be administered, without federal standards, at the state level.

We cannot afford to lose our tenuous grasp on this opportunity to reform our system. S. 3060, nor any of its predecessors, contemplates solving our abuse problems -- we must hammer them out at the state level or everyone loses -- the legitimately injured worker who should be receiving higher benefits and the already overburdened Michigan employer who pays the bill.

Gentlemen, workers' compensation is the greatest disincentive to creating jobs in our state. It is the major problem to be confronted

if we are ever to improve our business climate and thus provide jobs for our citizens. Only we can solve the Michigan problem, because it is peculiar to Michigan.

Should anyone doubt that statement (with which the Governor, the Speaker of the House, and other leaders agree), permit me to give you just a sample of the responses we receive from surveying our membership early this year. One thousand companies responded -- nearly three-quarters were small industries, employing less than 100 persons. 88% of all respondents said costs were rising faster in Michigan than elsewhere and 87% of them cited workers' compensation as the primary reason. 98% of our members rated the responsiveness of government to the needs of Michigan industry as average to poor. Expansion plans (the creation of jobs) were discouraging as were the answers to most other questions.

Therefore, there's no doubt that workers' compensation is a serious impediment to creating jobs in Michigan. I can assure you that employers are in constant fear the situation will worsen if federal standards are adopted because it would expand the cost disparity (not close it) between Michigan and other states.

In conclusion, we strongly urge you to not act upon S. 3060. Your absence of action will enable us to continue working to return the workers' compensation program in Michigan to one free of costly abuses and one which adequately provides for those unfortunate individuals whose disability or illness is job-induced -- and one which protects the economic climate of the State of Michigan.

* * * *

EXHIBIT A

This is an example of an automobile industry assembler with 30 years of service who retired on September 1, 1978 at age 62, with a spouse, also age 62.

WORKING

(This is computed on the basis of 173 (hours worked at a rate of $7.93 an hour. (The 7.93 is composed of two figures -- ($7.09 standard hourly rate and .84 COLA.)

$1372.00/month -- gross pay income

- 184.00 federal income tax
- 52.00 state income tax
- 83.00 social security deduction

319.00 total deductions

$1053.00 net pay (monthly) PRE-RETIREMENT

RETIRED

$ 400.00 monthly pension
+ 555.00 monthly social security benefit (composed of $378.00 retiree, and 177.00 for spouse)
+ 637.00 workers' compensation

$1592.00 TOTAL MONTHLY RETIREMENT INCOME

$1592.00
1053.00
$ 539.00 Difference between working and retired.

Mr. Chairman and members of the Subcommittee, my name is Jon L. Shebel and I am priviledged to serve as President of Associated Industries of Florida. The association is a statewide organization whose members employ over 40% of the private sector work force in Florida. Since 1920, the association has been the spokesman for Florida businessmen. In the area of workers' compensation, specifically, the association has been the spokesman for Florida businessmen since 1935. We have testified in past years on S. 2008 and S. 2018 and before committees of the U.S. House of Represenatives.

From the outset, I would like to observe that, in the opinion of our association, the existing workers' compensation system in Florida has been highly successful in achieving its intended purpose. It is our position that the state law in Florida meets the five objectives for a modern workers' compensation program as defined by the National Commission on State Workers' Compensation Laws. This is not to say that we do not have problems within our law because we certainly do and the legislature recognized this by repealing the entire Florida workers' compensation law (chapter 440, Florida Statutes) effective next year. In essence, the legislature put itself on notice that major revisions must be made in our law during the 1979 session of the legislature (which convenes in April, 1979) and placed a gun to its own head by repealing the law in the 1978 statute.

If I might, I would like to use Florida as an example of what has been done since 1972. During the 1973 session which met shortly after the National Commission report was available, the legislature increased the maximum weekly benefit amount $66 to $80 and increased the death

benefit from $15,000 to $25,000. The 1974 session of the legislature further increased the maximum weekly benefit amount from $80 to 66 2/3% of the statewide average weekly wage. This formula automatically increased the maximum weekly benefits overnight from $80 to $105. Today, because of the formula, the maximum weekly benefit amount in Florida is $126. The 1974 session also increased the death benefit from $25,000 to $50,000. In addition, Florida provided for a 5% yearly cost of living increase to the 2,200 permanent total cases to increase the weekly benefit amount of those permanent totals injured when the maximum weekly benefit amount was low.

Further, in 1974, the legislature in response to the National Commission report eliminated the numerical exemption and extended coverage to almost all workers in the state (exceptions include domestics and farm laborers under certain conditions). The 1974 bill provided that a severely injured worker would receive 80% of his average weekly wage until he had completed training in the use of artificial limbs or appliances and completed training or education in a rehabilitative program not to exceed six months from the date of injury. Fines were provided for in the amount of $100 to be levied against carriers and/or employers for late filings in the 1974 enactment. The bill further took the judges of industrial claims out of politics as much as possible and insured their retention if they had done a good job by placing them under the Judicial Nominating Commission of the various appellate districts. In addition, the bill amended the special disability trust fund in such a way as to accrue to the benefit of injured workers and the employers who hire workers with pre-existing conditions.

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Florida and many of the states have made tremendous strides since 1972 and these accomplishments have been quite costly to employers and the public through increased workers' compensation premiums. We are advised by the National Council on Compensation Insurance that Florida has the distinction of having the second highest workers' compensation benefits paid out in the nation. In 1971, the year before the National Commission report was rendered, the workers' compensation premium volume in Florida was $190 million. By 1977, the premium volume amounted to $656 million. While Florida paid out the second highest amount of benefits in the United States (exceeded only by Alaska), its maximum weekly benefit amount was 37th in the nation.

Florida, like many states, is basically a state of small employers with 51.7% of the 189,000 employers having a work force of three or less people. Since the 1974 workers' compensation revision in Florida, the number of employers purchasing workers' compensation has decreased from 135,481 to 116,967 for the year ending in 1977. Certainly this decrease in the number of employers in Florida cannot totally be attributed to the high cost of workers' compensation since, as you are aware, we went through a very drastic recession during this period of decrease. However, I can assure you that the high cost of workers' compensation to the small employer, 40% of whom are in the assigned risk pool in Florida in workers' compensation has had the effect of driving some small employers out of business.

S. 3060 adds costs to the workers' compensation program but does not speak to the real problem in Florida. The real problem in the Florida workers' compensation law is not in the level of benefits to the permanently and totally injured worker and death cases, but rather

in the area of permanent partial disability. As you are aware, a permanent partial disability is defined as one where the injured worker after reaching maximum medical improvement, continues to have some earnings or retain some proportion of their pre-injury earning capacity. In Florida, their benefits are calculated by statute by determining their "diminution of wage loss capacity". At best, this system is based on a "guesstimate". We have been working diligently in Florida during the past year to change this system to one which bases compensation on "actual wage loss". We sincerely feel that, by moving in this direction, we can significantly increase the benefits paid to validly and severely injured workers by decreasing the benefits paid to workers with minor injuries where such workers have no "actual wage loss". From the inception of workers' compensation, benefits paid to workers were never intended to enable the worker to have a net financial gain from his injury. The system in Florida and many other states has come to the point where workers are actually being compensated with benefits where they have little or no "actual wage loss" and thereby the worker derives a net gain from his injury. The workers' compensation system can no longer support this type payment. Of the 412,000 claims filed in Florida in 1977, only 2% involved the permanent partial disability area (8,240) and 89% of these permanent partial cases involved bodily disability ratings of 10% or less. However, this is where the bulk of the money was paid out to claimants.

The 1979 session of the Florida legislature will address the permanent partial area and we feel that by going to a determination based on "actual wage loss", we will take a gigantic step in the right direction to redistribute the benefits in workers' compensation which

will accrue to the benefit of the permanent total and death cases in a much more logical and realistic way than the approach attempted in As a matter of fact, the standards as contained in S. 3060 would destroy the initiative in Florida to reform its own law.

Workers' compensation in Florida and in many states has risen from a posture of having little attention paid to being one of the key issues when the legislatures convene and even in races for governor such as presently is happening in Florida. Progress is being made and will continue to be made in the future. Now, more than ever before, there is less need for federal standards or federal intervention in the workers' compensation area. The National Commission and the Inter-departmental Task Force have both advised against such intervention and progress continues to be made which should indicate to you that federal intervention is less appropriate today than at any time in the past.

I respectfully submit that the passage of S. 3060 or any measure which imposes federal standards could have exactly the opposite effect which advocates might expect. If Florida employers feel they would sustain increased costs due to the standards without any attention to the problems inherent in the programs, they will be less likely to continue investigating revisions to the state laws because all legislators are elected and, in a political sense, it would be in their best interest to lay the blame on the Congress for the continued increase in premiums in workers' compensation.

If the introduction and consideration of S. 3060 is to remind the states that unless they continue to make progress, federal standards may become a reality, then S. 3060 may be a good idea. However, if the

Congress is going to seriously consider passage of federal standards, this could work to the detriment of injured workers and the employers of our nation.

Mr. Chairman, we have apppreciated the opportunity to present NAM's views on S. 3060. At this time, we would be glad to answer any of your questions or address the comments of other members of the subcommittee.

LIST OF NATIONAL, STATE AND LOCAL ASSOCIATIONS
of the
NATIONAL INDUSTRIAL COUNCIL
endorsing the
NAM TESTIMONY ON S. 3060

STATE ASSOCIATIONS GROUP

Colorado Association of Commerce & Industry
Illinois Manufacturers' Association
Indiana Manufacturers Association
Kansas Association of Commerce & Industry
Louisiana Association of Business & Industry
Michigan Manufacturers Association
Minnesota Association of Commerce & Industry
Mississippi Manufacturers Association
Associated Industries of Missouri
Nebraska Association of Commerce & Industry
Association of Commerce & Industry of New Mexico
Associated Industries of Oklahoma
Associated Oregon Industries
Pennsylvania Manufacturers Association
Virginia Manufacturers Association
Wisconsin Association of Manufacturers & Commerce

INDUSTRIAL RELATIONS GROUP

Western Connecticut Industrial Council, Inc. - Waterbury, Connecticut
Associated Employers of Illinois - Chicago, Illinois
Printing Industry of Illinois Association, Inc. - Chicago, Illinois
Northern Illinois Industrial Association - Skokie, Illinois
Employers Association - Grand Rapids, Michigan
Employers Association - Detroit, Michigan
Jackson Area Manufacturers Association - Jackson, Michigan
Employers Association of Greate Minneapolis - Minneapolis, Minnesota
Midwest Employers' Council - Omaha, Nebraska
Associated Industries, Inc. - Gastonia, North Carolina
Capital Associated Industries, Inc. - Raleigh, North Carolina
Central Piedmont Employers Association, Inc. - Charlotte, North Carolina
Western Carolina Industries Association - Asheville, North Carolina
Manufacturers Association of Berks County - Reading, Pennsylvania
Employers Association - El Paso, Texas
Central Virginia Industies, Inc. - Lynchburg, Virginia

MANUFACTURING TRADE ASSOCIATIONS GROUP

Air-Conditioning and Refrigeration Institute - Arlington, Virginia
Cast Metals Federation - Westchester, Illinois
National Association of Glove Manufacturers, Inc. - Gloversville, New York
National Knitwear Manufacturers Association - New York, New York
Steel Plate Fabrications Association, Inc. - Hinsdale, Illinois
Webster Industries, Inc.

[Short recess.]

The CHAIRMAN. OK. Mr. Nemeth, of the National Council of Self-Insurers.

Thank you.

STATEMENT OF GEORGE G. NEMETH, GENERAL COUNSEL, NATIONAL COUNCIL OF SELF-INSURERS, ACCOMPANIED BY MR. RUSSELL GUY, ASSISTANT TO THE MANAGER OF WORKERS' COMPENSATION AND SAFETY, BETHLEHEM STEEL CORP.

Mr. NEMETH. Thank you, Mr. Chairman.

With me today is Mr. Russell Guy, who is assistant to the manager of workers' compensation and safety of Bethlehem Steel Corp. Mr. Guy is also a member of our board of managers.

The National Council of Self-Insurers has been an active participant over the past years in the effort to assess the workers' compensation laws in the various States and to improve these laws on a State-by-State basis.

Our interest and involvement on the Federal level has extended to participation in numerous ad hoc committees under joint industry and administration sponsorship and to offering our assistance to the development of the various surveys conducted by the Interdepartmental Task Force on Workers' Compensation.

Our member companies all self-insure their workers' compensation liability in one or more of the States.

We have appeared before your subcommittee in two prior occasions to testify concerning Senate bills 2008 and 2018. We are grateful for your invitation to us to offer our comments on the pending legislation, S. 3060.

While we recognize that changes have been made to meet objections to the prior bills, we must adhere to our earlier positions. We are opposed both in principle and content to the present legislation.

At our annual meeting in May of this year and again at the meeting of the IAIABC in September, we invited Prof. James Chelius of the Krannert School of Management, the University of Purdue, to speak on the topic of this legislation.

In summary, Professor Chelius reviewed the increased utilization and disincentive effect that results from raising the benefit level of any available program.

His studies show a direct relationship between benefit level and system use; in effect, increased benefits with nothing more result in a proportionate increased system use.

Further, in addition to greater utilization, as the level of compensation increases, the return to work incentive decreases, thereby encouraging longer dependency on the system.

We believe that Professor Chelius' observations are particularly applicable to S. 3060. We regard this legislation as essentially a benefit bill which does not, except in a minor regard, attempt to deal with the multitude of income replacement programs available to any given recipient.

The effect of this approach may vary from State to State depending on the existence of other programs, but by limiting offsets to social security death benefits, as this legislation would do, the legislation

would prevent the States from adjusting their compensation systems to account for other benefits paid.

The result would be a proliferation of economic burden on the States worsened by the increased utilization and disincentive to return to work factors. In effect, a benefits alone approach will serve to aggravate existing system abuses and will be counterproductive to State efforts to remedy those abuses.

As your committee is aware, in recent years many States have enacted various aspects of the 19 essential recommendations. We are just now beginning to experience the effects of these enactments.

The State of Illinois, for example, initially increased its benefit maximum to 200 percent of the statewide average weekly wage.

When the full economic impact of increased benefits was felt, Illinois cut its maximum back to 133 percent State average weekly wage. We do not know what further adjustments in State laws will be forthcoming, but we do believe that the 19 essential recommendations must be re-examined in light of the State-by-State experience and can no longer be accepted as inflexible minimums to be applied in all cases.

Senate bill 3060 does not allow for such individualized assessment.

As another example, we would like to mention New York. The State of New York is one in which we actively participated in the movement to improve the benefit levels.

That State enacted a substantial increase in its benefit level during the 1977 session. The maximum benefit level was raised to $215 a week, effective January 1, 1978, and is a three-tiered approach.

The choice of a fixed-dollar maximum rather than one stated in terms of percentage of average weekly wage was a conscious choice that was made despite the fact that it would leave New York out of strict compliance with the recommendation of the National Commission.

In New York, the level of benefits paid in workers' compensation has a direct effect on benefit levels in disability income and unemployment insurance.

The State has been struggling to avoid further loss of business and to restore a seriously faltering economy; the cumulative effect of benefit increases on New York's business community is simply too great a burden for it to bear at this time. Additionally, an automatically increasing benefit level would lessen labor's willingness to participate in reforming existing system abuses.

It is our feeling that the position adopted by New York was correct for it; yet S. 3060 would not have allowed New York to follow this course.

The effort on the Federal level to improve the State workers' compensation system is one which, to date, has concentrated on compelling compliance through the imposition of Federal standards.

Granted, compulsion has its effect, but those of us who participated in the New York reform effort found that the legislators responsible for enacting those changes were, until our appearance on the scene, unaware that a problem existed or that Federal action might be imminent.

The "19 essential recommendations" was a term that was foreign to their vocabulary. To us, this indicates that lack of awareness of the problem and lack of guidance in attaining a solution was primarily responsible for New York's inaction.

We are mindful of the fact that during the past several years, efforts have been made to study and analyze the existing State systems to reach conclusions about the level of performance nationwide.

Much of the current data was gathered by the Interdepartmental Task Force, but as yet, we are unaware of any published findings. In essence, the precise magnitude of the problem as would be reflected in those studies has yet to be defined.

In our prior testimony, we urged that this committee establish a technical assistance task force, adequately staffed and funded to assist the States in reviewing their laws and implementing improvements where needed.

Such assistance has been minimal at best, and the administration has recently turned its attention to attempting to remedy the problems which exist in its own system. We repeat our prior urgings and request that the work of the task force be resumed; that a State-by-State review be made and staff be provided to assist the States in resolving the problems in ways best suited to them.

The CHAIRMAN. Mr. Nemeth, that idea is one thing we are going to be working with.

I have to go over to vote again. I have some questions that I would like to address to you in writing. We will include your full statement in the record.

I can come back, but I am sure it will be just another repetition of this.

There are delaying tactics underway over there, and every amendment has to be voted on this way, and that is why we are in a jam.

Mr. NEMETH. We would be very happy to correspond with you and your staff, sir.

The CHAIRMAN. We are very, very appreciative to you for your presence, and also for your patience. Thank you.

Mr. NEMETH. Thank you, Senator.

[The prepared statement of Mr. Nemeth follows:]

THE NATIONAL COUNCIL OF SELF-INSURERS
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420 LEXINGTON AVENUE
NEW YORK, NEW YORK 10017
(212) 889-3340

September 22, 1978

STATEMENT ON BEHALF OF

THE NATIONAL COUNCIL OF SELF-INSURERS

TO BE PRESENTED BEFORE THE

SUBCOMMITTEE ON LABOR OF THE COMMITTEE ON

HUMAN RESOURCES

OF THE

UNITED STATES SENATE

The National Council of Self-Insurers has been an active participant over the past years in the effort to assess the Workers' Compensation laws of the various states and to improve these laws on a state by state basis. Its interest and involvement on the Federal level has extended to participation in numerous ad-hoc committees under joint industry and administration auspicies and to offering its assistance in the development of the various surveys conducted by the Interdepartmental Task

Force. Our member companies all self-insure their Workers' Compensation liability in one or more of the states.

We have appeared before your subcommittee on two prior occasions to testify concerning S-2008 and S-2018. We are grateful for your invitation to us to offer our comments on the pending legislation, S-3060. While we recognize that changes have been made to meet objections to the prior bills, we must adhere to our earlier positions . We are opposed both in principal and content to the present legislation.

At our annual meeting in May of this year and again at the meeting of the IAIABC in September, we invited Professor James Chelius of the Krannert School of Management, University of Perdue, to speak on the topic of this legislation. In summary, Professor Chelius reviewed the increased utilization and disincentive effect that results from raising the benefit level of any available program. His studies show a direct relationship between benefit level and system use; in effect, increased benefits with nothing more result in a proportionate increased system use. Further, in addition to greater utilization, as the level of compensation increases, the return to work incentive decreases, thereby encouraging longer dependency on the system.

We believe that Professor Chelius' observations are particularly applicable to S-3060. We regard this legislation as essentially a "benefit" bill which does not, except in one

minor regard, attempt to deal with the multitude of income replacement programs available to any given recipient. The effect of this approach may vary from state to state depending on the existence of other programs but by limiting off-sets to social security death benefits, the legislation would prevent the states from adjusting their compensation systems to account for other benefits paid. The result would be a proliferation of economic burden on the states, worsened by the increased utilization and disincentive to return to work factors. In effect, a benefits alone approach will serve to aggrevate existing system abuses and will be counter-productive to state efforts to remedy abuses.

As your Committee is aware, in recent years many states have enacted various aspects of the 19 Essential Recommendations. We are just now beginning to experience the effects of these enactments. The State of Illinois, for example, initially increased its benefit maximum to 200% of the SAWW. When the full economic impact of increased benefits was felt, Illinois cut its maximum back to 133% SAWW. We do not know what further adjustments in state laws will be forthcoming, but we do believe that the 19 Essential Recommendations must be reexamined in light of the state by state experience and can no longer be accepted as inflexible minimums to be applied in all cases. S-3060 would preclude any such individualized assessment.

As another example, we would like to mention New York. The State of New York enacted a substantial increase in its benefit level during 1977. The maximum benefit level was raised to $215/week. The choice of a fixed dollar maximum rather than one stated in terms of percentage of average weekly wage was a conscious choice made despite the fact that it would leave New York out of strict compliance with the recommendation of the National Commission. In New York, the level of benefits paid in Workers' Compensation have a direct effect on benefit levels in Disability Income and Unemployment Insurance. The State has been struggling to avoid further loss of business and to restore a seriously faltering economy; the cumulative effect of benefit increases on New York's business community was simply too great a burden to bear at this time. Additionally, an automatically increasing benefit level would lessen labor's willingness to participate in reforming existing system abuses. It is our feeling that the position adopted by New York was correct for it; yet 3060 would have precluded New York from following this course.

The effort on the Federal level to improve the State Workers' Compensation system is one which, to date, has concentrated on compelling compliance through the imposition of Federal Standards. Granted, compulsion has its effect, but those of us who partici-

pated in the New York reform effort found that the legislators responsible for enacting those changes were, until our appearance on the scene, unaware that a problem existed or that Federal action might be imminent. The "19 Essential Recommendations" was a term foreign to their vocabulary. To us, this indicates that lack of awareness of the problem and lack of guidance in attaining the solution was primarily responsible for New York's inaction.

We are mindful of the fact that during the past several years, efforts have been made to study and analyze the existing state systems to reach conclusions about the level of performance, nationwide. Much of the current data was gathered by the Inter-departmental Task Force, but as yet, we are unaware of any published findings. In essence, the precise magnitude of the problem has yet to be defined.

In our prior testimony we urged that this committee establish a technical assistance task force, adequately staffed and funded to assist the states in reviewing their laws and implementing improvements where needed. Such assistance has been minimal at best and the administration has recently turned its attention to attempting to remedy the problems which exist in its own system. We repeat our prior urgings and request that the work of the Task Force be resumed; that a state by state review be made and staff be provided to assist the states in resolving the problem in ways best suited to it.

Moreover, our attempt to analyze and draw conclusions regarding the provisions of S-3060, we found ourselves limited in one essential regard; we were unable to find any meaningful studies which could provide a basis for determing the cost of this bill. We feel we cannot reach an informed conclusion without this data; the impact on the cost of goods and services and on state and national economies must be a major concern in the thorough assessment of this legislation. Benefits conferred on one segment of the economy cannot be assayed properly without considering the effect on other segments. The cost impact on industry of the Black Lung legislation, (which now exceeds one billion dollars annually) has made us particularly sensitive to the need for accurate financial reviews. In light of increasing resistance to escalating cost and tax burdens, it is our belief that a state by state cost analysis should be made. Absent such analysis, we cannot reach final judgement on the desirability of this legislation. We note with particular concern the 6% cost-of-living factor which is built into the permanent disability and death benefit provisions.

We would like to offer one further observation regarding this legislation. Section 11(b) (2) authorizes the Secretary of Labor, by regulation, to "impose additional or alternative conditions on qualification for self-insurance in the event that the Secretary finds that the qualification requirements in a state are insufficient to assure the payment of supplemental compensation provided by this Act."

This particular section has no precedent in any prior legislation on this subject. We note that no similar authority is granted to the Secretary to review the adequacy of state regulation of insurance companies or of state funds; two sources which in combination provide between 80% and 85% of existing coverage. We are at a loss to explain this disparity in treatment.

Additionally, the authority granted to the Secretary would appear to be without any legislative guidelines whatsoever. Criteria for self-insurance vary from state to state, as do insurance company regulations. We see no justification for vesting in the Secretary of Labor or any other Federal official the authority to revoke the privilege of self-insurance which our member companies enjoy by reason of state grant. The effect of this seemingly innocuous section would be to supplant existing state self-insurance administrations with a federal bureaucracy, unfettered in its authority. We oppose, in the strongest terms, the creation of any federal authority to determine self-insurance criteria.

Respectfully Submitted,

NATIONAL COUNCIL OF SELF-INSURERS

George G. Nemeth
General Counsel

The CHAIRMAN. The distinguished Senator from Kansas, Senator Dole, has a statement on this bill. Because of the floor schedule, however, he could not testify, as he wanted to, personally. His statement in support of this bill will be included in the record.

[The prepared statement of Senator Dole follows:]

PREPARED STATEMENT OF SENATOR BOB DOLE

Senator DOLE. Mr. Chairman, I want to thank you and members of the committee for the opportunity to express my interest in S. 3060. I would also like to commend the committee, and in particular, Senator Williams and Javits, the principal authors of this bill, for bringing forth a measure that looks at the feasibility of establishing Federal minimum standards in our workers' compensation system and that would encourage and assist States in voluntarily meeting these Federal minimum standards.

A LONG TIME CONCERN

It has long been recognized that this country's workers compensation system has, in many cases, dismally failed to adequately compensate workers who have been injured on the job. As the members of this committee so well know, this matter has been the subject of much debate for many years. It has been approximately 10 years, as I recall, that Senator Javits proposed a national commission to study the workers' compensation system and to make recommendations for improvements, and if necessary, the establishment of Federal minimum standards.

COMMISSION FINDINGS

The findings of the commission verify what had long been suspected with respect to the inadequacies of State workers' compensation systems. The commission concluded that State workers' compensation laws were, in general, neither adequate or equitable. Mr. Chairman, I would like to note that not all States fall into this category. There are, in fact, some States that have excellent programs. However, as a whole, States have failed to correct the inadequacies of their workers' compensation programs. It is interesting to note that of the 19 recommendations issued by the commission, which it identified as essential in insuring that all American workers be adequately covered under the workers' compensation program, no State, as of early this year, had met all 19 of these essential standards.

Mr. Chairman, it seems apparent that we can no longer wait for individual States to act on their own in addressing this serious problem. We cannot continue to address the true victims of job injury and their dependents with a promise of workmen's compensation reform by States. I, for one, believe the time has come for Congress and appropriate Federal agencies to step in and provide leadership and technical assistance to States in developing a sensitive and fair workers' compensation program.

Workers' compensation is a highly technical subject involving the prompt delivery of quality medical care, rehabilitation services, weekly income replacement, payments for permanent partial disability, permanent total disabiity, and survivors' benefits, truly a variety of areas in which technical assistance could be provided.

S. 3060

S. 3060 establishes Federal minimum standards which will encourage the improvements which must be made in our State workers' compensation programs if they are to provide fair and adequate compensation to injured workers. While I certainly look toward the day we can have a fair and adequate workmens' compensation program, I also look forward to the day we will be able to adequately address the abuses in existing State programs.

Of particular importance and interest to the Senator from Kansas, is this bill's attempt to accomplish the goal of a fair workers' compensation program without creating a new Federal program in place of the existing State programs. This bill, as I understand it, gives the States every encouragement and opportunity to provide benefits in accordance with Federal standards. This still does not substitute Federal enforcement in place of State enforcement, instead, it

defers to State agencies in every case and provides a back-up Federal enforcement mechanism which applies only where State law does not meet Federal standards. Under this measure, if a State law meets the Federal minimum standard, all claims relating to that standard are determined solely by the States, and there is no access to Federal enforcement. In so far as this particular provision of the bill is concerned, it is an approach that recognizes the need to achieve a very important national goal through cooperation with the States and by providing needed Federal assistance.

That is why I am pleased to see these hearings being held and others scheduled for next year, as I believe hearing from those on both sides of the issue will be helpful in determining the best approach in addressing this matter.

Once again, I want to thank the chairman and members of the committee for the opportunity to offer my remarks on this very important matter.

The CHAIRMAN. At this point I order printed all statements of those who could not attend and other pertinent material submitted for the record.

[The material referred to follows:]

...ISOR
WILLIAMS, N.J.
78 SEP 19 AM 12:00

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC.
1101 CONNECTICUT AVENUE, N.W., SUITE 300, WASHINGTON, D.C. 20036
TWX: 710-822-9489
TEL: 202/862-0500

September 18, 1978

Honorable Harrison A. Williams
Chairman
Labor Subcommittee
Senate Committee on Human Resources
Washington, D.C. 20510

Dear Mr. Chairman:

We respectfully request that the enclosed ATMI statement be incorporated in the record of the Subcommittee's forthcoming hearings on S. 3060.

Sincerely,

W. Ray Shockley
Executive Vice President

Enclosure

WRS/tew

COMMITTEE ON
HUMAN RESOURCES
1978 SEP 19 PM 4:45

STATEMENT

On Behalf of

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC.

Re

S. 3060

To strengthen state workers' compensation programs and for other purposes,

Before

THE SUBCOMMITTEE OF THE COMMITTEE ON HUMAN RESOURCES

Of The

SENATE OF THE UNITED STATES

ATMI appreciates deeply the opportunity to record its objection to S. 3060 and other similar bills alleged to strengthen state workers' compensation programs as set forth in the findings and declaration of purpose of S. 3060.

The American Textile Manufacturers Institute is the national organization for the textile mill products industry in the United States. ATMI's members constitute about 85% of the spinning, weaving, knitting, and finishing capacity for domestic textile mill products.

Our objection may be concisely stated: S. 3060 would effect substantial federalization of state workers' compensation programs; and be a radical departure in scope and effect from the history and current status of workers' compensation and employers' liability programs.

I. History of Workers' Compensation.

We know that workers' compensation laws are designed to provide satisfactory means of handling occupational disabilities. They were enacted, starting about seventy years ago, to change the slow, costly and uncertain process arising from the common law principle that a master or employer was responsible for injury or death of employees only when resulting from a negligent act by the employer.

Today each of the fifty states has a workers' compensation law. Federal workmen's compensation laws have also been enacted; for example, the Workmen's Compensation Law of the District of

Columbia, the Federal Employees' Compensation Act, and the U. S. Longshoremen's and Harbor Workers' Compensation Act.

Workers' compensation laws basically 1) provide sure, prompt and reasonable income and medical benefits to work accident victims and income benefits to their dependents regardless of fault; 2) provide a single, economical, simple and more prompt remedy; 3) relieve others of the financial drain incident to uncompensated industrial accidents; 4) encourage maximum employer safety and rehabilitation interest through appropriate experience-rating mechanisms; and 5) promote frank study to reduce preventable accidents.

II. The National Commission on State Workmen's Compensation Laws.

In 1972 evaluation by the National Commission concluded that state laws were not living up to their potential. The Commission nevertheless was convinced that workers' compensation is a fundamentally sound system and a valued institution in our industrial economy. In January 1976 the policy group of the Federal Interdepartmental Workers' Compensation Task Force reported its findings on the need for reform of state workers' compensation programs to the President and the Congress. Essentially the Task Force found that existing programs must be reformed to bring about more effective management at the state level.

We feel these programs are improving in that the U. S. Department of Health, Education and Welfare estimated that employers spent $7.8 billion in 1974 to insure or self-insure their work-injury risks. This was over one billion more than the amount spent in the previous year. In comparison the amount spent in calendar 1976 was estimated at $10.8 billion. There have been many changes in state laws since the National Commission's 1972 evaluation and the subsequent Task Force findings. In 1977 alone nearly three hundred laws were enacted by state legislatures covering almost every phase of workers' compensation such as increasing benefits, coverage, reducing waiting periods, increasing medical care and improving administration of the laws.

Undoubtedly much of the legislation enacted in recent years was a result of the impact of the recommendations of the National Commission and the Task Force findings. According to the U. S. Chamber of Commerce, indemnity benefits have been increased in all states in recent years. Forty-two of the states now provide for automatic adjustment of benefits annually, based on the state average weekly wage. In forty-three states the maximum weekly benefit now equals or exceeds 66 2/3% of the average weekly wage for temporary total disability cases. Of these twenty-three states pay 100% or more. In all jurisdictions medical care benefits are now unlimited. And broad coverage of occupational diseases is now provided in all jurisdictions. Most jurisdictions now provide compulsory coverage and coverage is an elective in only three states.

Most jurisdictions now require employers to obtain insurance or prove financial ability to carry their own risk and virtually all industrial employment is now covered by workers' compensation. We should note here that workers' compensation does not seek to cover all worker health problems. To make this distinction fairly uniform statutory definitions and tests have been adopted in each state. Typically the statute limits compensation benefits to personal injury caused by accident or disease arising out of or in the course of employment.

III. How the System Has Worked.

In the business community and at state and local government levels there is basic agreement that the present system of workers' compensation has been improved and works well for interests concerned. In the overwhelming majority of states, benefits paid have more than kept pace with increases in spendable income. According to UBA Inc. of Washington, D. C. all states but Arizona have increased their weekly benefit amounts since 1975 and in several states management and labor representatives work out so-called "agreed bills" of proposed state workers' compensation improvements. Usually these "agreed bills" are subsequently enacted into law by the state legislatures. The state methods of handling and improving workers' compensation have a long history of basic labor/management cooperation and have served the country well for over half a century.

IV. The Basic Issue - Who Shall Decide.

We are deeply concerned over the impact of S. 3060 on the entire workers' compensation program. The basic issues are the proper level of government - federal or state - to make certain decisions in the workers' compensation field and whether the federal government and the Labor Department in particular will make decisions properly representing all interests.

One cannot speak unemotionally of costs in discussing worker health and rehabilitation. But we cannot ignore them and Congress must not act to allow unnecessary expenditures. Inflation is the deadliest enemy of us all. It has been popular to think the country could spend its way out of economic difficulties and increase employment by boosting government required expenditures. Clearly that option no longer exists and, if it ever did exist, it only worked by injecting a bigger dose of inflation into the economy followed by a higher level of unemployment.

Substantial sums must be spent in the prevention, treatment, cure and rehabilitation of job-related disabilities. However there certainly can be a real question raised concerning the identity of those making the ultimate decision in required expenditures. As one example the federal government's General Accounting Office, Congress' fiscal watchdog, has recently declared that hearing loss claims by federal workers have sky-rocketed in the past decade. GAO says such claims under the Federal Employees' Compensation Act climbed to 9,000 in 1976 from

500 in 1969. The 36,000 claims in that period amount to an expected liability of about $185,000,000. GAO attributes that figure largely to a Labor Department change in the criteria for determining hearing loss. The Labor Department acknowledges a problem but does not attribute it to the criteria. The Labor Department's criteria, however, the GAO report says, result in the program paying claims to persons without sufficient proof that the hearing loss is permanent or job-related. The report recommends a return to what it considers more accurate methods for determining hearing loss. Further the rising hearing loss payments typify the entire federal employees' compensation program. This program, applicable basically to sedentary occupations, is akin to what S. 3060 would now apply broadly across the full economy to all occupations. Further, OSHA now reports that work-related illness and injuries among federal civilian employees including the Postal Service increased 17% during 1976. They report 174,989 such illnesses and injuries during 1976 compared to 149,493 for 1975 and 121,052 in 1974. This is a combined incidence rate of 6.4 for 1976, 5.7 in 1975 and 4.4 in 1974. Again the federal programs appear not to encourage maximum job safety or effective effort to reduce preventable accidents.

Our objections go beyond the purely financial impact, important though it may be, and go directly to its impact on the conduct of government and the federal system of government. For under S. 3060, Congress will take over and pass to the executive

branch (Department of Labor) more and more of the responsibility for deciding how a state shall meet the local needs of its local citizens. We recognize, of course, that under our federal system of government the national interest dictates that certain functions be controlled by the federal government. Another principle of our federal system is that the federal government should abstain from getting involved in certain local activities.

Workers' compensation legislation has been before Congress for the past several years but there has been no compelling necessity for these bills to move them beyond the committee level. S. 3060 has basically evolved from these previous attempts.

Workers' compensation after all is the oldest form of social insurance in the United States. Since its introduction it has been state-administered. The various state programs have grown to provide employees and their dependents assured, prompt and efficient aid, financial, medical and rehabilitation in the event of a job-caused injury, disease or death. Despite this historically sound and effective approach to the problem the state workers' compensation system is again being questioned.

We believe that much of the criticism of the state framework evolved from the report of the National Commission on State Workmen's Compensation Laws; but that Commission expressly rejected the suggestion that federal administration be substituted for state programs. A current review of the progress made by the states will not support the drastic substitution of federal administration as contemplated by

S. 3060. Congress has heretofore declined to nationalize the workers' compensation system and has left to the states the final decisions on financing benefits, etc. This arrangement has worked well and there is no compelling reason to change it now.

Benefits have increased regularly both in weekly amounts and duration. Rehabilitation and safety have also received considerable attention. State autonomy has permitted relatively rapid adjustment to local conditions (given the normal routines in the legislative process). Some states, to permit even more rapid adjustment than the normal legislative processes permit, have adopted provisions for automatic adjustments in certain conditions. State autonomy has led to healthy differentials to reflect the various states' and localized industries' conditions and philosophies and even when some mistakes were made, they were less serious since they occurred on state level and had only limited effects.

Probably the most important effect of state autonomy has been the active participation by those directly affected, employers and employees, in the development of state programs generating a sense of responsibility for local affairs. Thus most every session of most state legislatures consider several proposals to amend the state workers' compensation law and all parties affected play close attention to the proposal. This way the administration of these important laws is conducted in a goldfish bowl. This interest in legislation administration

assures that local affairs are conducted in accordance with local needs and that local citizens take full responsibility for their local affairs. Conversely important decisions with important local effects are not decided by federal bureaucrats many miles away with little idea of local health or industry problems. For many years now the original separation of function between the federal government and the states has been under attack by those who for their reasons want to see the system nationalized. These advocates of nationalization have harassed state administrators by unfair criticism and by proposals which would undermine the roles of the states. It may even be suggested that certain of the states having embarked on unwise experimentation in workers' compensation benefits may now extract themselves only by the leveling effect of federal standards. This is not the type of equality the constitutional framers had in mind when they granted to Congress the power to regulate commerce with foreign nations and among the several states. . .

V. The Fallacy that Benefits are Inadequate.

As the Congress knows, there is no universally accepted standard of what is adequate or inadequate workers' compensation benefits. What may be adequate in a rural community may be inadequate in a metropolitan community in the same state. What may be adequate in Virginia may be inadequate in California. What may be adequate for a single man in his early years may be inadequate for a middle-aged married man with a family to support.

What may be adequate for a married woman who is a secondary wage earner may be inadequate for her husband. Each state is the best source for determination of these questions. We recognize that what was adequate in 1948 would not be adequate in 1978 and what is adequate today may be inadequate in 1988 or thereafter. State legislatures have periodically reviewed the benefit structures and we are confident that they will continue to make changes necessary to meet changing needs as it has been in the past. This brings us to the second fallacy in this thesis of proponents;

VI. The Fallacy that States have not Kept Pace.

We have addressed the criticisms of the National Commission on State Workers' Compensation Laws and the healthy adjustments that have been made therefrom. Such commissions from time to time serve a very helpful purpose and there is no reason to believe that future commissions will not likewise bring about future healthy adjustments. The national use of state weekly wage averages and base years and other measurements of benefits are all statistical measures with flaws. We feel that the state is its own best judge of the benefits amounts needed to care for its people and with the highest incentive to keep injured employees from being a general charge to the state.

VII. Conclusion.

At the very least S. 3060 seems to charge that the present workers' compensation system hasn't kept up to date or is obsolete, etc. ATMI on the contrary feels that the present

worker's compensation system is a credit to the state legislatures who have enacted it. It is a credit to those who have so diligently acted over the years with the assistance and advice of employers, state and local union representatives and others to keep it up to date. And it is a credit to the state and local officials who have administered it. The present state operated system for handling workers' compensation has worked well, will work well in the future, and should not be changed by imposing federal benefit standards.



THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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JOSEPH A. SETA, *Treasurer* JAMES M. SPROUSE, *Executive Vice President*

STATEMENT OF

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

TO THE SUBCOMMITTEE ON LABOR

OF THE SENATE COMMITTEE ON HUMAN RESOURCES

ON THE PROPOSED "NATIONAL WORKERS'

COMPENSATION STANDARDS ACT OF 1978 -- S.3060

September 27, 1978

The Associated General Contractors of America is a trade association representing 8400 general contracting construction firms with 113 chapters throughout the 50 states, the District of Columbia and Puerto Rico. It has an associate membership of 17,500 subcontractors, suppliers and other firms closely related to general contractors. AGC members put into place 60 percent of all contract construction done annually in the U. S., employing about three and one-half million on-site workers.

We appreciate the opportunity to present our views on S.3060, the proposed "National Workers' Compensation Standards Act of 1978." AGC is well familiar with legislative proposals at the national level which are intended to strengthen state workers' compensation programs. During the last Congress, AGC submitted statements on the Senate and House bills, S.2018 and H.R.9431 respectively. We also presented testimony on S.2008 in the 93rd Congress. Although S.2008 in the 93rd Congress, S.2018 and H.R.9431 in the 94th Congress and S.3060 now pending before the Senate Subcommittee on Labor are different bills on the same subject, several points from our statements on S.2008, S.2018 and H.R.9431 still apply:

° AGC recognizes the need for reform of workers' compensation at the state level accomplished by state legislatures;

° AGC recognizes the responsibility of the employer to those he employs;

° AGC believes it is unnecessary to rely on an unneeded Federal mechanism which would usurp state workers' compensation programs;

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° AGC believes that creating and implementing Federal standards immediately for workers' compensation would be an extremely expensive burden upon the economy, and;

° Construction firm failures would increase, since long-term, fixed price contracts would be adversely affected by this legislation.

For the reasons which were generally presented above, AGC must oppose S.3060 in the strongest terms.

AGC firmly believes enactment of S.3060 would federalize a process that is best handled at the state level. Although the attempt to improve state workers' compensation laws is laudable, and in several cases needed, improvement cannot be effectively achieved by removing the responsibility for workers' compensation matters from the state level where it is most responsive to the people affected by such compensation. Clearly, gutting the responsibility the state has for its own programs through legislation of this nature is a thinly veiled violation of states' rights. For years we have closely monitored the developments and events surrounding the attempt to federalize these state programs and have repeatedly listened to the question asked as to whether the federalization of workers' compensation programs is indeed constitutional. Once again, AGC is suspect and requests that this question be answered before the Congress expends any further effort in the future on this proposal.

AGC also believes that the Subcommittee on Labor should ascertain whether or not S.3060 conflicts with the McCarren-Ferguson Act. That Act leaves to state control and regulation insurance

matters. S.3060 prescribes that additional Federal regulations for self-insurers may be implemented if the Secretary of Labor believes those regulations are needed in a given state. Clearly, this is Federal intervention in a matter delegated by Congress to the states.

The proposed "National Workers' Compensation Standards Act of 1978" comes at a time when state legislatures are continuing to make progress in passing legislation to meet the 19 essential recommendations for state programs established by the National Commission on State Workmen's Compensation Laws. If state workers' compensation programs are regulated at the Federal level as S.3060 proposes, state legislatures will be handicapped in their efforts to make their programs responsive to factors such as climate and type of economy, which are unique to each state.

State legislatures are meeting little resistance in upgrading their workers' compensation programs to meet the recommendations of the National Commission on State Workmen's Compensation Laws. This improvement is attributed to the fact that there are organizations urging action in the various states to upgrade the programs. These groups, of which AGC is one, are continuing to push for action and expend effort despite the perpetual threat of intervention from the Federal government. These efforts, in our opinion, will be successful if the passage of legislation such as S.3060 does not make the efforts meaningless.

The solution S.3060 provides to the third party liability problem is a feature that AGC can endorse; however, since 1977, AGC

has been committed to an inter-industry effort to amend state tort liability laws to eliminate third party suits. AGC believes that state governments can act with more precision and expediency than the Federal government in this area. Evidence of this is the fact that 13 states have already passed tort reform measures.

The ramifications of this legislation on the national economy are profound. AGC believes that the economy cannot absorb such an expensive proposal at one fell swoop by mandate of Federal or even state legislatures. Such enactment would disrupt underwriting, ratemaking and procurement of insurance coverage for workers' compensation.

An example of the disastrous effects is evident in the state of Illinois, which passed legislation to raise the number of benefits meeting the essential recommendations from six to 14. The result to general contractors was that the premium for workers' compensation coverage was increased, over night, by a minimum of 47 percent. In some cases the increases were 200-400 percent! The effect of such increases on a general contractor who is operating (as most do) under a long-term, fixed price contract is devastating.

For the reasons stated above, the Associated General Contractors of America believes it would not be in the best interest of the nation, the economy or the construction industry to press for enactment of S.3060 or similar proposals at this time or in the near future. We respectfully suggest that consideration of such proposals be abandoned.

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MACHINERY and ALLIED PRODUCTS INSTITUTE
1200 EIGHTEENTH STREET, N.W. WASHINGTON, D.C. 20036 202-331-8430

October 2, 1978

The Honorable Harrison A. Williams
Chairman, Subcommittee on Labor
Senate Committee on Human Resources
4233 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Williams:

The Machinery and Allied Products Institute (MAPI) appreciates the opportunity of commenting on S. 3060, the "National Workers' Compensation Standards Act of 1978." The Institute, it should be noted, is the national organization representing capital goods and allied product manufacturers.

Although MAPI engages in an extensive program of economic and management research, we have not heretofore made any special study of workers' compensation and, hence, do not propose to comment on the specifics of the general program proposed by S. 3060. Rather, our statement is composed of observations on certain very broad questions of national policy necessarily raised by this measure and more specific comments on Section 10 of the bill entitled "Exclusivity and Third Party Liability." We ask that our statement be included in the published record of these hearings.

Questions of National Policy

Notwithstanding the Chairman's arguments favoring adoption of S. 3060 as outlined in his statement to the Senate at the time of the bill's introduction on May 11, 1978, the central question remains of whether or not it is appropriate and desirable to have federal workers' compensation standards. The Chairman's introductory remarks included the observations that "This legislation has succeeded in developing Federal minimum standards which will encourage the improvements which must be made to our State workers' compensation programs if they are to provide fair and adequate compensation to ill and injured workers in a modern, industrialized society. Equally important, this bill accomplishes this goal without creating a new Federal program in place of existing State programs."

Responding no doubt to the rising tide of public opposition to the continuous enlargement of federal regulation of human and business behavior, the Chairman has asserted that

MACHINERY & ALLIED PRODUCTS INSTITUTE AND ITS AFFILIATED ORGANIZATION, COUNCIL FOR TECHNOLOGICAL ADVANCEMENT, ARE ENGAGED IN RESEARCH IN THE ECONOMICS OF CAPITAL GOODS (THE FACILITIES OF PRODUCTION, DISTRIBUTION, TRANSPORTATION, COMMUNICATION AND COMMERCE) IN ADVANCING THE TECHNOLOGY AND FURTHERING THE ECONOMIC PROGRESS OF THE UNITED STATES

the bill ". . . neither usurps the resources and prerogatives of State agencies nor threatens to make a wholesale substitution of Federal enforcement in place of State enforcement." One sentence later, however, we learn that S. 3060 does ". . . provide a backup Federal enforcement mechanism which applies . . . where State law does not meet Federal standards." If the bill were to establish federal standards, and if there would be created a "backup Federal enforcement mechanism" to be actuated upon the failure of a state to satisfy federal standards established by this bill, would this not be "a new federal program" regardless of what we may choose to call it? In a broader sense, it seems proper to inquire if an increase in benefit levels without contemporaneous revisions of a substantial character in existing systems may simply amount to the papering over of present abuses.

Even if it were desirable to have federal workers' compensation standards, would it be wise to establish such standards, particularly at this time? As we understand Section 4 of S. 3060, "monetary benefits payable for total disability or for death shall be not less than 66-2/3 per centum of the employees' average weekly wage . . ." or ". . . 80 per centum of the spendable earnings . . . ." Furthermore, these monetary benefits would be subject to a minimum standard of "not less than 50 per centum of the statewide average weekly wage during the first four of the last eight calendar quarters preceding January 1 [of the year in which the death or disability occurs] . . ." or the employees' average weekly wage, whichever is less. The maximum monetary benefit standard imposed, effective January 1, 1983, "shall be not less than 200 per centum of the statewide average weekly wage . . . ," having been escalated from 100 per centum to 200 per centum of this base over the two-year period beginning January 1, 1981. In addition to establishing high monetary benefit standards, Section 4 would automatically require an annual upward adjustment of benefits for death or total disability (lasting more than two years) equal to at least six per centum.

It seems obvious to us that the enactment of these standards, which in effect establish floors and not ceilings, would result in very substantial cost increases for American industry and which, working their way through the economy, could not fail to be highly inflationary. We also are concerned that such large increases in monetary benefits without improvements in the basic systems might, in fact, create a disincentive to work and thus open the door to abuse by employees./1 In any event, we conclude that even if it were appropriate to establish federal standards and if the standards that would be established by Section 4 might be desirable in the long run, it would be most untimely to enact currently the schedule of benefits proposed by that Section.

1/ We acknowledge that S. 3060 makes certain provisions for administrative standards, but we question how effective they would be in eliminating the potential for employee abuse and reducing the cost to both employer and employee of the administrative system.

Section 10--Exclusivity and
Third Party Liability

In his introductory remarks as recorded in the Congressional Record of May 11, 1978, the Chairman has recognized the very serious products liability problem now facing capital goods manufacturers. This problem, incidentally, is one with which the Institute has been directly and increasingly concerned since 1960. It is perfectly true as the Chairman said in introducing S. 3060: "Under the present system, manufacturers of machinery and equipment continue to be liable for accidents which result from its use, even though they ordinarily have no control over the working environment. This has exposed manufacturers to enormous product liability claims, and has made it difficult for them to obtain complete liability insurance at reasonable rates."

In brief, Section 10 would make workers' compensation the sole and exclusive remedy of injured workmen against the employer, his insurer or any collective bargaining agent of the employer's employees, etc. In addition, it would undertake to mitigate the total products liability problem by providing, first, that in any action against a third party (e.g., a machinery manufacturer) under Section 4, the final judgment against any such party would have to be reduced ". . . by an amount equal to the amount paid to the injured employee or his or her survivors as compensation pursuant to any State workers' compensation law . . . ." And, second, no employer or insurer thereof would have any lien upon any judgment rendered against a third party in an action of this character nor would the employer or his insurer have any right of subrogation in connection with any such third party liability action.

So far as it goes, Section 10 of S. 3060 would undoubtedly tend to reduce in a limited fashion the present products liability problem arising from workplace accidents. The proposal is a step in the right direction but it does not, in our judgment, go far enough.

Not only is Section 10 a step in the right direction, it is wholly consistent with a developing body of both governmental and private sector thought directed to the products liability problem in the workplace. As the members of the Subcommittee know, the Final Report of the Interagency Task Force on Product Liability published on January 23, 1978--and which is surely the most comprehensive study of the subject yet completed--contained a variety of factual conclusions but no specific recommendations. However, in addressing directly the approach envisioned by Section 10 of S. 3060, the Final Report says:

> The cost effectiveness and potential impact of Worker Compensation as a sole source for product liability recovery have made it an attractive one for those considering product liability reform. It would appear that it should be considered along with more general Worker Compensation legislative reform . . . .

> If this reform is implemented, the worker must receive an appropriate benefit for foregoing his third-party claim. Also, the manufacturer of a defective product should contribute to the worker's award./1

Although the suggestion of the Interagency Task Force Final Report--which was subsequently formalized in a Commerce Department "Options Paper" of April 6, 1978--addresses the workplace products liability problem more comprehensively than does Section 10 of S. 3060, it too falls considerably short of providing a sole and exclusive remedy for injuries sustained by a worker in such circumstances.

We believe that the problem can ultimately be solved only by making the workers' compensation award in this kind of case the sole right of the injured employee to compensation for his injury. Let us enlarge briefly upon our reasoning.

Workers' compensation laws were adopted in the first place as a means of providing both assured and adequate compensation for workers injured on the job. To achieve this result the common law rules of tort, master-and-servant relationships, etc., were altered by statute to establish a "no fault" compensation system deemed socially and economically desirable--and one which avoided, generally, the delays and inefficiencies of litigation.

The recent rise of products liability lawsuits--of which the most serious on average are workplace accidents--presents new and very serious social and economic problems. It has resulted in a vast escalation in cost of the very expensive investigation and litigation of products liability claims. It has grown by reason of a significant change in the common law applicable to negligence for defective products and which has very substantially increased liabilities of this character. Almost imperceptibly, but none the less significantly, it has begun adversely to affect research and development and the exploration of new technology, and to endanger the existence of both present and future products which are useful to mankind and important to a growing economy. Finally, only a portion and probably a minor portion of the vast sums expended in the prosecution and defense of products liability claims finds its way into the hands of injured workmen and we ought not forget that it is his welfare to which the workers' compensation laws were addressed in the first place.

In summary, it seems to us that, if the Congress proceeds with the establishment of national workers' compensation standards, it would be both appropriate and desirable for it to make the workers' compensation award the sole and exclusive remedy of the injured workman against all parties. As for any contribution by the machinery manufacturer--as suggested in the Commerce Department's "Options Paper" on this subject--market forces

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1/ Page "1," Executive Summary for the Final Report of the Federal Interagency Task Force on Product Liability.

operating on the insurance mechanism by which the employer protects himself against workers' compensation costs will automatically produce that contribution in very short order and thus eliminate the necessity of requiring some awkward post-accident arbitration proceeding by which negligence and liability would be apportioned between the employer and product manufacturer. Such a culpability-apportionment system would simply perpetuate the costs and confusion now suffered by many applicants under the present legal system.

For reasons already indicated, we are dubious about the desirability of enacting federal workers' compensation standards but that dubiety in nowise affects our belief that workers' compensation should be made the sole and exclusive remedy for workplace accidents whether statutory authority for workers' compensation is federalized or remains at the state level.

This concludes our statement on S. 3060. Again we want to express our appreciation for the opportunity of commenting on this important proposal.

Respectfully,

Charles Stewart
President

STATEMENT OF

AMERICAN TRUCKING ASSOCIATIONS, INC.

ON

S.3060, THE NATIONAL WORKERS COMPENSATION STANDARDS ACT OF 1978

BEFORE THE

SUBCOMMITTEE ON LABOR OF THE

HUMAN RESOURCES COMMITTEE OF THE

UNITED STATES SENATE

September 30, 1978

We welcome the opportunity to have our comments included in the record of your Subcommittee's hearings on S.3060 the National Workers Compensation Standards Act of 1978.

American Trucking Associations, Inc. is the national trade association of the trucking industry, a federation of associations in all 50 states and the District of Columbia. We speak for more than 16,000 firms regulated in interstate commerce, as well as thousands of exempt and private fleets. Truck operations provide employment directly to as many as eight million people. Many of these people labor in occupations which are hazardous and in which safety of operations to employee and to the public are paramount parts of the motor carrier's public service duty. Clearly, the provisions of S.3060 would affect our companies virtually without exception. It is our position that the state workers compensation system basically is working well. With federal encouragement, substantial change has occurred and continues to occur in state laws. This change substantially meets federal objectives but is not without problems for the states. There is a need and a proper role for federal assistance in this difficult area. However, the approach in the proposed legislation is not the one best calculated to meet the needs of employers, employees, and the states. These needs can be met by more guided effort at the State level.

While S.3060 undoubtedly represents a conscientious effort to meet many of the objections to the federal standards bill which was considered in the 94th Congress, we think that the real

problems confronting the states, as they attempt to go forward with an up-to-date system, are not going to be solved beneficially or realistically by a parallel, substitute, or supplemental federal override on the state system.

At stake is the continuing question of whether any federal standards legislation will enhance a benefit delivery system which resides in the states and which on the whole remains efficient, effective, equitable and self-reforming.

1. Background.

Workers compensation laws comprise one of our oldest employee benefits. It is worth reminding ourselves that workers compensation was an ingenious method, begun early in this century, for resolving the uneven remedies of common law. It is a type of no-fault insurance, in which employer liability is limited. By it the employee who is the victim of an industrial injury or illness is compensated during unemployment. While subject to rehabilitative care the law intends he be motivated to return to employment. The cost of disability is absorbed as part of the cost of commerce.

For half a century the states have been perfecting this system, sometimes unevenly, but certainly with an eye on the differing economies and circumstances in their localities. It is a complicated program in which there is a necessary, close interaction among the providers and receivers of benefits. This happens at the local level where the system is best able to be managed. There is probably no larger body of expertise on an employee beneficial matter than exists in the states on this subject. Such a degree of expertise does not exist at the federal level. Present proposals to federalize or otherwise encumber this state system in the absence of sufficient expertise at the federal level would seem both premature and imprudent.

When Congress enacted the Occupational Safety and Health Act of 1970, it expressed concern about certain shortcomings in workers compensation in the states, particularly changes needed because of an "increase in medical knowledge, changes in the hazards associated with various types of employment, new technology creating new risks to health and safety, and increases in the general level of wages..." 1/ The National Commission on State Workmen's Compensation Laws which was established under this law issued its report in 1972, spelling out a number of recommendations for the states. The Commission said that the states were best equipped to carry out its recommended program for improvement. "The states have the distinct advantage of having personnel procedures in place; a federal take-over would substantially disrupt established administrative arrangements. Moreover, we have seen no evidence that federal administrative procedures are superior to those of the states." 2/

The Commission thought that a proper role for the federal government "is to help the states learn from one another." 3/ The Commission urged the creation of another federal commission to provide this assistance. In partial fulfillment of that need, an Interdepartmental Task Force report in 1977, said emphatically, "a more active and effective role for State Workers Compensation agencies is central to our recommendations for reorienting the workers compensation system." 4/

2. The states are reforming their systems substantially according to the federal model. Federal legislation is not needed.

Your record is replete with lists of steps taken by the states to bring their laws into conformity with the Commission's nineteen "essential" recommendations. Advocates of federal standards seem impressed with box-score totals measured by the states' lack of strict conformity with all nineteen recommendations. They say this lack of conformity mandates speedy passage of federal standards legislation. What interests us is whether the states have met, or will have the incentive to continue to reach for the objectives laid out by the Commission.

A review of a number of the Commission's basic points hints at the extraordinary legislative efforts taken by state governments to comply with the national guidelines.

Forty-nine states now call for compulsory coverage of all private employers, an increase of seventeen states over the 1972 level. Thirty-eight states prohibit numerical exemptions in coverage, and among the remaining thirteen the highest number of employees exempted is five. The most common number is three, and this is a reduction in the number of such exemptions over the prior period.

By the end of 1977 all fifty-one state jurisdictions including the District of Columbia had begun to cover occupational diseases with full coverage.

Forty-eight states provide for temporary total disability benefits at 2/3 of the worker's gross weekly wage, and forty-seven states provide permanent total disability benefits at the same level. In 1972, most states limited the amount a worker could receive by various percentages of the state average weekly wage, and most percentages were less than the Commission's recommended 2/3 figure. By 1976 forty-seven states met or exceeded the Commission's 2/3 limit. Twenty-seven met the further objective of a maximum benefit of at least 100% of the state average.

Fifty states now set no limits on time or dollar amount for medical care or physical rehabilitation services for work related impairments.

Fifty states have committed themselves to a stricter accounting of permanent total disability benefits by adding rehabilitation to those recipients of such benefits who still have a potential earning capacity.

What did these changes mean in real benefits? In 1972 twelve states, for example, covering 42.2% of United States workers gave temporary total benefits representing 70 to 79% of spendable earnings. By 1976 twenty-two states covering 51.6% of United States workers reached this level, and another twenty-one states covering an additional 31.9% of United States workers were exceeding 80% of the worker's spendable earnings. 5/

Much of this extraordinary change occurred during the recession.

In 1977, the states enacted nearly three hundred statutory amendments on workers compensation. They considered many others. Excepting the post recession period, the same level of state activity has occurred in most of the years since 1970. In all that time, 51 jurisdictions, including the Congress, legislating for the District of Columbia as if it were a state, have enacted close to two thousand amendments. This rate since 1971, if annualized, is about triple the level of legislative activity in the years prior thereto.

It is important to recall that the Commission issued 84 recommendations. It considered all of its recommendations important. Many of the states' amendments touched these other important but less essential recommendations. No one apparently has tabulated or analyzed the full extent and effect of the States' conformity with these other recommendations. If this has been done, it is not generally known. Nor has the effect of such enormous state activity been adequately examined in these hearings. For example, has any among the advocates of S.3060 asked what problems the states were encountering when they enacted some parts of the more difficult recommendations, but failed to enact others? This question has not been answered in these hearings. Suggestions for increased technical assistance have been all but ignored.

We think it is clear that most state governments have taken extensive steps to comply with the national guidelines. They have done so with their own money, personnel, and court systems and with full recognition of the varied circumstances in their localities. This change is truly astounding if it is realized that little federal help to adjust state laws was forthcoming for five years until the appointment of the Task Force.

It also seems clear that these many legislatures took swift action, even on controversial subjects, because they thought that if they corrected any deficiencies, Congress would leave them alone. For Congress to act now, even while state legislatures are continuing to move, might well prompt some to reverse direction and even to repeal their state enactments.

In 1977, the Task Force Policy Group completely re-evaluated the states' progress. It did so critically and with care. Opening its report, the Task Force Policy Group recommended giving the states a while longer to strengthen their workers compensation systems. "Legislation," to federalize the system "it said," is not warranted at this time. 6/

Furthermore, the Policy Group said, it "believes that the problem[s] in worker's compensation are due as much to the structure and management of the system as they are to the adequacy of benefits. More and more may be less the answer than better and better." 7/ "Although we concur," they went on to say, "with the thrust of the nineteen essential recommendations of the National Commission, we believe it is time to move beyond these recommendations and endeavor to improve the efficiency of worker's compensation programs, and their effectiveness in obtaining their fundamental objectives." 8/ They did not agree that federal standards legislation is the only or best way to achieve this.

Our contention is that states are still on their way toward changing their laws, and that federal legislation is not desirable or needed now to interrupt the process.

3. S.3060 is not the answer to the problems now facing the state benefit systems.

The introduction of this legislation comes at a time when the states have made decided progress toward the objectives set forth in the legislation. They have much new law to digest, and the digestive process is not complete.

As state benefit levels have increased, both for wage replacement and health care, some states have rolled-back some changes. Thus evidence emerges that the system is not easily accommodating the extent of change. Complaints are heard that state personnel cannot handle claim loads. Administrative procedures have not kept pace. Abuses have crept in. Insurance carriers warn of non-insurability. Employers complain that as claimants receive so large a part of spendable earnings, there is a disincentive to return to work.

We think the states can accommodate these matters, given time. Far from helping the states to accommodate change, however, the federal role contemplated by this bill will add further burdens to state laws.

We think this is not the time to offer commentaries and criticisms in every detailed aspect of the S.3060 provisions. You expect to hold further hearings next year. The intervening time will allow us to consult further with our companies. We then hope to give you our additional views on all of the problems this bill presents.

At this time, let us briefly state some of our more basic concerns about this legislation.

a. The federal supplement will present substantial administrative impediments for all parties to the state system.

Whatever the disclaimer of advocates of a federal standards measure, we think the federal supplement measure will trouble employers, claimants and state administrators more than anyone contemplates.

It cannot be expected that all state jurisdictions may ever totally be certified according to the Secretary's interpretations of the statute. Indeed his policy judgments on what the state legislatures, administrative bodies and courts have done during the year will lead to controversies on what is certifiable.

An employer's failure to pay the federal benefit level once a case has progressed through the state system then triggers procedures under the Longshoremen's and Harbor Workers Act, an overburdened, costly, inefficient, and discredited process.

b. The bill does nothing to help solve abuses in the partial disability area.

Instead this bill would bifurcate the state system by creating a federal responsibility for the size and extent of permanent disabilities, while leaving responsibility for partial benefits with the state. This split benefit responsibility will involve parts of the benefit packages of many individual recipients, and will further unbalance benefits and administration in the states.

c. No estimates have been made of the costs of the legislation.

The costs of a health care system in which wage replacement also is involved cannot be ignored. The examples of other federal workers compensation enactments in Black Lung and in Longshore and Maritime are too instructive to be ignored. Here a federal presence has created systems which the economy probably will not be able to afford. This would be especially true, if so many discrete state systems are translated into more generic law.

The National Commission's cost estimates went only to its nineteen recommendations at pre 1972 inflation levels. No indexing or other escalator guarantee provision was included. However, this bill provides for an escalator feature of no less than 6% per year. We have seen no estimates of its effect on state plans. Given the billions of dollars which the state programs cost now, it would seem prudent to evaluate the costs of each provision of the legislation, and to evaluate other less costly alternatives. As laudable or necessary as some reforms may be, questions need to be asked about how best to spend available money to achieve necessary objectives without putting

further impossible burdens on state plans.

4. Conclusion.

The preceding by no means exhausts our problems with this legislation. We have suggested that the states have made enough change to satisfactorily have met the objectives set by the Commission. However, the current legislation, far from assisting states in improving their laws, seems apt to encumber them with a piecemeal federal takeover, creating excessive costs for state, employer and employe alike. Unnecessary and excessive litigation will result.

And worst of all effective delivery systems in many states will be disrupted. This legislation ought not to be enacted.

We urge that the states be allowed the breathing period necessary to digest the hundreds of enactments already on their books. We urge that the amount of federal research and study already given this subject be given more time to work its influence at the state level.

FOOTNOTES

1/ The Report of the National Commission on State Workmen's Compensation Laws, 1972. p. 13

2/ Ibid, p. 26

3/ Ibid, p. 26

4/ Report to the President and the Congress of the Policy Group of the Interdepartmental Worker's Compensation Task Force, January 19, 1977, Commerce Clearing House Reprint, p. 3.

5/ Statement of Andre Maisonpierre, American Mutual Insurance Alliance, on S.2018 before the U. S. Senate's Subcommittee on Labor, p. 341-3, March 4, 1976.

6/ Task Force Policy Group; see footnote 4, p 2.

7/Ibid, p. 37

8/Ibid, p. 38

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SENATOR WILLIAMS, N.J.
1978 OCT -9 PM 2:50

October 3, 1978

The Honorable Harrison A. Williams, Jr.
United States Senate
352 Russell SOB Building
Washington, D. C. 20510

Dear Senator Williams:

In response to your letter of September 11, 1978, I make the following comments on S.3060, The Workers' Compensation Standards Bill:

Surprise is voiced that hearings would be held on this bill at this time in this session, unless the constituency and composition of the committee is expected to be the same in the next session of Congress. According to the President there are so many pertinent issues pending.

Presently, we have an inappropriate and undemocratic situation in an amended law which should be corrected before S.3060 is considered. That is the Longshoremen's and Harbor Worker's Compensation Act which amendment thereto (fall 1972) extended the jurisdiction of that act for the first time "beyond the waters edge" to the Shipbuilding and Repair (including Ship-breaking) Industry -- this without any representation and in haste -- witness the committee, the staff and floor actions following that midnight session of the Committee. Never before in the history of the Act had it been applied to our industry except over the water -- the navigable waters of the United States which are historically the province of the Federal Government.

S.3060, which I believe is patterned after the LHWCA, can be logically assumed to have similar ills to the LHWCA. These are so serious as to require Congressional correction before attempting to saddle our once highly productive American Industry with a preemptive Workmen's Compensation Law drawn and administered as the LHWCA.

The Louisaina Shipbuilding and Repair Association is a State Association whose members cross all segments of that industry in this State. There are, according to the latest published Federal statistics (1976), some 142 companies engaged in ship and boat building and repair in this State. These companies

employed directly (at that time) 19,707 personnel with an annual payroll of $251,342,000. These establishments run the gamut in size of those hiring 1-4 employees to those hiring 1,000 or more. Twenty (20) establishments hire 250 men or more, nineteen (19) hire 50-249, and one hundred one (101) hire 49 or fewer employees. The value of the product of this industry in this state -- toward the national economy was $784,200,000.

It is on these employers that the brunt of the expense of insuring and litigating the LHWCA falls. This "model act" or a reasonable facsimile thereof we cannot afford to have applied to the whole of American industry.

We need incentives to work, not disincentives.

In the matter of Workmen's Compensation Federal law should not preempt State law. Nor would it be proper to have standard wages across the nation, for living expenses vary with the geographic locale. Wages in each are geared to the COL in that area. A New Yorker (bankrupt State) moving to New Orleans should not expect to be paid at the same scale as a New Yorker for our COL is lower.

With the nation on the verge of bankruptcy it seems highly unwise to foster laws which boost the cost of business (which is passed on to the consumer) and which is labelled "inflationary" (putting business in that dog house). At the same time high Workmen's Compensation payments serve as a disincentive to production -- to work. In these days of mal-practice suits Doctors are part of the problem in that they err on the ultra-conservative side.

Our nation, to regain economic (and moral) health must stop subsidizing unemployment.

The same faults in administration that have been experienced in federal workers compensation administration are a problem in LHWCA including skyrocketing awards/benefits and insurance costs. Add to this the costly litigation involved in LHWCA cases and the program becomes a potentially damning law to a large segment of the industry to which it applies and indirectly harms the employee you seek to serve.

Our position is that the LHWCA must be reformed/amended before S.3060 is considered and put before the Congress.

Respectfully,

John D. McCubbin
President

JDMC/cs

STATEMENT OF STEWART E. NILES, JR.
SPECIAL COUNSEL FOR THE SHIPBUILDERS COUNCIL OF AMERICA

ON

S. 3060, THE "NATIONAL WORKERS' COMPENSATION STANDARDS ACT OF 1978"

BEFORE THE

SUBCOMMITTEE ON LABOR
COMMITTEE ON HUMAN RESOURCES
UNITED STATES SENATE

OCTOBER 6, 1978

STATEMENT OF STEWART E. NILES, JR.
SPECIAL COUNSEL FOR SHIPBUILDERS COUNCIL OF AMERICA

I.

Introduction

The Shipbuilders Council of America reiterates its request for appropriate time to review and analyze any proposed national reform of workers' compensation programs. Since additional hearings are to be scheduled next session of the Congress, the Shipbuilders Council of America respectfully requests adequate opportunity to present such discussion when next these hearings convene.

This statement is prepared by Special Counsel for workers' compensation programs, Stewart E. Niles, Jr., a partner in the law firm of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, Louisiana. Counsel's practice embraces personal injury litigation, including workmen's compensation laws under State and Federal statutes. In the arena of workers' compensation, he has represented claimants, self-insured employers and insurance companies.

The Shipbuilders Council of America is a national industry trade association composed of major shipbuilders, shiprepairers and ship component manufacturers. Most of the 172,400 private shipyard workers are employed by members of the Shipbuilders Council of America. In the private sector, shipyard workers comprise the largest number of workers covered by the provisions of the United States Longshoremen's and Harbor Workers' Compensation Act.

II.

Experience of Workers' Compensation Programs Amended by Congress Since the National Commission Report

S. 3060 is not the first workers' compensation reform legislation to be reviewed by this Committee. Indeed, as a direct reaction to the report of the National Commission Report on Workers' Compensation Systems, the Congress enacted "reform" amendments to the United States Longshoremen's and Harbor Workers' Compensation Act. The 1972 Amendments to the USLHWCA were heralded as the establishment of a "model workers' compensation system." The USLHWCA, it was reported, would avoid litigation as a program capable of self-administration and be easily comprehended by claimants. The USLHWCA, it was said, would represent a workers' compensation system that would be adopted by the states as the best response to the challenge of compliance with the National Commission Report.

The representations and sayings were mere works without substance. The well-intended actions of the Congress in 1972 have caused virtual disappearance of insurers, total disappearance of reasonable insurance rates, a morass of administrative entanglements, expensive and extensive litigation at all levels, and serious potential for economic ruin for a substantial segment of employers. Since S. 3060 contains many of the provisions of the 1972 Amendments to the USLHWCA and since Federal reform of state workers' compensation programs is premised on the "model system" of

the USLHWCA, it is imperative to review the experience of the USLHWCA since 1972.

Oversight hearings conducted by the Subcommittee on Health, Compensation and Safety of the House Committee on Education and Labor are a study in statutory and admininstrative abuse. Partial review of the problems is staggering. In a poll of Congressmen, the agency charged with administration of the USLHWCA, the Office of Workers' Compensation Programs, Department of Labor, produced "the greatest volume of complaints from the public to Congressional offices," The Washington Post, August 17, 1977. Indeed the best assessment of the Office of Workers' Compensation Program's effectiveness is summed up by Assistant Secretary Donald Ellisburg at a Shipbuilders Council of America conference in San Diego in April, 1977; he observed that administration of the USLHWCA is "totally out of control". In subsequent testimony received during House oversight hearings, compared to awesome problems, scant change was revealed.

In part, the difficulties arise from inept administration, but the major problem is the statutory scheme. Insurance company dislocation from the market has diminished participating insurers to two or three. Underwriting of new business in almost absent. Reasonable rates are nonexistent. The shipbuilders' experience approaching approximately a 400% increase in total cost is representative for all employers. Closure of some small shipyards has occurred in the wake of economic havoc. Through the Oversight Hearings conducted by

the House Subcommittee, facts and figures confirm unreasonable costs escalating uncontrollably. The 1972 Amendments transform the USLHWCA from a workers' compensation system into social welfare insurance, into a retirement program, and into provisions tantamount to life insurance.

Similarly, the Federal Employee's Compensation Act exemplifies waste of taxpayer's dollars. The General Accounting Office criticized FECA in a recent study. Of major concern was the unwarranted award of benefits in 40% of cases reviewed without establishing that the claimant's disability or death was caused by Federal employment. However, the General Accounting Office's condemnation of the FECA program has not generated legislation to ease the taxpayer's burden. The Congress should direct its energies to reform FECA and alleviate the burden placed upon taxpayers as a consequence of unwarranted payments and related abuse.

III.

Congress Should Not Embark Upon Reform of State Workers' Compensation Standards Until Congressional Enacted Workers' Compensation Programs Such as USLHWCA and FECA Are Made Equitable, Predictable and Affordable

Since 1972, state workers' compensation programs have undergone meaningful transformation. Controversy exists only to the extent of the states' efforts. Unquestionably, the states have enacted significant reform. Improvement of benefits has resulted from considered deliberations. Dramatic change has been occasioned, and all indications point to further improvement.

Conversely, Congressionally enacted and federally administered compensation programs border on catastrophe. So called "reform legislation" was speedily enacted without careful evaluation of the recommendations of the National Commission. The resultant system authorizes abuse and embraces inefficiency and unnecessary cost. To date, amendments to Congressionally enacted workers' compensation systems have not provided both equitable benefits and reasonable costs.

Considerable resources could be marshalled to analyze the factors causing the myriad of problems. The House's Oversight Hearings have demonstrated that attempts to reform the "reform" legislation will be difficult. The most telling point, however, is that the Congress has not proven it has a solution to correct the deficiencies in its created and administered programs, much less those of the states. Before imposing "reform" of state workers' compensation programs and thereby creating the potential for tremendous cost impact, administrative inefficiencies, and insurance unavailability, the Congress should first amend workers' compensation programs under its jurisdiction. After the Federal Acts are proven equitable to employers and employees alike, then reform of state workers' compensation programs could be considered.

Indeed, it appears premature of the Congress to consider reform of state workers' compensation programs which have steadily improved since 1972. Although the rate of change by the states is in question, change has proceeded orderly.

Conversely, the USLHWCA approaches a catastrophic situation. The critical urgency for reform in the workers' compensation sphere is not at the state level but at the Federal level.

IV.

Testimony and Analysis of S. 3060 by Shipyards Is Crucial in Light of Their Experience of Amendments to the United States Longshoremen's and Harbor Workers' Compensation Act

The Shipbuilders Council of America represents the largest segment of employers of workers in the private sector covered by the 1972 Amendments to the USLHWCA. The shipbuilder's experience under the USLHWCA is broadest and traverses the full parameters of the Act. Accordingly, the Shipbuilders Council respectfully submits that it should be afforded ample opportunity to testify and submit analysis of any proposed legislation covering national workers' compensation standards, including S. 3060.

Finally, the Shipbuilders Council of America further submits that the USLHWCA should be amended to make it an act worthy of its billing as a "model compensation act". Criticism of state programs by the Congress must come by example. The Congress must cure the ills of its own programs and strike the proper balance between equitable reparations and reasonable costing. In essence, the experience of USLHWCA and FECA should perforce incite reform of those Acts. The necessity to reform state workers' compensation laws should be considered after balance is attained in the USLHWCA and FECA.

WRITTEN TESTIMONY OF FRANK B. HALL, P.E.

ON BEHALF OF THE FOUNDRY EQUIPMENT MANUFACTURERS ASSOCIATION, INC.

Before the Subcommittee on Labor
Committee on Human Resources

United States Senate
September 28, 1978

I am Frank B. Hall of Beardsley and Piper Division, Pettibone Corporation, and am a member of the Product Liability Committee of the Foundry Equipment Manufacturers Association, Inc.

FEMA is a national association of foundry equipment and foundry supply manufacturers. With a membership of over 65 company members, FEMA represents a very substantial portion of the foundry industry throughout the United States.

FEMA is also a member of the Special Committee for Workplace Product Liability Reform (SCWPLR), and supports strongly the testimony given by Mr. Taft on September 22, 1978, and the amendment to Section 10 proposed by SCWPLR.

On behalf of FEMA, I offer for inclusion in the record of these hearings on Senate Bill S3060 the position paper of FEMA which deals with product liability and the industrial accident.

The paper originally appeared under my name in the materials of First World Congress on Product Liability in January, 1977, and after some revision was adopted in 1978 by FEMA as its official position paper.

The fundamental solution this paper advocates is that of making workmen's compensation the sole and exclusive remedy of the worker in the case of injury in the workplace. The paper emphasizes the essential differences between consumer product accidents and the industrial workplace accidents, the 'lost right' of the manufacturer which makes him so vulnerable to litigation, and the critical role of the litigation-shielded-employer in accidents for which the manufacturer of a machine is sued.

For the convenience of the committee, the FEMA position paper has been arranged in the following order: 1. Summary, 2. Discussion, 3. Proposed Solutions, 4. Comments, and 5. Table of Contents.

SUMMARY

The industrial accident differs radically from the consumer accident.

The difference is recognized by the U.S. Government in its two separate safety agenices, one directed to the manufacturer, the other to the employer.

The facts of the industrial accident are fundamentally affected by workmen's compensation; the facts of the consumer accident are in no way so affected. In the industrial accident, both the machine and the operators are under the control of a third party whose actions and conduct have a profound effect on prevention of accidents.

The manufacturer has already lost a right in workmen's compensation without ever receiving a corresponding benefit; to the contrary, its existence has encouraged an increase of predatory litigation against him.

The only long range equitable solution to the present dilemma is the inclusion of the manufacturer under workmen's compensation.

> "Indeed a product liability system for dealing with accident losses occurring in the course of the use of industrial and commercial products need not logically be the same as that for products intended for use by the consuming public at large.
>
> "As for products intended for industrial and commercial use, fault might well be a requisite to recovery, especially in the light of two other liability-without-fault schemes applicable to the users of these products - the workmen's compensation system for the protection of employees and the abnormally dangerous activity doctrine applicable in most jurisdictions that protects bystanders in many situations."
>
> THE MEANING OF DEFECT, PAGE KEETON, 5 St. Mary's Law Journal 30, (1973)

DISCUSSION

The machine as a typical industrial product

For convenience in reference and because it is particularly illustrative of of the issues involved, the machine is selected as rperesentative of industrial products in general.

The present situation

An employee falls off a walkway in his employer's workplace and is injured. Regardless of fault he receives compensation under the workmen's compensation act.

Alternatively, the employee falls of a machine in his employer's workplace and is injured. Again, regardless of fault he received compensation under the workmen's compensation act.

Now, supported by compensation payments, he brings suit against the manufacturer of the machine. He is already receiving compensation through routine application, and all that he needs to show is the work-related injury. Even if he should fail in his suit against the manufacturer, his compensation is not affected. During the trail the jury is never permitted to learn of this compensation. (They must continue to believe that if he does not succeed in the litigation, he will receive nothing.)

In some of the discussions of strict liability, there is the implicit argument that the injured party being under great financial pressure because of medical bills and loss of income should be favored with a legal scheme that will facilitate his successful litigation against the manufacturer. If in fact there be any validity to the argument with regard to consumer products, it fails utterly under the facts of the industrial accident.

The "lost right" of the manufacturer under workmen's compensation

The justification of the original compensation acts was straightforward. Both the employee and the employer gave up established rights in exchange for new rights. Regardless of fault, the employee when injured receives assured compensation. The

employer in agreeing to such no-fault compensation receives immunity from suit by the employee. This was the basic constitutional justification for the acts.

In effect it was an "agreement" between two parties arranged by the legislature. The employee received the assurance of compensation even if he were at fault, and the employer was immunized from suit even if he were at fault. But immunization affected other rights, namely those of the manufacturer who lost his right to sue the employer!

The manufacturer's relation was never discussed except incidentally. At the turn of the century when workmen's compensation acts were first being passed, an employee's suit against the manufacturer instead of his employer was virtually unheard of. Later, when the manufacturer was sued and he tried to bring the employer in, the courts in most cases insisted that the workmen's compensation act had insulated the employer and denied the manufacturer the right to sue that employer.

As one jurisdiction states simply: "that which may not be done directly, may not be done indirectly." The defendant manufacturer may not make the employer a defendant when the workmen's compensation act has precluded the employee from suing the employer directly.

The refusal of the courts to recognize the manufacturer's right is now predicated upon the existence of a workmen's compensation act, and that act came into existence only by ignoring the manufacturer's real part in the relationship!

Ironically, it was the very immunity of the employer from suits by the employee that eventually shifted the focus of litigation to the manufacturer. Jury awards exceeded compensation awards by an order of magnitude, and legal fees were fatter and jucier in litigation. Because the employer was immune from suit, it now became the lucrative task of the plaintiff's attorney to translate the employer's negligence into a defect existing in the manufacturer's machine.

For instance, where in the absence of a workmen's compensation act the employee would have sued the employer for negligence in taking off a machine guard, the plain-

tiff's attorney now, with the employer immunized from suit, ignores the employer and attacks the manufacturer for the "defect" of having made it possible for his machine to run without the guard. See the later discussion of this. The rationale is not logic or justice, but dollars.

To repeat; without having been assured of immunity from suit, the employer never would have agreed to grant no-fault compensation to the employee. But the employer could never receive immunity without depriving the manufacturer of his right to sue the employer. Hence, to give the employee no-fault compensation, the manufacturer was deprived of his right.

In all equity and justice, workmen's compensation has to be a legislatively constructed bargain struck among three parties--employee, employer, and manufacturer. However, to allow the manufacturer to recover his right to sue the employer now is to deprive the employer of the benefit he bargained for, while allowing the employee to keep the benefit he bargained for.

Certainly, the only equitable way or preserving the compensation system is to grant the manufacturer not his original "lost" right but an equivalent right; namely, the same kind of immunity that the employer enjoys--immunity from suit by the employee.

The workmen's compensation acts have been basically successful, even though subjected to abuses, is unquestioned in this age. They will either be amended to correct the present unfairness by immunizing the manufacturer like the employer or be subjected to economically forced attacks by the manufacturer on the employer's immunity. These attacks, if successful, will finally deprive the employer of his benefits under the act, and eventually leave as a sole beneficiary the employee. Eventually, such a one-sided arrangement, having lost its support, will topple.

Reasons given for the doctrine of strict liability

Two statements can be found echoing down the long line of strict liability cases. That in industrial cases they are as false as they are frequent has never been adequately emphasized.

The first statement is that with regard to the injured party, the manufacturer has made a profit from the sale of the product, and as the enterpriser should therefore bear the costs of the risk of injury. It can easily be recognized that in the industrial scene there is not one but two enterprisers -- the manufacturer and the employer. Although the manufacturer makes a profit on the initial sale of the machine, this is a single, one-time profit. The employer makes a profit from the operation of the machine over its entire lifetime. If a choice for bearing the risk were to be made between these two enterprises on the basis of profit alone, the employer is certainly the obvious choice.

The second statement is that the manufacturer is in the best position to include the cost of compenating injury in the prices of his products, and therefor the best one to distribute the risk to society. One must realize that the choice here is really what costs should be distributed to society. That is, shall the distributed cost to society be the cost of adequate workmen's compensation or the cost of unlimited judgments resulting from litigation?

In the employer's case, it is the costs under workmen's compensation in which the amounts are pre-determined for injuries, only after studies, hearings, debates, and due deliberation by a legislative body. In the manufacturer's case, it is the costs that result from series of jury decisions—juries that have been subjected to skillful barrages of emotional appeals and have no thought of the cumulative ultimate impact of their decisions on society.

While we speak of one-third to one-half with regard to the award itself, it is instructive to compare the attorney's feel to the plaintiff's net recovery. One-third now becomes fifty percent and one-half becomes a hundred percent. This is, the attorney receives fifty to one hundred percent of what the injured party receives.

That the value of a lawyer's services should be measured by the extent of his client's insuries is understood clearly only by the plaintiff lawyer's bar.

Examine the actual facts of the situation. If there ever really was any thought that the manufacturer could distribute the costs of the present magnitude of suits and awards, that thought is certainly discredited now. Witness the present crisis in insurance premiums, and in fact the utter inability of the smaller manufacturer to obtain insurance at all, while the larger manufacturer merely postpones the ultimate disaster by self-insuring.

Negligence versus strict liability and breach of warranty

The proposed solution provides that if the employer sues the manufacturer to recover compensation, the action shall be solely in negligence (2(a) and 2(b)). This is an important condition.

As presently interpreted, strict liability is not suited to the purpose of an action to recover compensation; and breach of warranty, a monster shaped by the courts out of a reluctant sales contact, has long since outworn its dubious usefulness. Negligence remains as the logical choice for the action.

Yet if we cannot establish negligence as the sole basis for an action of recovery of compensation (2(a) and 2(b)), then it will be necessary to take a harder look at the doctrine of strict liability.

The reason is that in such an action, inevitably there will be some responsibility on the part of both employer and manufacturer - and perhaps as well on the part of the injured employee. Strict liability is not inherently constituted to permit allocation of fault. There must be some way to accommodate the doctrine to the situation.

Courts have consistently refused to apply the doctrine of contributory negligence under the strict liability doctrine, deeming it irrelevant because strict liability will lie even where the manufacturer "... has exercised all possible care in the preparation and sale of his product..."

Yet the injustice of finding a defect responsible when the injured party has been grossly careless and negligent has troubled the courts who are now slowly

turning to "comparative negligence" as an adjustment. After liability has been found, some courts are saying, "leg us look at the comparative negligence of the parties to see if the defendant should pay the full award or only some part of it dependent upon his share (of fault?)."

While the logic of insisting that an action has nothing to do with negligence and then evaluating the amount of negligence on each side might trouble a layman, it does not trouble the sophistication of the courts, which were producing legal fictions long before science fiction came into vogue.

The judicial process in fact seems at times like a skillful magician who is actually doing one thing while appearing to do another, and simultaneously telling his audience a pleasant story about the whole matter.

A more forthright approach might be to foresake the doctrine of comparative negligence and adopt an extension of some of the basic terms of strict liability. It can be recognized that a "defect" may in fact be a composite defect, composed of defects contributed by various parties. The term "defect" already has an elastic meaning, having very little relation to a word of the same spelling found in Webster's dictionary.

It would be quite simple to agree that actions of the employer or of the employee might be of such nature as to constitute a defect, or a contribution to a composite defect. Where such a contribution by several parties to a composite defect existed, it would then be equally simple- and quite logical- to adopt a theory of contributory or comparative defect. Thus the results of applying comparative negligence could be reached without ever tripping over the illogic of that concept in strict liability.

Perhaps then the concepts of composite defect and comparative defect might be successful in making strict liability slightly more applicable to an "action of recovery of compensation."

The Government view of consumer and industrial products

It is highly significant that the United States Government in its program for

improved safety takes two different approaches to the subject.

In the case of consumer products, the Government focuses on the manufacturer of such products under the Consumer Product Safety Act.

In the case of industrial products, the Government focuses not on the manufacturer, but on the employer. Under the Occupational Safety and Health Act (OSHA), the government regulates in the workplace. The obvious criterion is control of the product.

It is also frustrating that the courts take no notice at all of any difference between consumer products and industrial products, applying with fine impartiality the same reasoning to the electric toaster as to the giant transfer line.

The critical role of the employer in machine accidents

One purpose of this paper is to emphasize that the employer is an active party in the safe operation of a machine, and the theories of liability that do not recognize his role as an enterpriser along with the manufacturer warp justice. The manufacturer who has once released his machine into the employer's control is thereafter at the employer's mercy with regard to liability, perhaps beginning with a faulty installation in which the machine is neither level nor secure.

Consider a machine with a number of guards. Poor supervision on the part of the employer will result in their removal. Hinges or chains will not defeat negligence, for the hinges can be removed and the chains can be cut and discarded. Only the employer can control this.

Interlock switches are not the answer and are often contraindicated. They may by their very presence invite reliance on their "released" mode and suggest to an inexperienced man that it is safe to reach into the machine, when in fact they might be shorted or malfunctioning because of poor maintenance or neglect by the employer. They are easily defeated by tying them down or jumping their connections in the control cabinet. Or they may be disabled by accident, as for instance with a crushed conduit shorting the two leads electrically. Only the employer can control this.

If such interlock switches are used, they can create more of a problem than an effective simple visual inspection program. For instance, they require frequent checking. But they can be checked only by partially removing each guard. On a machine with many guards, this could be intolerable and lead to neglect of the testing. Again, the

employers control makes the difference.

The real answer to keeping guards on a machine is a strict policy by the employer of enforcing safety rules. At its best the interlock switch requires frequent checking and inspection. Is the employer who negligently allows guards to be left off machines apt to exert due care in checking and testing interlock switches?

Warning and caution signs are commonly applied to machines, but an effective program of safety training resulting in the awareness of industrial hazards is preferable and far more effective. Only the employer can provide such a program. Signs that are allowed to be covered by dirt and grease or damaged, removed or painted over fail to warn. Only the employer can prevent such deterioration.

The courts have said that a warning is not adequate unless it also set out the consequences of its violation. Such lengthy negative injuctions are only possible in some meaure by inclusion in a manual of operation and maintenance. Unless the employer makes the manuals available to the machine personnel, requires their reading or instructs from the manual, and periodically reviews them with machine personnel, the warnings will not be effective.

Particularly damaging is the employer who permits the machines to run without proper maintenance, without repair of worn parts, and with only enough servicing to keep them running. Worn parts may produce unsafe conditions, but only the employer can control this.

The manufacturer of a complex industrial machine must be able to rely on the employer providing competent tradesmen in the mechanical, electrical, and fluid power fields. He must be able to assume that they know the safety procedures peculiar to their own trades, for there is no way he can include all of these in the machine's special instructions. Yet if the employer is careless in assigning personnel or negligent in not having competenent personnel to assign, their own lack of competency may be visited upon the manufacturer in a suit based on an analogy to a consumer product.

Worst of all is the employer who permits his employees to reach into, climb upon or into a machine that has not been properly shut down, or whose power is still on, or even one that is in autuomatic mode. This is a particularly fertile cause of injury, and

one which only the employer can control.

Another fertile source of injuries is sponsored by the employer who buys that thirty-year old machine resurrected from the junkyard; "modernized" by a gasoline bath and a coat of paint; altered, modified and minus guards. This "bargain" for the employer is a nightmare of liability for the manufacturer.

PROPOSED SOLUTIONS

****1. Legislation declaring that any injured party whose injury falls under the provision of a workmen's compensation act be limited to the provisions of that act for determination of his damages and limited to his employer for their recovery.

****2. (a) That the employer has the right of recovery of part or all such damages against the manufacturer of a machine or product causally related to the injury, the suit being brought in the employer's name.

(The action is to be identified statutorily as a "right of recovery of compensation." It is obviously not a subrogation action since under this proposal the employee has no right against the manufacturer to which the employer could be subrogated.

Because of the various interpretations and limitations on contribution and indemnification in the various jurisdictions, it would be advisable in carrying our the intent of this right of recovery to distinguish it from such actions.

It is also quite possible that by treating this as a specialized action, that allocation of fault (under the negligence theory) could be incorporated even in a State that had only contributory negligence.)

*** (b) That the action of recovery be permissible only as a tort action based on negligence, breach of warranty and strict liability being prohibited as inappropriate remedies for the purpose.

*** 3. That all usual, ordinary, and traditional defenses to a negligence action be available to the defendant including (accoring to the jurisdiction) contributory or comparative negligence on the part of the injured employee, fellow employees, or the employer.

** 4. That a complete defense to the charge of foreseeable misuse would be the showing that the misuse was a violation of a recognized and generally accepted shop rule of safety. (Example: Violation of the rule never to measure or adjust the work with the machine in operation.) Stated another way, showing that the misuse was identifiable as an act recognizable as a "critical incident" as that term is used in safety engineering, would be a complete defense in a "right of recovery" action.

** 5. That the manufacturer be notified promptly of an accident and be granted full and immediate access to relevant records, witnesses, and the accused product. That these conditions be conditions precedent to the bringing of any later "right of recovery" action by the employer.

**** 6. Statute of limitations to apply on the basis of negligence; and that in any case no suit shall be brought on any product more than six years after shipment by the manufacturer.

* 7. That an action for recovery (see par. 2(a) by the employer or the employer's insurance carrier would be reviewed by a board of experts to determine whether there was sufficient merit and plausibility to the case to permit it to go to trial.

8. By mutual consent, the parties could elect to have the judgment made by the review board, with costs borne equally by the parties.

9. That the burden of the present liberal discovery process permitted by the courts in interrogatories and depositions be lightened for both sides by a preliminary review and determination. This review by a board of experts would limit the areas in which discovery might proceed. Their decision regarding such limitations would have a presumptive effect in a subsequent suit, but the presumption would be rebuttable.

COMMENT

Listed in order of importance (indicated by *) and desirability, the paragraphs are:

****	1,	2(a),	6
***	2(b)	3	
**	4,	5	
*	7,		
	8	9	

(Paragraphs 8 & 9 are subject to future consideration)

Under the above proposals in which all of the involved parties are included fairly, workmen's compensation would more nearly serve the purposes for which it was intended- assured prompt compensation for the injured employee and an end to wasteful protracted litigation in which only the attorneys profit.

The employer has the greatest continuing control of the product. He is responsible for its proper maintenance, its proper use, and is responsible for training and instructing those who will use the machine or product. He is also responsible for adherence to shop safety rules and the prevention of unsafe acts. Also, he is the one who continues during the lifetime of the machine to profit from it. He therefore will continue to have a primary responsbility in workmen's compensation.

The manufacturer has only a single, one-time profit at the time of sale. If, however, an injury results because of the manufacturer's negligence in the design of manufacturer of the machine, he can be held answerable if in fact he be negligent. This is accomplished by the employer's right of recovery of compensation.

In any personal injury suit, with sympathy sitting in the jury box, it is hard to bring justice into the courtroom. This objection would not obtain in a suit recovery of compensation, for in that case, the two parties to the suit are both uninjured. There is no sympathetic bias for either side. A fair trial of the facts could be anticipated.

The objection to the foregoing proposals is often that awards under workmen's compensation are not adequate. The answer is to make the awards adequate and not pursue the present irrational system of litigation against the manufacturer to the final breakdown of our economic system.

CONCLUSION

The Foundry Equipment Manufacturers Association finds the present Section 10 of Senate Bill S3060 unacceptable in that it perpetuates the present 'critical role of the employer in machinge accidents', without relief to the manufacturer and without any attempt to restore the manufacturers' 'lost right'. For the reasons given in this paper, FEMA urges adoption of the amendment of Section 10 proposed by the Special Committee for Workplace Product Liability Reform (SCWPLR). (See testimony by Robert Taft given September 22, 1978.)

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Migrant Legal Action Program, Inc.

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October 12, 1978

Senator Harrison Williams
Chairman, Senate Committee
on Human Resources
United States Senate
Washington, D. C.

Dear Senator Williams and Members of the Committee:

The Migrant Legal Action Program, Inc., appreciates this opportunity to comment on S. 3060. The Migrant Legal Action Program, Inc., is a legal services national support center located in Washington, D. C. It provides information and assistance to some eighty field offices in twenty-nine states and provides direct representation to migrant and seasonal farmworkers before judicial, administrative, and legislative bodies.

We vigorously commend the sponsors of S. 3060 for their efforts to clarify and strengthen state workers' compensation programs. This bill takes a progressive step toward eliminating gaps in workers' compensation coverage in areas where coverage is badly needed. The bill also continues the present flexibility in administration of workers' compensation programs at the state and local levels.

1. The Need for Agricultural Coverage. Although agricultural work is the third most hazardous occupation,* it is largely uncovered under state workers' compensation plans. Only nine states provide general coverage for agricultural employees, and another eight states provide partial coverage.** S. 3060 goes far toward resolving problems which

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* National Safety Council, Work Accidents, 1975.

** The nine states having general agricultural coverage are California, Connecticut, Hawaii, New Jersey, Ohio, Oregon, Pennsylvania, Vermont, and Washington. The eight states with partial coverage are Colorado, Florida, Illinois, Michigan, Minnesota, New York, West Virginia, and Wisconsin. (Source: Federal and State Statutes Relating to Farmworkers, House Subcommittee on Agricultural Labor of the Committee on Education and Labor, 94th Cong., 2d Sess., Oct., 1976.)

arise from the absence of farmworker coverage of the uncertainty of such coverage under existing workers' compensation programs. This bill, in contrast, would create a continuity in coverage standards among the states, and would clarify minimum standards of coverage of agricultural workers in each state.

Under the present system the states control workers' compensation while the federal government is limited to promoting voluntary acceptance of approved standards. In contrast to almost complete compulsory coverage of industrial workers under state workers' compensation laws, farm occupations constitute the largest population group largely excluded from such coverage. Hired farmworkers during the month of July, 1978, totalled 1,839,600 persons [Crop Reporting Board, Department of Agriculture, August 23, 1978, p. 21].

Questions of farmworker coverage under workers' compensation systems are compounded today in interstate recruitment situations where a crewleader, rather than the farm operator, is considered the employer. Often it is unclear about which state law applies to determine coverage or liability from an agricultural injury -- whether it is the law of the farmworker's home state, the state where an employment agreement is reached, the state where the injury occurs, or the state of actual employment. When the law of one state clearly does apply, that law may be cloudy with respect to injuries occurring out of state. For example, Florida workers' compensation will cover out-of-state injuries on a contract of employment made within the State of Florida, unless the employment contract was made expressly for services to be rendered exclusively outside of the state. S. 3060 in its present form creates a uniformity in coverage standards and benefit standards which will eliminate much of the present controversy over conflicting state laws.

2. The Fifteen-Day Test. S. 3060 at § 3(5)(b) provides for coverage of any agricultural laborer except those employed "by an employer who during the current or preceeding calendar quarter did not employ one or more individuals as agricultural or domestic on at least 15 days." We would suggest that the Committee adopt, for agricultural purposes, a standard which would provide for coverage of any agricultural laborer except those employed "by any employer who during the current or preceeding calendar quarter did not employ 15 man-days of agricultural labor."

COMMENT: By using the "15 man-day" test, this provision would adopt a test similar to that found in § 206 of the Fair Labor Standards Act. Furthermore, adoption of the proposal would eliminate the possibility that the present provision would be construed to mean that coverage obtains only where the same individual has been employed by the same employer for at least 15 days. It would eliminate the anomalous situation where a small agricultural employer having a single hired hand for 20 days would be covered, but a large fruit ranch hiring 60 workers for a 10-day fruit harvest would not be covered. We wish to point out that peach and apple harvests on the East Coast and in the Pacific Northwest often do not exceed two weeks' time. Thus, the Committee may wish to clarify its formula by utilizing the "15 man-day" test to avoid such a disparate result through strained construction of the statutory language.

3. Designation of Employer. As indicated previously in this letter, questions of coverage and state law applicability in interstate recruitment situations are largely avoided where the grower or farm operator is designated as the employer under workers' compensation programs. We would propose that, in the event the "15 man-day" test is adopted by the Committee, that S. 3060 make a specific designation of the farm operator or owner as the employer in all cases.

COMMENT: Problems have always arisen where it has been unclear whether the crewleader or the farm operator is the actual employer. Generally, an individual farmworkers' efforts to enforce his minimum wage rights under the Fair Labor Standards Act are compounded in the very beginning when he seeks to determine whether it is the crewleader or the farm operator that is his employer. By designating the farm operator as the employer, S. 3060 would eliminate this difficulty. Crewleaders tend to be elusive characters whose responsibilities towards their crew members are often unenforceable either because the Department of Labor has insufficient manpower to enforce laws pertaining to crewleaders or because individual crew members tend to be intimidated by, and tend not to enforce their rights against, their crewleaders.

In the alternative, S. 3060 might designate the employer for workers' compensation purposes as the party who actually pays the worker. Or, S. 3060 could designate the farm operator as the employer in all cases except where the crewleader has agreed to accept workers' compensation responsibility in writing, has transmitted such information to the Department of Labor when applying for a Farm Labor Contractor Registration certificate, and where the worker is so informed.

Ultimately, if the Committee rejects the proposal of a "15 man-day" test, it would be necessary to have the crewleader considered the employer in circumstances where the crewleader employs workers on more than 15 days per quarter but works for farm operators who rarely use the crews' services for more than 15 days each. [In short, the "15 man-day" test is a realistic coverage standard. Combined with a provision designating only the farm operator as an employer, S. 3060 would achieve clarity in standards and ease in enforcement. However, these two provisions must go together. If the Committee does not adopt the "15 man-day" test, then we would ask the Committee not to designate only the farm operator as the employer.]

We very much appreciate the Committee's consideration of these comments. We commend the Committee for its efforts on behalf of this much needed and foresighted legislation.

Respectfully submitted,

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Staff Attorney

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Legislative Director

BDF/sf

AMERICAN INSURANCE ASSOCIATION



STATE WORKERS' COMPENSATION LAWS
COMPARED WITH ESSENTIAL RECOMMENDATIONS OF
THE NATIONAL COMMISSION ON STATE WORKERS' COMPENSATION LAWS
AS OF JANUARY 1, 1978

FORWARD

Since the National Commission issued its Report in July, 1972, all parties interested in workers' compensation -- insurers, employers, labor, academicians -- have used the National Commission's essential recommendations as a bench mark in determining whether the states are making progress in improving the workers' compensation system. The following chart measures each state's compliance with these 19 recommendations.

The code used in the chart is --

X - Full compliance with the recommendation

S - Substantial compliance with the recommendation

SC - Some coverage is mandatory for farm labor and domestics

- - Noncompliance with the recommendation

In the notes following the chart, the full recommendation of the Commission is set forth. After the recommendation is the standard, generally agreed upon, for determining substantial compliance. An asterisk indicates there is a provision in the state's law which we believe warrants consideration and which is explained in the notes.

Finally, recommendations R2.4 -- coverage for farm labor -- and R2.5 -- coverage for casual and domestics -- were handled differently. Prior to the issuance of the Report, these two classes of employments (particularly domestics) were, in many states, wholly excluded from mandatory coverage. In those states where coverage is now mandatory, the threshold for coverage varies greatly. Accordingly, the chart only indicates those states where some coverage (SC) is mandatory for these employments.

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	R2.1		R2.2	R2.4	R2.5	R2.6	R2.7	R2.11	R2.13	R3.7
	Compulsory (a)	Waivers (b)	Numerical Exemptions	Farm Workers	Domestic Casuals	Govt. Employees	Class Exclusions	Extra-territoriality	Full Occupational Coverage	2/3 of Employee's Wage
Alabama	X	X	S*	-	-	-	X	X	X	X
Alaska	X	S*	X	X-1	SC	-	S*	X	X	X
Arizona	X*	-	X	X	-	X	S*	X	X	X
Arkansas	X	S*	S*	-	-	X	-	X	X	X
California	X	X	X	X	X	X	X	-	X	X
Colorado	X	-	X	X	SC	X	S*	X	X	X
Connecticut	X	S*	X	X	SC	-	S*	S	X	X
Delaware	X	X	X	-	SC	-	S*	X	X	X
D.C.	X	X	X	-	-	X	-	-	X	X
Florida	X	S*	X	SC	-	X	-	X	X	-
Georgia	X	S*	S*	-	-	X	S*	X	X	X
Hawaii	X	X	X	X	SC	X	S*	X	X	X
Idaho	X	S*	X	-	-	X	-	X	X	-
Illinois	X	X	X	SC	-	-	-	X	X	X
Indiana	X	X	X	-	-	X	S*	X	X	X
Iowa	X	-	X	SC	SC	X	S*	X	X	X
Kansas	X	-	-	-	-	X	X	X	X	X
Kentucky	X*	-	X	-	SC	X	X	X	X	X
Louisiana	X	X	X	X	-	-	X	X	X	X
Maine	X	-	X	SC	-	X	X	-	X	X
Maryland	X	-	X	SC	SC	X	X	-	X	X
Massachusetts	X	X	X	X	SC	-	S*	-	X	X
Michigan	X	X	X	X	SC	X	X	X	X	X
Minnesota	X	X	X	SC	SC	-	X	S	X	X
Mississippi	X	S*	-	-	-	-	-	-	X	X
Missouri	X	X	-	SC	SC	X	X	X	X	X
Montana	X	X	X	X	SC	X	S*	S	X	X
Nebraska	X	S*	X	-	-	X	X	X	X	X
Nevada	X	X	X	-	-	X	S*	S	X	X
New Hampshire	X	X	X	X	X	X	X	X	X	X
New Jersey	-	X	X	X	X*	X	X	X	X	X
New Mexico	X	X	-	-	-	X	S*	X	X	X
New York	X	X	X	SC	SC	-	-	S	X	X
North Carolina	X	S*	-	-	-	-	S*	X	X	X
North Dakota	X	X	X	-	-	X	-	S	X	X
Ohio	X	S*	X	X	SC*	X	X	-	X	X
Oklahoma	X	S*	X*	SC	SC	X	X	X	X	X
Oregon	X	X	X	X	-	X	S*	-	X	X
Pennsylvania	X	X	X	X*	SC	-	S*	X	X	X
Rhode Island	X	X	-	-	-	-	X	S	X	X
South Carolina	-	-	-	-	SC	-	S*	-	X	X
South Dakota	X	S*	X	-	SC	-	S*	-	X	X
Tennessee	X	-	-	-	-	-	X	X	X	X
Texas	-	X	X	-	-	-	S*	-	X	X
Utah	X	X	X	SC	SC	X	X	-	X	X
Vermont	X	-	X	X.1	-	-	X	X	X	X
Virginia	X	-	S*	SC	-	-	S*	-	X	X
Washington	X	X	X	X.1	-	X	X	X	X	-
West Virginia	X	X	X	SC	-	X	X	S	X	X
Wisconsin	X	X	X	SC	-	X	X	S	X	X
Wyoming	X	X	X	-	-	-	-	X	X	X

	R3.8		R3.11	R3.12	R3.15		R3.17	R3.21	R3.23	
	2/3 of Avg. State Wage	100% of Avg. State Wage	Definition of Permanent Total Disability	Permanent Total - 2/3 of Workers' Wage	Permanent Total - 2/3 of State Wage	Permanent Total - 100% of State Wage	Benefits for Duration of Total Disability	Death Benefits-2/3 of Employee's wage	Death Benefits-2/3 of State Wage	100% of State Wage
Alabama	X	-	X	X	X	-	X	X	X	-
Alaska	X	X	X	X	X	X	X	X	X	X
Arizona	X	S	X	X	X	S	X	S	S	S
Arkansas	-	-	X	X	-	-	X	X	-	-
California	X	-	X	X	X	-	X	X	X	-
Colorado	X	S	X	X	X	S	X	X	X	S
Connecticut	X	-	X	X	X	-	X	X	X	-
Delaware	X	-	X	X	X	-	X	X	X	S
D.C.	X	X	X	X	X	X	X	S	X	-
Florida	X	-	X	-	X	-	X	-	X	-
Georgia	S	-	X	X	S	-	X	X	S	-
Hawaii	X	X	X	X	X	X	X	X	X	-
Idaho	S	-	X	-	S	-	X	-	-	-
Illinois	X	X	X	X	X	X	X	X	X	X
Indiana	-	-	X	X	-	-	X	X	-	-
Iowa	X	X	X	X	X	X	X	X	X	X
Kansas	X	-	X	X	X	-	-	X	X	-
Kentucky	-	-	X	-	-	-	X	S	-	-
Louisiana	-	-	X	X	-	-	X	-	-	-
Maine	X	X	X	X	X	X	X	X	X	X
Maryland	X	X	X	X	X	X	X	X	X	X
Massachusetts	X	X*	X	X	X	X*	X	-	-	-
Michigan	S	-	-	X	-	-	X	X	-	-
Minnesota	X	X	X	X	X	X	X	S	X	X
Mississippi	-	-	X	X	-	-	-	S	-	-
Missouri	-	-	X	X	-	-	X	X	-	-
Montana	X	X	X	X	X	X	X	X	X	X
Nebraska	X	-	X	X	X	-	X	X	X	-
Nevada	X	X	X	X	X	X	X	X	X	X
New Hampshire	X	X	X	X	X	X	X	X	X	X
New Jersey	X	-	X	X	X	-	X	S	X	-
New Mexico	X	X*	X	X	X	X*	-	X	X	X*
New York	S	-	X	X	S	-	X	X	S	-
North Carolina	X	X	X	X	X	X	X	X	X	X
North Dakota	X	X	X	X	X	X	X	X	-	-
Ohio	X	X	X	X	X	X	X	X	X	X
Oklahoma	X	-	X	X	-	-	X	S	X	X
Oregon	X	X	X	X	X	X	X	S	S	-
Pennsylvania	X	X	X	X	X	X	X	S	X	X
Rhode Island	X	X	X	X	X	X	X	X	X	X
South Carolina	X	X	X	X	X	-	-	X	X	X
South Dakota	X	X*	X	X	X	X*	X	X	X	X*
Tennessee	S	-	X	X	S	-	-	S	S	-
Texas	-	-	X	X	-	-	-	X	-	-
Utah	X	X	X	X	X	S	X	X	X	S
Vermont	X	X	X	X	X	X	-	X	X	X
Virginia	X	X	X	X	X	X	-	X	X	X
Washington	X	-	X	-	X	-	X	S	X	S
West Virginia	X	X	X	X	X	X	X	X	X	X
Wisconsin	X	X	X	X	X	X	X	X	X	X
Wyoming	X	X	X	X	X	-	X	X	X	-

	R3.25 - Death Benefits				R4.2	R4.4	Totals		
	For Life or Until Re-marriage	Lump Sum on Re-marriage	To Children Until 18 or Dependent	To Children Until 25 if a Student	Unlimited Medical	Medical Termination Due to Pas-sage of Time	X	S/SC	-
Alabama	-	-	-	-	X	X	12-1/2	1	5-1/2
Alaska	-	X	X	S	X	X	15	2-3/4	1-1/4
Arizona	X	X	X	-	X	X	13-1/4	4	1-3/4
Arkansas	X	X	X	X	X	X	11-1/2	1-1/2	6
California	-	-	X	-	X	-	14-3/4	0	4-1/4
Colorado	X	X	X	S	X	X	14-3/4	3-3/4	1/2
Connecticut	X	-	S	-	X	X	12-1/4	3-3/4	3
Delaware	X	X	S	X	X	X	13-1/4	2-3/4	3
D.C.	X	X	X	S	X	X	13-1/4	1-1/4	4-1/2
Florida	-	-	-	-	X	-	9	1-1/2	8-1/2
Georgia	-	-	-	-	X	X	10-1/2	4	4-1/2
Hawaii	X	X	X	S	X	X	16-1/4	2-1/4	1/2
Idaho	-	-	-	-	X	X	8-1/2	1-1/2	9
Illinois	-	X	X	X	X	X	14-3/4	1	3-1/4
Indiana	-	X*	-	-	X	X	12-1/4	1	5-3/4
Iowa	X	X	X	X	X	X	15-1/2	3	1/2
Kansas	-	-	S	S	X	X	12	1/2	6-1/2
Kentucky	X	X	S	-	X	X	11	2-1/4	5-3/4
Louisiana	X	X	X	S	X	X	12-3/4	1/4	6
Maine	X	-	X	S	X	S	14	2-1/4	2-3/4
Maryland	X	X	X	S	X	X	15-1/4	2-1/4	1-1/2
Massachusetts	X	-	X	X	X	X	12-3/4	2	4-1/4
Michigan	-	-	-	-	X	X	13	1-1/2	4-1/2
Minnesota	X	X	X	S	X	X	13-3/4	4-1/4	1
Mississippi	-	-	-	-	X	X	6-1/2	1-1/2	11
Missouri	X	X	X	S	X	X	12-3/4	2-1/4	4
Montana	X	X	X	X	S*	X	15	4	0
Nebraska	X	X	X	X	X	X	15	1/2	3-1/2
Nevada	X	X	X	S	X	X	14-3/4	2-1/4	2
New Hampshire	-	-	X	X	X	X	18-1/2	0	1/2
New Jersey	X	-	X	-	X	-	14-1/2	1	3-1/2
New Mexico	-	X*	X	S	X	X	13-1/2	1-1/4	4-1/4
New York	X	X	X	-	X	X	10-3/4	4-1/2	3-3/4
North Carolina	-	-	S	-	X	X	12-1/2	1-3/4	4-3/4
North Dakota	X	X	X	-	X	X	13-3/4	1	4-1/4
Ohio	X	X	X	X	X	X	16-1/2	1-1/2	1
Oklahoma	X	X	X	S	X	X	13-3/4	3-3/4	1-1/2
Oregon	X	S*	X	S	X	X	13-1/2	3	2-1/2
Pennsylvania	X	X	X	S	X	X	14-3/4	3-1/4	1
Rhode Island	X	-	X	S	X	X	13-1/2	1-1/4	4-1/4
South Carolina	-	X*	S	S	X	X	9-3/4	2-1/2	6-3/4
South Dakota	X	X	X	X	X	X	13-1/2	2-1/2	3
Tennessee	-	-	S	S	X	X	8-1/2	3	7-1/2
Texas	X	X	X	X	X	X	9-1/2	1	8-1/2
Utah	X	S	X	-	X	X	14-1/2	3-1/4	1-1/4
Vermont	X	-	S	S	S*	X	13-3/4	1-1/2	3-3/4
Virginia	-	-	-	-	X	X	10-1/2	3	5-1/2
Washington	X	X	X	S	X	X	13-1/4	1-3/4	4
West Virginia	X	-	X	S	X	X	15-1/2	2-1/4	1-1/4
Wisconsin	-	-	-	-	X	X	15	2	2
Wyoming	X	S*	S	-	X	X	13-1/4	1/2	5-1/4

R2.1

Coverage by workmen's compensation laws be compulsory and that no waivers be permitted.

A (Compulsory) - Arizona and Kentucky: Employer must provide coverage but any employee may reject it.
B (Waivers) - Alaska, Connecticut, Florida, Idaho, Mississippi, Nebraska and North Carolina allow executive officers of a corporation to waive coverage.

Arkansas, Georgia and Oklahoma allow employees to waive coverage only for an aggravation of silicosis or asbestosis. South Dakota allows employees to waive only for aggravation of silicosis.

Ohio allows a blind employee to waive coverage for injuries caused by or due to his blindness.

R2.2

Employers not be exempted from workmen's compensation coverage because of the number of their employees.

Arkansas, Georgia, Virginia and Alabama exclude coverage for two or less employees. Oklahoma has no numerical exemption effective January 1, 1979.

R2.4

A two-stage approach to the coverage of farmworkers. First, as of July 1, 1973, each agriculture employer who has an annual payroll that in total exceeds $1,000 be required to provide workmen's compensation coverage to all of his employees. As a second stage, as of July 1, 1975, farmworkers be covered on the same basis as all other employees.

X.1 means that the state mandates coverage for employers whose payroll exceeds $1,000.00.

Pennsylvania mandates coverage if one employee is paid wages of $150 during the year or one employee works 20 or more days.

R2.5

As of July 1, 1975, household workers and all causal workers be covered under workmen's compensation at least to the extent they are covered by Social Security.

Partial coverage in Illinois effective July 1, 1980.

New Jersey provides coverage for domestics employed on a regular, periodic or recurring basis but there is no obligation on the employer to insure.

Ohio formerly provided domestic and casual coverage for employees earning $50 or more a calendar quarter. Effective December 2, 1975, such employees must earn $160 or more a calendar quarter to qualify for coverage.

R2.6

Workmen's compensation coverage be mandatory for all government employees.

R2.7

There be no exemptions for any class of employees, such as professional athletes or employees of charitable organizations.

Alaska - part time baby sitters, harvest help, transient help, executives of charitable organizations - exempt.

Arizona - excludes only motion picture employees who work less than 8 months and also have compensation coverage in another state.

Colorado - excludes employees of charitable organizations only if they make $700 or less a year.

Connecticut - fraternal corporation officer who makes less than $100 per year is exempted from coverage.

Delaware - cottage workers exempt.

Georgia - Employees of intrastate railroads excluded.

Hawaii - clergymen exempt. Recipients of charitable aid who perform services are exempt.

Indiana - exempts miners who work underground in Indiana if the mine entrance is outside Indiana.

Iowa - officers of corporation who are not full time employees of such corporation are exempted.

Massachusetts - professional athletes exempted only if their contracts do not provide for payment of wages while disabled.

Montana - excludes members of an employer's family who live in his household. Persons performing services in return for aid or sustenance only, are excluded.

Nevada - excludes theatrical or stage performers.

New Mexico - excludes student labor in any school.

North Carolina - executive officers of charitable corporations excluded.

Oregon - recipients of charitable aid who perform services are excluded.

Pennsylvania - cottage workers excluded.

South Carolina - employees of one named charitable corporation are excluded.

South Dakota - executive officers of charitable corporations excluded.

Texas - employees of interurban railways are excluded.

Virginia - employees of intrastate railroads are excluded.

R2.11

An employee or his survivor be given the choice of filing a workmen's compensation claim in the State where the injury or death occurred, or where the employment was principally localized, or where the employee was hired.

X means that the state complies with all three parts of R2.11.

S means that it complies with two out of three.

- means that the state complies with only one part or with none.

R2.13

All States provide full coverage for work-related diseases.

R3.7

Subject to the State's maximum weekly benefit, temporary total disability benefits be at least 66-2/3 percent of the workers' gross weekly wage.

R3.8

As of July 1, 1973, the maximum weekly benefit for temporary total disability be at least 66-2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

Column 1. S is 60% or better of the State average weekly wage.
Column 2. S is 80% or better of the State average weekly wage.

Massachusetts - 100% of State wage effective October 1, 1978.

New Mexico - 100% of State wage effective July 1, 1978.

South Dakota - 100% of State wage effective July 1, 1979.

R3.11

The definition of permanent total disability used in most States be retained. However, in those few States which permit the payment of permanent total disability benefits to workers who retain substantial earning capacity, the benefit proposals be applicable only to those cases which meet the test of permanent total disability used in most States.

R3.12

Subject to the State's maximum weekly benefit, permanent total disability benefits be at least 66-2/3 percent of the worker's gross weekly wage.

R3.15

As of July 1, 1973, the maximum weekly benefit for permanent total disability be at least 66-2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

Column 1. S is 60% or better of the State average weekly wage.
Column 2. S is 80% or better of the State average weekly wage.

Massachusetts - 100% of State wage effective October 1, 1978.

New Mexico - 100% of State wage effective July 1, 1978.

South Dakota - 100% of State wage effective July 1, 1979.

R3.17

Total disability benefits be paid for the duration of the worker's disability, or for life, without any limitations as to dollar amount or time.

R3.21

Subject to the State's maximum weekly benefit, death benefits be at least 66-2/3 percent of the worker's gross weekly wage.

S means that the benefits payable to spouse and children are 66-2/3 percent, or better, of the worker's average weekly wage.

R3.23

As of July 1, 1973, the maximum weekly death benefit be at least 66-2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

Column 1. S is 60% or better of the State average weekly wage.
Column 2. S is 80% or better of the State average weekly wage.

New Mexico - 100% of State wage effective July 1, 1978.

South Dakota - 100% of State wage effective July 1, 1979.

R3.25

Death benefits be paid to a widow or widower for life or until remarriage, and in the event of remarriage two years' benefits be paid in a lump sum to the widow or widower. Benefits for a dependent child be continued at least until the child reaches 18, or beyond such age if actually dependent, or at least until age 25 if enrolled as a full-time student in any accredited educational institution.

Column 1. X is used when benefits are payable to a widow or a disabled widower.
Column 2. X is used when benefits are payable to a widow or a disabled widower.

Indiana has a 104 week remarriage award subject to a total death benefit of 500 weeks.

New Mexico has a 104 week remarriage award subject to a total death benefit of 600 weeks.

Oregon has a $5,000 remarriage award.

South Carolina pays 104 weeks of benefits but this is subject to a total death benefit of 500 weeks and $40,000.

Utah has a 52 week remarriage award subject to a total death benefit of 312 weeks.

Wyoming has a $500 remarriage award.

Column 3. S is used if benefits are payable to age 18. S is also used if benefits are payable only to a dependent or unmarried child.

Column 4. S is used if benefits are payable beyond age 18 (though less than 25) if a student.

R4.2

There be no statutory limits of time or dollar amount for medical care or physical rehabilitation services for any work-related impairment.

Montana has a $2,500 limit in non-disabling occupational disease cases.

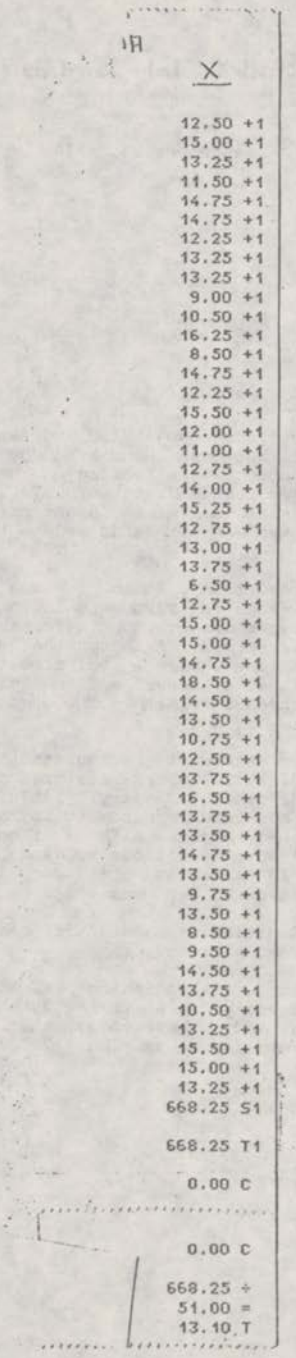
Vermont has a limit of $1,000 or three years payable for silicosis or asbestosis.

R4,4

The right to medical and physical rehabilitation benefits not terminated by the mere passage of time.

Maine has a two-year limit for rehabilitation.

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85 JOHN STREET, NEW YORK, NY 10038



X

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15.00 +1
13.25 +1
11.50 +1
14.75 +1
14.75 +1
12.25 +1
13.25 +1
13.25 +1
9.00 +1
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United States Senate
COMMITTEE ON HUMAN RESOURCES
WASHINGTON, D.C. 20510

September 25, 1978

Mr. Phillip N. Pulizzi, Jr.
Director
Legislative Affairs
Industrial Relations
National Association of
Manufacturers
1776 F Street, N.W.
Washington, D.C. 20006

Dear Mr. Pulizzi:

This is to thank you for your cooperation and assistance in providing testimony by the National Association of Manufacturers at the Labor Subcommittee hearing on the National Workers' Compensation Standards Act of 1978 (S. 3060), on September 22, 1978. I regret that time did not permit me to ask several questions of the NAM witnesses and to receive their responses orally.

As you know, it was agreed that I would propound questions in writing and include the witnesses' responses in the hearing record. I would appreciate your cooperation in forwarding the following questions to the witnesses. Although the questions are directed to specific witnesses, please feel free to share all the questions with all three witnesses and to include any response which any witness chooses to make. The questions are as follows:

Mr. Adams: I am told by your statement that substantial compliance by the States with the 19 Essential recommendations averaged almost 80 percent by January 1, 1978. A table prepared by the United States Department of Labor shows that only 13 States had complied with 14 or more of the Commission's Essential Recommendations by January 1, 1978. The same table shows that 13 States had still complied with fewer than 10 of the 19 Essential Recommenations by that date.

What is your definition of substantial compliance with the 19 Essential Redommendations?

The American Insurance Association presented testimony to this Committee last Wednesday, on September 20th. They did not state at that time, as you have today, that their statistics indicate full compliance was almost 70 percent as of January 1st.

Can you provide the Committee with documentation to show that the AIA believes that full compliance is almost 70 percent?

Mr. Adams: I appreciate your statement that the National Association of Manufacturers (NAM) has long supported state reform of workers' compensation systems and that you continue to do so.

Is it your position that the States should adopt the 19 Essential Recommendations of the National Commission?

Mr. Adams: You have stated that State legislatures are able, by virtue of their size, to move more swiftly to correct inequities in their workers' compensation programs, and you are concerned that the size and complexity of a national program would not permit sufficient flexibility.

The question of flexibility aside, it seems clear to the Committee that State legislatures have not been able to move swiftly in correcting deficiencies in their workers' compensation programs. That is why we are here today. When the blue ribbon, nonpartisan National Commission issued its recommendations for reform in 1972, they were unanimous in their conclusion that at least their 19 Essential Recommendations should be adopted by the States no later than July of 1975. That date has, of course, long since passed.

No State has yet adopted all 19 of the Essential Recommendations. I would suggest that it is too late to argue that the States can move swiftly in this area.

With regard to the question of flexibility, I would like to point out that this legislation will leave substantial flexibility for the States. We are adopting only general principles of fair coverage and minimum standards of compensation and benefits. The States will remain free to reform their systems in other ways and to administer them in accordance with State needs. Would you care to comment further on this point?

Mr. Adams: I can appreciate your criticism of the Federal Government's performance in the area of compensation programs. The Federal Employees' Compensation Act (FECA) Program is certainly a troubled one, and the other programs you refer to are not without their problems.

However, you seem to have glossed over the fact that this bill leaves administrative responsibility with the States. Wouldn't you agree that our approach in this bill is the best way to put Federal minimum standards into place?

Mr. Thodis: You have expressed the view that "workers' compensation is the greatest disincentive to creating jobs in your State."

It has long been a basic tenent of Senator Javits and myself, and of this Committee, that substandard wages, hours and conditions of employment should not be a legitimate basis of competition between employers.

As a part of your reform efforts in Michigan, have you considered how the cost of meeting the 19 Essential Recommendations would affect the competitive position of employers in your State as opposed to employers in States which have not substantially met the essentials of workers' compensation reform?

Mr. Thodis: You have stated that "retiree abuse" is a problem which costs your State's workers' compensation system many millions of dollars each year. The example which you have included in your testimony is certainly dramatic, it appears to assume that the hypothetical retiree is receiving total disability compensation.

On the other hand, you have stated that retirees receiving workers' compensation have, for the most part, voluntarily left the labor market.

Isn't it true that most retirees who are receiving workers' compensation benefits are receiving only partial disability benefits?

If there are a substantial number of totally disabled employees receiving workers' compensation benefits in addition to retirement benefits and social security benefits, how can it be said that these totally disabled employees have voluntarily left the labor market?

Thank you again for your assistance in providing testimony to the Committee.

With best wishes,

Sincerely,

Harrison A. Williams, Jr.
Chairman

HAW:daw

GENERAL MOTORS CORPORATION

October 25, 1978

The Honorable Harrison A. Williams, Jr.
Chairman, Committee on Human Resources
The United States Senate
Washington, D. C. 20510

Dear Mr. Williams:

Thank you for the opportunity to appear and offer testimony on behalf of the National Association of Manufacturers at the Labor Subcommittee hearing on September 22, 1978, regarding the National Workers' Compensation Standards Act of 1978 (S. 3060).

The written questions, which were forwarded to me by Mr. Phil Pulizzi in a letter dated September 25, have been reviewed and my answers are as follows:

Question

"I am told by your statement that substantial compliance by the States with the 19 Essential Recommendations averaged almost 80 percent by January 1, 1978. A table prepared by the United States Department of Labor shows that only 13 States had complied with 14 or more of the Commission's Essential Recommendations by January 1, 1978. The same table shows that 13 States had still complied with fewer than 10 of the 19 Essential Recommendations by that date.

"What is your definition of substantial compliance with the 19 Essential Recommendations?

"The American Insurance Association presented testimony to this Committee last Wednesday, on September 20th. They did not state at that time, as you have today, that their statistics indicate full compliance was almost 70 percent as of January 1st.

"Can you provide the Committee with documentation to show that the AIA believes that full compliance is almost 70 percent?"

Answer

In using the term, "substantial compliance," we utilized the definition set forth in a publication by the American Insurance Association entitled, "State Workers' Compensation Laws Compared with Essential Recommendations of the National Commission on State Workers' Compensation Laws as of January 1, 1978." (Copy attached)

We did state that American Insurance Association statistics indicate that full compliance was almost 70 percent on January 1, 1978. The overall percentage figure was developed by Mr. Albert J. Millus, Assistant to the Executive Director, New York State Insurance Fund. We are enclosing a tape (copy) furnished by Mr. Millus on which he extracted compliance statistics for each of the 50 states plus the District of Columbia from the aforesaid AIA publication. This tape indicates an average full compliance of 13.10 which is 68.94% of the 19 Essential Recommendations.

Question

"I appreciate your statement that the National Association of Manufacturers (NAM) has long supported state reform of workers' compensation systems and that you continue to do so.

"Is it your position that the states should adopt the 19 Essential Recommendations of the National Commission?"

Answer

The NAM supports the spirit of the total National Study Commission Report which includes state adoption of the 19 Essential Recommendations. We feel that attention to merely the 19 Essential Recommendations fails to produce a balanced reform. We favor addressing all workers' compensation issues on a state-by-state basis in order to achieve a total and balanced reform.

Question

"You have stated that state legislatures are able, by virtue of their size, to move more swiftly to correct inequities in their workers' compensation programs, and you are concerned that the size and complexity of a national program would not permit sufficient flexibility.

"The question of flexibility aside, it seems clear to the Committee that state legislatures have not been able to move swiftly in correcting deficiencies in their workers' compensation programs. That is why we are here today. When the blue ribbon, nonpartisan National Commission issued its recommendations for reform in 1972, they were unanimous in their conclusion that at least their 19 Essential Recommendations should be adopted by the states no later than July of 1975. That date has, of course, long since passed.

"No state has yet adopted all 19 of the Essential Recommendations. I would suggest that it is too late to argue that the states can move swiftly in this area.

"With regard to the question of flexibility, I would like to point out that this legislation will leave substantial flexibility for the states. We are adopting only general principles of fair coverage and minimum standards of compensation and benefits. The states will remain free to reform their systems in other ways and to administer them in accordance with state needs. Would you care to comment further on this point?"

Answer

I would like to answer first your comment regarding the inability of states to "move swiftly" and second the question of flexibility.

State legislatures, by virtue of their size, closeness to their constituency, and familiarity with the uniqueness of their state workers' compensation system, can move more swiftly than can the U.S. Congress to correct inequities in their programs. We recognize that state reforms have not occurred as rapidly as we might like. However, we believe that the federal standards' approach is not a better alternative for either the short or the long term.

In the short term, federal standards will not correct and, in fact, will embed abuses and waste currently in many state programs. For the long term, there is no evidence that Congress will move more swiftly than will the state legislatures. Prior to 1972, Congress failed to improve benefits under the Longshore & Harbor Workers Act for an eleven-year period.

Secondly, we do not agree that the enactment of S. 3060 would leave the states with "substantial flexibility" or that they "would remain free to reform their systems in other ways." We believe the exact opposite is a more realistic expectation.

For example, S. 3060 is not limited to the 19 Essential Recommendations; it goes much further. Future Congresses would likely expand the spectrum of standards until eventually it encompassed the entire program. One might also anticipate that once Congress preempts a portion of the workers' compensation systems, state legislatures will no longer feel responsible -- and for many it's a highly controversial subject which they would just as soon avoid anyway.

Technically, the enactment of a few standards would leave the states free to seek total reform of their systems. The question is, "Will it happen?" I think not! The legislative process, in determining workers' compensation issues, is one of balancing interests. I believe, in most instances, it is politically impossible for state legislatures to achieve reform of abuses unless they also have control over such things as benefit amounts.

Question

"I can appreciate your criticism of the Federal Government's performance in the area of compensation programs. The Federal Employees' Compensation Act (FECA) Program is certainly a troubled one, and the other programs you refer to are not without their problems.

"However, you seem to have glossed over the fact that this bill leaves administrative responsibility with the states. Wouldn't you agree that our approach in this bill is the best way to put Federal minimum standards into place?"

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Answer

We would certainly agree that administrative responsibility should remain with the states where the personnel are in place and have more than 50 years experience.

We have deep reservations, however, about the eventual quality of administration when one governmental body calls the tune and another plays the fiddle. We believe that quality administration is more likely to be achieved when accountability for substantive and administrative changes in the system is located in the same legislative body.

We must point out, however, that we do not interprete S. 3060 as leaving all of the administrative responsibility with the states. For example, the Secretary of HEW is given broad authority in the area of occupational diseases to determine not only substantive matters but standards for administration.

Very truly yours,

Ralph R. Adams

Ralph R. Adams, Director
Unemployment and Workers
Compensation Activity

Attachments

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Michigan Manufacturers Association Lansing

13 October 1978

The Honorable Harrison A. Williams, Jr.
Chairman, Committee on Human Resources
United States Senate
Washington, D. C. 20510

Dear Senator Williams:

I am writing to respond to the questions directed to me in your September 25th letter, to Mr. Pulizzi of the National Association of Manufacturers. But, first, permit me to take this opportunity to thank you and your staff for the cordial manner in which I was treated when I appeared before the Labor Subcommittee on September 22, 1978.

Answer to Question 1

The costs to employers of Workers Compensation in Michigan are in fact currently higher than in most other states. Michigan employers are nevertheless willing to bring our law into substantial compliance with the 19 essential recommendations providing the abuses in Michigan's current law are corrected. It is these abuses, most notably the retiree abuse, which are primarily responsible for the high costs in Michigan.

In fact, several states which have recently increased their benefit levels in compliance with the 19 essentials, have substantially lower costs than Michigan due, in part, to the relative absence of abuses. As a result, Michigan employers believe that they can meet the 19 essential recommendations without substantially eroding their competitive position if abuses unique to Michigan are corrected at the same time.

As I stated in my testimony, S. 3060 would have a profound negative impact on our economy. The workers compensation cost disparity which exists today between Michigan and other states will be widened further if S. 3060 were to be enacted. It is a disparity which today places Michigan industry in an unfavorable competitive position. Should the benefit levels envisioned in S. 3060 be enacted, without elimination of the costly and wasteful abuses which exist today, the costs of workers compensation will become unbearable for this state's job-providers. National standards will not recognize state wage disparities.

.... over

Answer to Question 2

First, it is not true that most retiree workers compensation claimants in Michigan are receiving (permanent) partial disability payments. Permanent partial disability benefits, as that term is commonly used in other states, are not payable under the wage-loss system in Michigan. Virtually all retiree W/C claimants in Michigan allege total disability.

Secondly, the typical Michigan W/C retiree claimant left his employment because he chose to retire early or in some cases, at a contractually agreed upon retirement age -- but, in either case, without any allegation of disability. Following retirement, a claim is filed which, for the first time, alleges disability from performing the job held prior to retirement. Typically, claims are filed from 3 to 18 months after retirement.

I hope I have been responsive to your questions.

Sincerely,

John G. Thodis

John G. Thodis
President

STATEMENT OF
NATIONAL MACHINE TOOL BUILDERS' ASSOCIATION
BEFORE THE
SUBCOMMITTEE ON LABOR
COMMITTEE ON HUMAN RESOURCES
UNITED STATES SENATE
SEPTEMBER 22, 1978

NMTBA is a national trade association with about 400 member companies accounting for 90% of the United State's machine tool production. Most of the member companies are small businesses with over 70% of these companies employing less than 250 people. The entire industry employs approximately 92,000 workers.

We are grateful for this opportunity to submit our industry's views on S. 3060 and add our suggestions on how S. 3060 may be amended to better, rather than worsen, the product liability crisis prevalent in America's capital goods industry.

Two years ago, NMTBA testified before this Subcommittee on S. 2018, the predecessor to S. 3060. At that time, we offered several suggestions concerning the entitlement and enforcement sections of the Bill. We commend Senators Williams and Javits for their inclusion of many of these suggestions in S. 3060.

Two years ago, we also presented statistics showing that the vast majority of workplace injuries occur because of employer fault. In the intervening years this fact has remained

constant, but third-party product liability suits against capital goods manufacturers have continued unabated. Product liability insurance costs have skyrocketed to the point that 22% of our membership can neither afford nor obtain product liability coverage.

NMTBA has consistently supported legislation to improve industrial safety -- both for our own employees and the employees of those who operate the equipment we produce. In S. 3060 we see a unique opportunity to improve workers' compensation benefits (which admittedly are grossly inconsistent both in application and substance throughout the country), while alleviating the worsening product liability problem within the machine tool industry.

This product liability crisis could be greatly reduced by amending S. 3060 to include an exclusive remedy provision for disabilities covered by the Act. S. 3060 does provide some minor relief by barring workers' compensation subrogation liens in third-party suits. But it does not make workers' compensation the true no-fault it was originally intended to be, because it still permits the maintenance of third-party actions.

At first blush, an exclusive remedy provision appears to be an abrogation of workers' legal rights. However, statistics show that relatively few injured workers benefit by our product liability tort system which amounts to a lottery.

The Interagency Task Force Study on Workers' Compensation reveals that only 2.1% of some one and a half million workers' compensation claimants proceeded against a third party in an effort to recover an amount of money in excess of their workers' compensation benefits. Our own data gathered in 1976 and updated earlier this year reveals that only 3% of the workers' compensation claims against our members resulted in courtroom recoveries substantially in excess of the applicable workers' compensation benefits. Interpolating the results of these two studies would indicate that we are in effect today maintaining a workplace product liability tort litigation system for the benefit of 900 people and their lawyers.

Although a maximum of 900 workers would lose their right to successfully sue third parties under your proposal the remaining 1,499,100 annual workers' compensation claimants would receive benefits, in many cases, much greater than those currently available. The workers' compensation insurance carriers, who are today recouping their costs 43% of the time from our members (regardless of employer fault in most states) would no longer be able to do so. An exclusive remedy amendment would end this "lottery" and would have the further effect of greatly diminishing legal defense and investigation costs which ISO estimates run about 35¢ for every dollar paid out for a product liability award. We believe that this resultant massive decrease in defense and settlement costs will encourage reputable insurers to once again offer adequate product liability coverage at affordable rates.

Affordable rates for product liability coverage are a vanishing species for machine tool builders. The few reputable insurers issuing product liability coverage assert they must charge large premiums to protect themselves against potentially huge losses. Our research shows the occurrence of catastrophic product liability losses in the machine tool industry are quite rare. In fact, almost 50% of the machine tool builders going bare have experienced no product liability claims within the past five years. Although these catastrophic losses appear illusory, unaffordable rates are strikingly real.

The average NMTBA member, who still has insurance, only experienced a 7% increase in premium costs over last year. The average machine tool builder is today paying $141,500 for primary coverage -- as opposed to $132,100 a year ago -- and to $71,000 in 1976 and $10,000 in 1970.

This percentage is even higher among our members with sales of less than $5 million -- over ¼ of these small companies are unable to purchase product liability insurance at a price they can afford. And many of these companies have had no claims experience whatsoever.

Twenty-one percent of those who do have coverage indicate that they have reason to believe that their policies will be cancelled or that their premiums will be substantially increased and/or coverage will be reduced upon the anniversary dates of their current policies.

Moreover, one-ninth of those who have coverage express grave concerns about the financial stability and integrity of their current carriers.

The average metal forming machinery builder is paying $147,200 in premiums -- 1.8% of sales. But for metal forming machinery builders in the $7½ to $15 million annual sales category, the bite is even higher -- 2.3% of sales and in the $2½ to $5 million group it is an astounding 2.9%.

The average metal cutting machinery builder saw his premiums jump from $1,900 in 1970 to $20,000 in 1975; more than double to $44,000 in 1976; triple again in 1977 to $126,800; and then increase again to $139,200 in 1978 -- a 7,226% increase in just eight years!

Another alarming trend revealed by our survey is the fact that 21% of the builders with annual sales in excess of $2½ million are unable to afford umbrella coverage. This is the coverage companies buy to protect against the catastrophic claim -- the award which exceeds the liability limits of the primary insurance policy and which threatens the total assets of a company. Last year's survey revealed a 238% increase in the cost of umbrella insurance over 1976 costs.

Finally, the number of companies who are forced to retain a portion of their liability through a deductible has risen to 28% of those with insurance -- and the average deductible amount has risen from $27,000 in 1975 to $85,400 in 1978.

All of these data demonstrate a clear case that -- regardless of what product liability situation exists for most products -- a near-crisis situation exists for the producers of the machine tools, which constitute the backbone of our American industrial economy.

Now let's look at our industry's claims experience, as expressed in our 1976 survey, updated by this year's figures.

Of the 723 closed claims reported in the 1976 and 1978 surveys, only 12% were actually tried in the courtroom -- and of these, our members have won 75%.

In other words, only 3% of the total number of product liability claims against our members have resulted in a courtroom award for an amount of money substantially in excess of the plaintiff's workers' compensation award -- an average of $209,500.

Forty-four percent of the claims have resulted in an out-of-court settlement averaging about $19,800 -- which in most cases is an amount of money right around the workers' compensation subrogation lien.

This means that over half the claimants either drop their lawsuits before trial or settlement, or they lose to one of our members in the courtroom.

What these data indicate is that our problem is not that we lose a lot of cases in the courtroom. The problem is that we get sued a lot -- and our insurance premiums reflect this vulnerability -- assuming we are able to purchase insurance at all.

It is unrealistic to believe that an increase in workers' compensation benefits afforded by S. 3060 would discourage injured employees from filing third-party lawsuits in which they can sue for money far in excess of statutorily proscribed workers' compensation benefits. These relatively few plaintiffs have no conception of the slim chances of their winning, the fact that today's product liability tort systems benefits primarily the plaintiff's bar and the insurance industry (through enforcement of subrogation liens), and that the defense costs attributable to his oftentimes meritless case may cause a third-party defendant to lose his product liability insurance or abandon a product line.

Moreover, S. 3060 could become a complete employer-employee no-fault reparations system, if it included permanent partial benefit standards along with a sole source remedy section. We trust that the Subcommittee could devise a permanent partial disability section which could equitably combine "the whole man" theory of compensation with the wage loss theory. Such an amendment would assure all injured workers of federally-mandated minimum benefits, further reduce the number of product liability suits against third-party manufacturers, and increase worker safety.

Although our statistics have shown the vast majority of workplace injuries are attributable to employer fault, we realistically admit some injuries do occur because of the defective operation or design of machinery. To insure that an S. 3060 sole source remedy amendment does not completely insulate

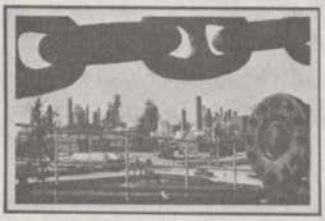
a culpable third-party manufacturer from liability, S. 3060 must contain some sort of mechanism whereby a culpable manufacturer contributes to or indemnifies the claimant's employer. This can be accomplished through industry-wide agreements among workers' compensation carriers on determining comparative fault or through post-award arbitration.

We are confident that the Subcommittee can include within S. 3060 some sort of mechanism whereby culpable third-party manufacturers and employers can equitably apportion workers' compensation losses among themselves. We are also confident that this can be done without running the risk of Joint Committee referral.

Again, we urge the Subcommittee to take advantage of this golden opportunity to finally provide the American worker with a comprehensive, truly no-fault workers' compensation system and to give relief to capital goods manufacturers and suppliers beleaguered by usually specious and always costly product liability suits in which the attorneys and workers' compensation carrier (rarely the injured worker) come out ahead. Of the million and one half workers' compensation claims filed each year, only a few hundred claimants would surrender their rights to sue in return for improved workers' compensation benefits. Most importantly, the onus of maintaining a safe workplace will fall squarely on the shoulders of the employer who has the ultimate control over his worker's environment and thus should have a greater incentive to keep workers' compensation costs down.

NMTBA is in general agreement with the benefit standards and enforcement mechanism contained in S. 3060, and we are prepared to support the entire bill, if Section 10 is amended to make the increased benefits mandated under Section 4 the sole and exclusive remedy for workplace injuries. Moreover, we urge that you include in S. 3060 a comprehensive permanent partial disability section thus making these increased permanent partial benefits the sole and exclusive remedy for workplace injuries.











Statement of the

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

ON: THE NATIONAL WORKERS' COMPENSATION STANDARDS ACT (S. 3060)

TO: SUBCOMMITTEE ON LABOR, SENATE HUMAN RESOURCES COMMITTEE

BY: MICHAEL J. ROMIG

DATE: OCTOBER 6, 1978

STATEMENT
on
THE NATIONAL WORKERS' COMPENSATION STANDARDS ACT (S. 3060)
to the
SUBCOMMITTEE ON LABOR
of the
SENATE HUMAN RESOURCES COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Michael J. Romig*
October 6, 1978

This statement is submitted on behalf of the 77,000 members of the National Chamber.

CHAMBER POSITION

While we share your hopes for a modern workers' compensation system responsive to today's work environments, we do not believe that the National Workers' Compensation Standards Act (S. 3060) is necessary for its achievement. Moreover, our evaluation of S. 3060 has convinced us that this bill, with its unworkable and prohibitively expensive provisions, would produce a compensation program irreconcilable with what heretofore has been viewed as needed improvements in job-injury compensation.

Despite our opposition to S. 3060, we do believe that there is a need for a constructive federal role in workers' compensation. The contribution and impact of the National Commission on State Workmen's Compensation Laws is a testimony to how the federal government can render enlightened and creative assistance to the States. Implementation of constructive federal technical assistance is far preferable to the domination of the States contemplated by S. 3060.

The National Chamber has already begun drawing upon its diverse membership in an effort to define appropriate areas for the federal government to assist those who seek to improve the performance of the workers' compensation system. We look forward to the opportunity to share our findings along with more detailed comments upon S. 3060 whenever the Subcommittee schedules additional hearings.

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* Director, Economic Security, Education and Manpower Section

BUSINESS SUPPORT OF WORKERS' COMPENSATION

The National Chamber has long been vitally interested in the effective operation of our state workers' compensation system. The record clearly demonstrates that this nearly 100 year-old system has proven to be a highly efficient method of protecting employers and their employees against the financial risk of job-caused disabilities and motivating job place safety and injured worker rehabilitation. Because we believe that no satisfactory alternative is available and that the basically sound state workers' compensation system must be strengthened if it is to be continued, we have long urged our membership to work for and support needed improvements in state job-injury laws.

Within a few months after the release of the Report of the National Commission on State Workmen's Compensation Laws, and despite misgivings over some aspects of the Report, our Board of Directors urged our entire membership to respond to the challenge offered by the Commission's recommendations.

Since then, National Chamber staff and members have worked hard to bring together the forces needed to make the necessary reforms. The task has not been easy nor has it been fruitless. As charted by our "Analysis of Workers' Compensation Laws," most of the state laws are in substantial compliance with the 19 essential recommendations. Thus the progress has indeed been heartening albeit incomplete. This has reinforced our belief that the states are able and willing voluntarily to improve their laws but are in need of appropriate assistance to overcome structural hurdles to reform.

Despite our support for better job injury laws, we are opposed to S. 3060. Our position was influenced by consideration of three related and essential concerns. Our first concern was the obvious need to determine what reforms were necessary. Secondly having identified the reform, there remained the critical question of whether federal legislation would be necessary to achieve them. Finally, assuming that federal legislation might be necessary, is the proposed legislation desirable?

We concluded that, while we share your hopes for a modern workers' compensation system responsible to today's work environments, federal legislation is not necessary for its achievement. Moreover, our evaluation of S. 3060 has convinced us that this legislation, with its unworkable and prohibitively expensive provisions,

would produce a compensation program irreconcilable with what our members perceive as an adequate, equitable and prompt program.

THE NEED FOR REFORM

I - The National Commission Report

On July 31, 1972, the National Commission on State Workmen's Compensation Laws finished a one year review of the state system of job-injury compensation with the conclusion that "significant improvements in workmen's compensation are necessary." The report that accompanied this finding set forth a strategy for documenting and achieving the reforms that were needed to permit the workmen's compensation system to fulfill its great potential.

The strategy rejected recommendations that would have abandoned the state system in favor of a federal system, or a return to the tort system, or a dismembering of the system and distribution of its components to other programs. Instead, the Commission issued eighty-four recommendations for improving state laws. Nineteen of these were viewed as essential to reform. The States were asked to adopt them within three years.

Because these suggested changes in state law were substantive and involved significant cost, the Commission recommended a successor commission as a second component of its strategy. The new commission would provide creative federal assistance to the States to help them examine their laws and develop support for suggested reforms. The Commission also noted the incompleteness of its own review and recommended that its successor be instructed to analyze many critical areas not adequately examined but recognized as important components of complete reform.

The third and final component of the reform strategy was a request that Congress evaluate the response of the States and the federal government to the strategy. If the response proved inadequate, it was recommended that Congress move to guarantee compliance.

II - The Inter-Agency Task Force on Workers' Compensation

Four and one-half years later, the federal government took a second look at state job-injury compensation laws and reached very similar conclusions. In a report filed on January 19, 1977, the Inter-Agency Task force on Workers'

Compensation said, "A sharp reordering of priorities and a new mode of operation will be necessary if workers' compensation is to achieve its traditional goals."

In spelling out what priorities must be ordered and what new modes of operation are needed, the report quickly rejected the suggestion of substituting federal administration for that of the States with the unequivocal conclusion that "...legislation to federalize the system is unwarranted at this time. A program so affected by local government conditions and local services, and requiring so much interaction with claimants probably is more effectively managed at the same level." Working on this premise, the report noted that "a more active and effective role for state agencies is central..." to achieving its recommendations.

The report also predicted that "without such changes in emphasis, workers' compensation is in danger of becoming more expensive, less equitable, and less effective," a prediction that many employers contend is already at hand, and as was the case with the 1972 National Commission on State Workmen's Compensation laws, the Task Force recommended that continued state progress will benefit from federal assistance and monitoring. To that end the Task Force supported a significant increase in technical assistance efforts by the federal government.

III - Abuses Ignored

Neither the Commission nor the Task Force report examined the increasing phenomenon of abuse within the workers' compensation system. Without reciting a litany of these abuses, we would point out just one area -- permanent partial disabilities -- that is proving to be most disturbing and exceedingly costly as a result of abuses by claimants.

In compiling a list of priorities for reform of the workers' compensation system, it is imperative that full attention be given to the elimination of abuses of the system before we ask employers to pay for higher and more costly benefits (as suggested by the National Commission) that also would serve to increase the incentives for abuse.

IV - Response to the Federal Reports

The response to these federal reports and the allegations of abuse by both the States and the federal government has been mixed.

A. Response by the States

The response by the States to the Commission report has been phenomenal.

Since the issuance of the Commission report, over 1500 amendments to the various laws have been adopted. Without question, the Commission report was a major factor in this outpouring of state law changes.

All of the changes have been followed and reported by the National Chamber in our publication, ANALYSIS OF WORKERS' COMPENSATION LAWS.

The following highlight the progress made by the states since 1972:

- o Every state has raised cash benefits at least once. Forty-two states now provide for the automatic adjustment of benefits, annually, based on the state average weekly wage.

- o In forty-three states, the maximum weekly benefit now equals or exceeds 66 2/3 of the average weekly wage. Of these, 23 states pay 100% or more.

- o Only 15 states still set a dollar maximum on cash benefits -- less than 1/3 of the number with dollar maximums in 1973.

- o Fifty jurisdictions now provide for compulsory coverage under workers' compensation with only three states maintaining an elective law (South Carolina, New Jersey and Texas). Only eleven states provide for numerical exemptions and these are at lower levels than those of 1973.

- o Every state now provides for broad occupational disease coverage and unlimited medical benefits.

Without question, the response by the States to the recommendations of the 1972 Commission and the Interagency Task Force provides a clear showing that the states are willing and able to improve their laws.

B. Response by the Federal Government

An important component of the 1972 National Commission strategy for improving the workers' compensation system was the appointment of a successor commission. However, neither Congress nor the Administration has been willing to make this commitment, although the Administration did appoint the Inter-departmental Workers' Compensation Task Force some two years after the release of the Commission report. Beyond a summary report, the Task Force has not published its findings.

It has been generally recognized that the Commission was hindered by a lack of data and time. The Commission report candidly noted that there was little exploration of such topics as permanent partial awards, occupational disease and program administration. The White Paper on Workers' Compensation which gave rise to the Task Force called attention to the potential advantages of more research into broader changes and new perspectives of the problems depicted by the National Commission. Finally, the Task Force Report urged significant increases in technical assistance to the States.

Despite these facts, not enough basic rethinking of workers' compensation is being done. Admittedly, the Task Force Report examined several areas, but its resources were limited, its work has gone unpublished and its efforts largely have been ignored by the Administration and the Congress. This is most unfortunate since the Task Force Report has much to offer the reform effort.

For example, a major finding of the Task Force was that permanent disability, work related death and occupational disease cases represented only about 5 percent of the claims but these accounted for almost one half of the benefits being paid. Moreover, these claims typically involved excessive litigation, long delays in payment and little relationship between the benefits awarded and wages lost. The solution offered was to move to a wage loss system which would assure adequate compensation for wages lost, undercut the need to litigate and foster rehabilitation as a way to hold down costs.

While there may be some disagreement over these conclusions, we wonder why neither the Department of Labor nor the Congress has fostered discussion of this recommendation.

There are other excellent discussions in the Task Force Report as well as some serious shortcomings. An example of the latter is the question of disincentives to employment -- a concern expressed in both the Commission report and the White Paper. The research program of the Task Force ignored this concern although a study by UBA, Inc. reveals that the Commission suggestion for a maximum benefit equal to 100% of average wages would produce a sizable work disincentive in several states.[1/]

1/ UBA, Inc. Research Report Bulletin No. 14, W.C., May 20, 1976.

All in all, the federal government has not really been willing to devote the resources to the problems which have been so amply documented. The positive impact of the National Commission and the promising contribution by the Task Force support the proposition that study and review by the federal government can have a beneficial effect. The improvements to date are traceable to these efforts and not to federal legislation such as S. 3060.

C. Response by the Congress

The Congressional response to the National Commission report has not been helpful. Rather than affording the States a fair opportunity to weigh their laws against the Commission report, Congress has offered a series of alternative guidelines for the States.

This has been most confusing to affected state officials. Moreover, it has diverted important interest groups and their resources away from the pursuit of state legislation. A more helpful stance by the Congress would have included efforts to channel constructive and enlightened federal technical assistance to the States. Other than the limited efforts by the Task Force, we are unaware of any such effort by the Congress or the Executive branch.

For the above reasons, we conclude that reform of the workers' compensation system will entail more than the increases in benefits called for by the 1972 Commission on which S. 3060 is premised. Reform will have to address the findings of the Task Force and the wide array of abuses that plague the system. Reaching a consensus on what these reforms will include can be achieved best through patient and studied efforts by both federal and state agencies working cooperatively with employers and employees in each state.

NEED FOR FEDERAL LEGISLATION

I - S. 3060 Is Not The Solution

S. 3060 will not produce a modern workers' compensation system responsive to today's work environments. Indeed, if this bill were to be enacted, we foresee the creation of a workers' compensation program irreconcilable with what we and others consider to be an adequate, equitable and efficient job-injury compensation system. Our preference is a commitment by the federal government to provide constructive and enlightened technical assistance.

To appreciate these concerns, it is necessary to understand what S. 3060 proposes to do and how it would do it.

The bill proposes to impose a comprehensive, nationwide system of workers' compensation benefit standards upon employers and to establish appropriate procedures for the enforcement by employees of such benefit guarantees made by these federal standards (Section 2B). It would achieve this by granting broad powers to the Secretary of Labor. His judgements would supplant all of the judgements made by countless number of legislators in the fifty states. Moreover, employers already reeling from a heavy burden of state and federal record keeping requirements would find new Department of Labor demands on top of those already sought by the states' workers compensation boards.

Several sections of the bill specify the rights of injured workers and how they may enforce these rights. Section 4 prescribes fifteen (15) minimum benefit standards for the states to meet. In addition, Section 5 authorizes the Secretary of Labor to prescribe additional benefit standards relating to occupational disease via administrative fiat. Section 7(a) directs the Secretary of Labor to evaluate annually each state law and determine to what extent it complies with each of the standards prescribed by Section 4. Based on this evaluation, he would certify each state law accordingly. Section 7(b) then states that any employee shall be entitled to receive benefits for his injury, illness or death in accordance with standards prescribed by Section 4 and 5. Should the state law not grant all of the federally promised benefits, the injured employee may seek (pursuant to Section 8 of the Act) any additional benefits by bringing an action with the Benefits Review Board, a quasi-independent federal board created to adjudicate workers' compensation claims brought under federal workers' compensation statutes.

Sections 9 through 17 establish a pattern of dual federal and state regulations of employers and insurance carriers through a complex system of federal requirements, grants, research programs, statistics gathering, audits and an advisory commission.

S. 3060 is not substantially different from its predecessors in the 93rd Congress (S. 2008) and the 94th Congress (S. 2018). The objective is the

same -- federalization of workers' compensation. It simply proceeds on a path parallel to that of its predecessors.

While this new path avoids some of the constitutional deficiencies of S. 2018 and the logistic impracticalities of S. 2008, it presents some new concerns of equal magnitude. While we will not endeavor to analyze S. 3060 line by line (indeed, this process continues), we will identify what we perceive to be the primary defects of this proposal and reserve a more detailed critique for further hearings in the next Congress.

Our analysis of S. 3060 reveals four glaring deficiencies. They are:

(1) It is an incomplete reform proposal in that it focuses almost exclusively on benefit improvements while leaving untouched much more troublesome aspects of workers' compensation, such as permanent partial awards, occupational disease, and duplication benefit awards;

(2) It promises to be an exceedingly costly proposal because it implicitly promises to make workers' compensation into a comprehensive health care and income maintenance program for all private sector employees irrespective of the cause or source of their disability. Based upon the cost increases resulting from other federal forays into workers' compensation (i.e. Black Lung, FECA and Longshoremen's & Harbor Workers' Acts), this suggests a five fold increase in costs for most employers -- a significant inflationary pressure.

(3) It would establish a cumbersome collateral recovery system for workers' compensation claimants that by its nature would be litigious. The suggestion to allow a claimant to proceed in a federal forum following exhaustion of his state administrative (but not judicial) forum promises the prospect of both federal and state appeals proceding simultaneously.

As proposed, S. 3060 encourages forum-shopping. Few cases, if any, would be resolved finally at either the state administrative or judicial level as long as a federal alternative remained.

There is also a serious question as to whether the Benefits Review Board and the Office of Workers' Compensation Programs are able to cope with the added responsibilities assigned to them by S. 3060. All of these agencies have come under heavy criticism for their failure to cope with their present workloads.

(4) It grants far too much discretion to the Secretary of Labor. One man is entrusted with the authority to override the carefully exercised judgements of the legislatures, courts and citizens of all fifty states. One man is entrusted with the authority to

> resolve the difficult issues surrounding the resolution of occupational disease benefits, permanent partial awards and any aspect of the workers' compensation system as he sees fit. Moreover, he is carefully granted this authority in a manner calculated to reduce the opportunity to review and override any arbitrary or capricious decisions.

While this concludes our statement on the National Workers' Compensation Standards Act, we continue our analysis of the bill and its implications for the future of workers' compensation. We also will continue our efforts to define the reforms needed in the state programs, how they may best be achieved and what role the federal government might play in this pursuit. We look forward to the opportunity to appear at future hearings of this Subcommittee and to share our findings with you.

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AMERICAN METAL STAMPING ASSOCIATION

STATEMENT ON S.3060

NATIONAL WORKERS' COMPENSATION ACT OF 1978
PRESENTED FOR THE HEARING RECORD
OF THE
SUBCOMMITTEE ON LABOR
OF THE
SENATE COMMITTEE ON HUMAN RESOURCES

OCTOBER 6, 1978

Our 35th Year of Service

SUMMARY

AMERICAN METAL STAMPING ASSOCIATION

STATEMENT ON S.3060

NATIONAL WORKERS' COMPENSATION ACT OF 1978

I. INTRODUCTION

An overview of AMSA, its members, and the metal stamping industry. Highlights of why S.3060 is important to metal stampers.

II. AMSA's TWOFOLD CONCERN:

- Concept and practice of Federal Standards--they are a formula for disaster.
- Third party liability provisions of S.3060.

III. FEDERAL STANDARDS ARE UNWARRANTED:

- Progress in states is slow but measurable
- Cost analysis of S.3060 is critical
- Cost of meeting "19 essential recommendations" has exceeded estimates
- S.3060 Mishandles Occupational Disease
  - Potential for additional bureaucracy is huge
  - Excessive and unprecedented transfer of authority to Secretary of Labor
- S.3060 can be compared to the Longshoremen's and Harbor Workers' Comensation Act
  - Federal Benefits Review Board is a totally discredited agency

IV. THIRD PARTY LIABILITY

- Only small segment of Industry backs S.3060 in exchange for alleged relief from product liability insurance costs.
- Problems with sole remedy
  - May increase litigation cost for many
  - Some 3rd party risk must be retained
  - Other solutions are available
  - Cure would be worse than disease

V. CONCLUSION

It is not in the public interest to adopt a federal standards program which does not address fundamental abuses of similar systems. S.3060 would be too expensive and unworkable.

A STATEMENT BY THE
AMERICAN METAL STAMPING ASSOCIATION
ON
S.3060 -- NATIONAL WORKERS' COMPENSATION
STANDARDS ACT OF 1978

The American Metal Stamping Association (AMSA) is a national trade association with over 700 member companies representing the producers of metal stampings and related products in North America.

Nearly all member companies are small businesses, averaging 65 employees. The entire industry has some 250,000 employees.

Metal stamping companies typically are independent contract manufacturers of component parts produced to the specifications of industrial customers. Some produce end-products as well. But most are "sub-contractors" to an enormous variety of larger manufacturers who assemble and market the finished products.

Major customers for metal stampings include the aerospace, appliance, automotive, construction equipment, electronics, farm implements, nuclear and transportation industries. Annual sales volume of the metal stamping industry is estimated to exceed $12 billion.

AMSA's TWOFOLD CONCERN

The American Metal Stamping Association is opposed to S.3060 and the array of federal standards for state workers' compensation programs which it would establish. Our concerns are twofold.

First, we are concerned that the proposed federal standards would prove to be an unmanageable and unworkable method for upgrading state workers' compensation programs. An expansion of federal involvement in this area would explode costs, create new and unprecedented bureaucratic snafus and pave the way for a massive increase in federal government regulation of industry.

Second, we are deeply concerned that the Section 10 provisions of S.3060, which are intended to address the workplace product liability problem, do so inappropriately. In fact, contrary to claims made by some segments of the capital equipment producing industry, the Section 10 proposals (and certain possible amendments to them) may simply transfer costs of product liability suits from one segment of industry to another, without addressing the root causes of the problem.

It is quite possible that skyrocketing product liability insurance premiums for a relatively small segment of industry would be exchanged for even more

devasting increases in workers' compensation insurance premiums for all employers.

FEDERAL STANDARDS ARE UNWARRANTED

Progress in States is Slow But Measureable

The prevelent rallying cry in Congress and among supporters for federalization or federal standards (as proposed by S.3060) has been the lack of compliance by individual states with the well known "19 essential recommendations" of the National Commission on Workmen's Compensation Laws. It is true that as of the end of 1977 all 19 essential recommendations had not been adopted by any of the states.

A study by the Alliance of American Insurers (AAI) does demonstrate that progress toward improved state workers' compensation programs has been quite dramatic since 1972 and that progress continues to be made. The AAI cites benefit increases during the last two years which far outstrip the increase in average spendable earnings as evidence of progress. They note that:

- the vast majority of the states have eliminated caps on total workers' compensation payments;
- all states now provide full medical benefits to workers injured on the job; and

- all state programs now cover occupational diseases

To some, this may be slow progress. To us however, this shows a necessary and responsible level of caution.

A final point -- could the unwillingness of the states to adopt all 19 essential recommendations indicate that some of the recommendations might be inappropriate or excessive?

Cost Analysis of S.3060 is Critical

Inflation and our apparent inability to control inflationary pressures raise another question -- what is the cost of S.3060?

The National Commission had projected that costs, if all states increased maximum weekly benefits to 200% of the state average weekly wage, would increase by 44%. The AAI study shows that the 44% increase in cost was an unrealistic estimate that has been greatly exceeded by most states.

The ability of business to absorb higher and higher costs mandated by federal legislative programs is finite. Nonproductive increases in the cost of produc-

tion without counterbalancing advancements in productive capacity simply fuels inflationary fires. Many small businesses feel the pinch of increased workers' compensation rates already. If S.3060's provisions are thrust upon them, the costs may reach the "unaffordable" level very quickly.

The true costs of S.3060 must be determined. It is totally unacceptable for legislation such as this to be considered without accurate cost analysis, on the public record.

S.3060 Mishandles Occupational Disease

Section 5 of S.3060 proposes a mechanism for establishing standards for compensating disabilities resulting from occupational disease. The responsibility for determining "legal" diseases is vested with the Secretary of Labor who would have broad authority through a new regulatory procedure.

Simply put, the potential for abuse in Section 5 is unbelievable! Responsible government officials at all levels agree that something must be done to streamline the regulatory process. The growth of federal regulation of business is like a cancer which has gone wild.

Currently all states are in compliance with the National Commission's recommendation that workers' compensation systems provide broad coverage of occupational diseases. There seems to be little reason to abandon a functioning system of state disease standards in favor of a federal standard which is tied to a massive regulation generating mechanism which vests all authority in a single non-elective post. We fear the result would be a bureaucratic morass which would make OSHA seem like paradise!

What Can Be Learned From LSHWCA?

Extensive oversight hearings have been held in both houses of Congress on the Longshoremen's and Harbor Workers' Compensation Act. The hearing record is voluminous, and loaded with horror stories of abuse and mismanagement. Documented case histories have been recorded where compensation for injuries exceeds an individual's regular earnings.

Premiums for some occupations covered by LSHWCA have increased over sixfold since 1972. It is a program where benefits have reached levels such that there is an arguable disincentive to work or return to work following a temporary total disability.

The Federal Benefits Review Board would be designated

by S.3060, to be the appeal mechanism for an injured worker who believes he has not received adequate and proper compensation under the federal standard for a state compensation system. This designation of responsibility is absolutely absurd! There is not one federal agency which is more discredited than this Board. Surely there must be a better way!

THIRD PARTY LIABILITY

Section 10 seeks to address the product liability insurance problem presently impacting certain segments of industry -- most notably, the capital equipment producers. Frankly, Section 10, as it stands in S.3060, is quite supportable by AMSA. It is the only portion of S.3060 we could support!

Section 10 offers significant relief to third parties sued for recovery under a product liability claim for injuries sustained in the workplace. Statistics developed by capital equipment producers show that only 3% of all product liability claimants attempting to recover for workplace injuries are awarded judgements significantly in excess of workers' compensation benefits currently paid. Section 10's provisions reducing product liability awards by the amount of any workers' compensation benefits paid would, therefore, go a long way toward cutting

insurance losses and restoring sense to the product liability insurance arena.

Unfortunately, because the chances are extremely remote that Section 10 would be implemented alone, without the balance of S.3060; and because the preponderence of S.3060 is unnecessary and counter to realistic and reasonable changes which could be made in state workers' compensation programs; AMSA must reject Section 10 along with the rest of S.3060.

Much attention is paid to the workplace product liability problem. It is important to remember that only 42% of the claim dollars paid for product liability suits stem from workplace injuries. A solution must be found for the product liability situation which addresses the basic problem -- the distortion of tort law recovery principles.

Solutions offered in Section 10, deal with less than half the dollar volume of product liability claims, and only 11% of the actual claims filed. More complete solutions such as model state legislation the Commerce Department recently agreed to develop is the real answer for workplace product liability problems.

Until tort law is changed, the root cause will remain. Solutions offered by S.3060 are only window dressing and a transparent attempt to lure some product

liability-prone industries into supporting S.3060 -- a bill which otherwise is a complete anathema to business!

Problems with Sole Remedy

The proposal by a small segment of the business community to amend S.3060 to include a "sole remedy" clause in Section 10 are similarly little more than a narrow and self-serving effort to get out from under admittedly unbearable increases in product liability insurance premiums. The real answer is not "sole remedy".

What is necessary is a reassessment of tort law interpretation re-establishing the equilibrium and common sense that was lost during the past few years. Fifteen years ago, even five years ago, product liability was not a major problem.

It is claimed that the sole remedy concept would eliminate attorneys' fees and other litigation costs. Yet assuming that there must be a financial incentive maintained to ensure the manufacture of safe capital equipment, some sort of an ajudication process would still occur between the employer and the equipment producer. How could anyone believe that this will take place without expensive attorneys, costly discovery procedures, and other transaction costs? In fact, it may even be more expensive!

Certainly costs for employers will skyrocket -- first for increased workers' compensation insurance premiums, and second, to pay attorney's and consulting engineers.

It should by now be obvious that for all employers covered by workers' compensation programs to be guided by S.3060's federal standards, the cure to the workplace product liability problems proposed by S.3060 (especially with a sole remedy amendment) is worse than the disease which now plagues capital equipment producers.

CONCLUSION

Federal standards for state workers' compensation programs is an idea whose time has not yet come -- and which we hope will never come.

The public interest demands a reduction in federal government regulation, not an increase. The public interest demands a lessening of inflationary pressure, not an increase. The public interest demands solutions to the product liability problem (both in the workplace and in consumer product areas), not just a shift of the cost from one industry to another.

Continued upgrading of state controlled workers'

compensation programs is important and should continue. Benefits in many states are not yet adequate and must continue to be increased. However, state by state flexibility must be maintained and federal intrusion avoided.

It must be recoginzed that punative financial incentives against employers are not enough to eliminate workplace injuries. At times actual fault may reside with the employee or with the capital equipment producer. Economic incentives must be retained to encourage safe work practices by employees and the safe manufacture of products by capital equipment producers.

AMSA urges the Labor Subcommittee of the Senate Committee on Human Resources to reconsider the need for S.3060. We are convinced the proposal for federal standards for state workers' compensation systems would not serve the public interest.

STATEMENT OF
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON

Before

THE SUBCOMMITTEE ON LABOR OF
THE SENATE COMMITTEE ON HUMAN RESOURCES

On

S. 3060 "THE NATIONAL WORKERS'
COMPENSATION STANDARDS ACT OF 1978"

This statement is submitted on behalf of Seyfarth, Shaw, Fairweather & Geraldson, a law firm with offices in Washington, D.C.; Chicago, Illinois; Los Angeles, California; and Miami, Florida. The firm represents a substantial number of clients in workers' compensation cases under both state and federal law.

The experience of the firm indicates that certain aspects of state workers' compensation systems are still inadequate. However, as Professor Peter Barth testified before this Subcommittee, in 1977, regarding the issue of occupational disease, "[t]he difficulties are not simple ones and do not lend themselves to simple or partial solutions."[1/] Dr. Barth's comment applies with equal force to the entire issue of compensation law reform. Yet, this bill proposes overly simplistic solutions to very complex

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1/ Examination of the Scope of the Industrial Disease Problem which Confronts Our Society: Hearings Before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. [hereinafter "Occupational Disease Hearings"] 241 (statement of Dr. Peter S. Barth).

problems and provides only partial responses to problems which need to be addressed in their entirety. For example, the bill does not even speak to a tremendous area of compensation law, partial disability; it does not undertake to define what "total disability" is; it provides a framework for the comepnsation of occupational disease that is unfair to both employees and employers; and, it places what will surely amount to vastly increased litigation into the already overburdened Benefits Review Board/Circuit Courts of Appeal System.

Accordingly, we are submitting a series of proposals we believe will make the bill more effective in promoting the goal of upgrading the system of compensating workers for work-related injuries, illnesses and diseases.

I. MONETARY BENEFITS, REHABILITATION, AND RETURN TO WORK

Until recently, many states had a ceiling on benefits awardable to claimants for compensation. Prior to the 1972 amendments, even the Longshoremen's and Harbor Workers' Compensation Act's maximum weekly benefit was only $70. As the cost of living has increased, so has the need for more liberal benefits for injured and ill workers. Many states now provide that monetary benefits for total disability are

to be two-thirds of an employee's wages, up to the state's average weekly wage. Section 4(b) of the bill proposes that, by 1983, maximum weekly benefits shall be up to 200% of the statewide average weekly wage.

Presumably recognizing that improved total disability benefits might operate as a disincentive for some people to return to work, section 4(b)(2) of the bill provides that an employer may award a claimant 80% of his spendable income in lieu of two-thirds of his gross wages. However, even this amount of money may be a sufficient disincentive for young singles or older workers who are otherwise bothered by the physical problems of aging. The bill has recognized that the primary goal of any compensation system should be to return less than totally disabled employees to productive activity as soon as possible. This goal has been addressed by provisions for prompt rehabilitation services (section 4(h)) and for reemployment of injured workers by their former employers whenever feasible and as soon as possible (section 4(i)).

However, in order to minimize abuses of the system while providing maximum monetary benefits, we recommend that rehabilitation services only be undertaken when a physician certifies that the claimant cannot return to his former work. We also recommend that, once a claimant has been

found unfit to return to his former employment, occupational rehabilitation be mandatory, rather than optional, and that federal assistance be granted to help states provide more comprehensive rehabilitation services. A rehabilitation counselor may conclude that by age, experience, physical condition or other factors, a claimant may not be able to return to the workplace, but the claimant himself should not be permitted to reach that conclusion, for reasons other than disability, and preclude effective review of that decision.

As an additional incentive for employers to offer work to previously injured employees, a second injury fund, with the purpose of limiting the liability of any one employer for total disability caused only in part by a second injury, should be a part of this bill.

In a related situation, a person may be found to be totally disabled and still be able to hold down a job. This may occur, for example, when the stresses of regular work would cause a psychiatric overlay manifesting itself as continued pain, but a low stress job may be within the capabilities of a claimant. Under some compensation systems, a person may be entitled to receive total disability payments in addition to the pay from his job because the employment represents an "extraordinary effort."

So that disabled people are not put in a better position than their colleagues who are not disabled, we recommend that wages of people who return to some form of work operate as an offset to compensation.

II. DISABILITY

Although the bill purports to deal with compensating total disability, that term is never defined. If that definition is left to state law, the uniformity sought to be brought to state law will not be achieved.

We suggest that a modification of the definition of "disability" set forth in the statute authorizing the payment of disability insurance benefits under the Social Security Act, 42 U.S.C. § 423(d), be adopted for purposes of this bill:

> The term [total] 'disability' means --
>
> [I]nability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . . .
>
> . . . .
>
> [A]n individual . . . shall be determined to be under a [total] disability only if his physical or mental impairment or impairments are 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 gainful work which

> exists in the national economy . . . [and which exists in the immediate region in which he lives].
>
> . . . .
>
> [A] 'physical or mental impairment' is an impairment that results from anatomical, physiological or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

(Bracketed portions of the above definition are recommended changes.)

Total disability should not be an easy status to obtain. However, it should not be impossible to achieve. Therefore, the employer should be permitted to offer all available evidence that the claimant can work. On the other hand, nonmedical factors, such as age, education or experience, should be permitted to be introduced by the claimant. Similarly, the finder of fact should be permitted the flexibility to determine that a claimant is totally disabled based on his inability to engage in substantial gainful activity, rather than any gainful activity.

III. OCCUPATIONAL DISEASE

The occupational disease standards, as proposed, are unfair to both claimants and employers.

The standards are unfair to claimants because they do not create any presumptions regarding those occupational diseases known to be associated with employment. Instead, an elaborate procedure of study, recommendation, and promulgation is set out. That procedure is fine for areas in which little is currently known of the relationship between employment and disease, such as cardiovascular problems.[2/] However, once a physician has diagnosed any of a number of diseases presently known to be associated with certain occupational factors, and sufficient work exposure to the occupational agent causing such disease has been established, claimants should be entitled to rely on a rebuttable presumption that their disease is work related. Though the Secretary of Labor may create presumptions, the delay inherent in that process will operate to the disadvantage of persons whose disease is now known to be related to employment.

In addition, allowing states the option of creating presumptions will result in unequal treatment of claimants depending on the state in which the case is brought, and this provision of the bill should be deleted.

2/ Occupational Disease Hearings 238 (Statement of Dr. Peter S. Barth).

The occupational disease standards are unfair to employers because they do not clearly set out that the disease or illness suffered by a particular claimant must be related to that claimant's employment in order to be compensable.

As Judge Learned Hand once noted regarding occupational disease:

> It is indeed necessary not to extend the statute so as to make it a general health insurance, and to avoid this the coverage must be limited to diseases resulting from working conditions peculiar to the calling. In order to recover a workman must be exposed to hazards greater than those involved in ordinary living, and the disease must arise from one of these.3/

The joint publication of the Public Health Service, the Center for Disease Control and NIOSH, entitled "A Guide to the Work-Relatedness of Disease," states that proposition in somewhat different terms as follows: "In order for the compensation system to treat both injury and illness in a uniform manner, disease must be related to the workplace as effectively as injury."4/

However, section 4(g) of the bill provides, in pertinent part:

3/ Grain Handling Company v. Sweeney, 102 F.2d 464, 465 (2d Cir. 1939), cert. denied, 308 U.S. 70 (1939).

4/ United States Department of Health, Education and Welfare, "A Guide to the Work-Relatedness of Disease" (1976).

> [C]ompensation due to disease shall not be denied . . . if such disease might, under some circumstances, arise out of and in the course of employment; or . . . 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.

Such open ended language is an invitation for the filing of claims involving a large variety of diseases and illnesses which responsible medical opinion cannot, at the present time, link to causative factors in the claimant's workplace. As Dr. Peter Barth said in a statement before this Subcommittee in 1977:

> When certain cases do enter the compensation system they pose very serious problems for the system, one initially designed to cope with injuries due to accident. Noted below are simply a few of the areas that pose such special difficulties.
>
> 1. Cardiovascular cases - Not only is there an enormous range of actual coverage under workers' compensation laws for persons suffering heart attacks or strokes . . . but there is necessarily extreme inconsistency in awards within states. The issue here is simply that scientific and medical wisdom are not advanced enough to cope with evidentiary needs.
>
> 2. Infectious Disease Cases - In order to preclude compensating 'unworthy' claims for compensation by persons with infectious illnesses, the statutes have been contorted in a variety of ways, frequently yielding outcomes that appear capricious. Yet, if the states widen coverage to allow more 'worthy' claims to be compensated they fear being deluged with claims for influenza, the common cold, etc. At

> root, of course, are several issues including our ignorance about the cause and transmission of disease.5/

Accordingly, it is recommended that section 4(g) be amended to read:

> [C]ompensation due to disease shall not be denied . . . if such disease might, under some circumstances, arise out of and in the course of employment; or . . . is an ordinary disease of life or is a communicable disease, so long as the disease is established, by a reasonable degree of medical certainty, to have been caused or aggravated by the claimant's employment.

Another problem which must be addressed in any statute compensating occupational disease is that multiple causitive factors exist for many, if not most, diseases. Dr. E. Cuyler Hammond, Director of the Department of Epidemiology and Statistics of the American Cancer Society, testified before this Subcommittee: "Most human cancers are caused by combined exposures."6/ Evidence is so great that smoking is synergistic with asbestos in producing lung cancer7/ that a bill introduced to compensate victims of asbestos disease

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5/ Occupational Disease Hearings 252-53 (Statement of Dr. Peter S. Barth).

6/ Occupational Disease Hearings 15 (Statement of Dr. E. Cuyler Hammond).

7/ Occupational Disease Hearings 16 (Statement of Dr. E. Cuyler Hammond).

creates a fund made up of contributions by cigarette manufacturers as well as asbestos product manufacturers.[8/] The "Guide to the Work-Relatedness of Disease" provides, as an example, a list of numerous occupational and nonoccupational factors which contribute to cause cardiovascular disease, hearing loss, arthritis and pulmonary diseases.[9/] Brown Lung, the disease of many textile workers, is aggravated by smoking.[10/] As well, evidence is continuing to mount that nitrites in food,[11/] saccharin as a sugar substitute, and benzo-a-pyrene, to which human exposure cannot be eliminated,[12/] are potential carcinogins or promoters of neoplastic changes.

As Dr. Eula Bingham said to this Subcommittee:

> In some cases, the relationship is relatively clearcut, as in the case of angiosarcomas caused by vinyl chloride, mesotheliomas

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8/ H.R. 9496, 95th Cong., 1st Sess. (1977).

9/ United States Department of Health, Education and Welfare, "A Guide to the Work-Relatedness of Disease" 14 (1976).

10/ Special Hearing, Department of Health Education and Welfare: Hearing Before a Subcommittee of the Senate Committee on Appropriations, 95th Cong., 1st Sess. (Brown Lung Hearing) 108. (Statement of Dr. James A. Merchant.)

11/ P. Newberne, Dietary Nitrite in the Rat (May 18, 1978) (Final Report on Contract FDA 74-2181).

12/ Occupational Disease Hearings 18-19 (Statement of Dr. E. Cuyler Hammond).

> related to asbestos exposure, and bladder cancer among workers exposed to benzidine. In other diseases, the relationship is clouded by multiple exposures and by synergistic effects. We need to improve on the data base, to develop tumor registries, and to draw on statistics within the medical insurance system to identify job-related illnesses.13/

Therefore, it is recommended that a second injury fund be established, along the lines of the second injury fund in the Longshoremen's and Harbor Workers' Compensation Act, to limit the liability of employers when multiple factors have caused or aggravated a disabling disease process.

IV. MEDICAL SERVICES

Section 4(j) of the bill provides that a disabled employee shall be allowed free choice of physician for diagnosis and treatment, subject to state workers' compensation agency rules. In the event that some state laws do not so provide, the bill should also permit the employer to refer employees to physicians of the employer's choice for consultations or examinations. The interests of both employers and employees will best be served by permitting employers to seek prompt treatment for employees from qualified

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13/ Occupational Disease Hearings 57-58 (Statement of The Honorable Eula Bingham).

specialists. Employers that have clinics or Health Maintenance Organizations should be given the first option to treat injured employees or those with occupational illnesses or diseases.

Unreasonable refusal by an employee to undergo recommended diagnostic procedures or medical treatment should result in an automatic termination of compensation, subject only to a ruling as to the reasonableness of the refusal.

V. ELIMINATION OF FORUM SHOPPING AND REPEAL OF OTHER COMPENSATION STATUTES

If the purpose of the bill is to increase benefits and eliminate discrepancies among compensation systems, there should be no reason to permit selection of jurisdictions in which to bring a claim, as section 4(e) of the bill does. Similarly, other federal compensation statutes should be repealed. Even if this bill is passed, four neighbors, living in Northern Virginia, for example, could be covered by four different compensation acts. One might work in Virginia and be covered by the Virginia Act, with the minimum federal standards. One might work in the District of Columbia and be covered by the District of Columbia Compensation Act (Longshoremen's Act, as modified). One might be a civil servant and thus be covered by the Federal

Employees' Compensation Act and one might be in the military and thus covered by the Physical Evaluation Board system (modified Veterans Administration schedules).

If something more than a piecemeal approach to compensation law reform is desired, most of the above statutes and the Longshoremen's Act should be repealed. The Veterans Administration and Social Security disability systems and the military compensation system operate under different premises and should be retained.

VI. STATUTE OF LIMITATIONS

The statute of limitations provision of this bill, section 4(n), provides that a claim for compensation must be filed within two years after the onset of disability.

Since "disability" is not defined in the bill (see Recommendation II), a statute of limitations provision which is tied to the onset of "disability" has no meaning. It may be as short or as long as the state agency chooses to decide that it is.

Although the statute of limitations is too short in some states, the reasons for a limitation period are sound. Memories fade, evidence disappears, witnesses change jobs, and prompt investigation is precluded.

Therefore, we recommend that the statute of limitations provision should provide that the limitation period shall be two years from the date the claimant is aware, or by the exercise of reasonable diligence, should have been aware, of the causal relationship of the injury, illness or disease to his employment.

VII. SUPPLEMENTAL COMPENSATION ENFORCEMENT

Section 8 of the bill provides that any claimant who is aggrieved by a state workers' compensation award or order insofar as it fails to award compensation at least equivalent to "supplemental compensation" may file a petition for review with the Benefits Review Board. If a state agency has refused to assert jurisdiction over the claim or has otherwise precluded the introduction of evidence, the Board may permit the parties to submit additional relevant evidence in a hearing before an administrative law judge. In any case where new evidence is not submitted, the findings of the state agency, insofar as they involve eligibility for supplemental compensation, shall be conclusive if supported by "substantial evidence on the record as a whole." Issues covered solely by state law shall not be subject to review under this section of the bill.

The review procedure as set out in section 8 has several distinct disadvantages. First, the Benefits Review Board already has a tremendous case load under its statutory obligations to review Black Lung and Longshoremen's Act cases (including District of Columbia compensation cases). Additionally, testimony before this Subcommittee indicates that expanded coverage of occupational disease is very apt to result in greatly increased litigation, thus creating an even greater backlog of cases.[14/] Second, the Board will be burdened with acquiring a working knowledge of state law, even with its limited review of state decisions. Additional time will be consumed in the referral of cases back to the Office of Workers' Compensation Programs and administrative law judges under section 8(c)(1) of the bill. In addition, it is unclear how the "substantial evidence" test will be applied to a variety of state decisions which will be decided under differing standards of proof.

Clearly, a more adequate review mechanism is needed. Therefore, we recommend that this section of the bill be

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14/ Dr. Barth notes that, in cases of occupational injury, the average length of time between notification to the insurance carrier and the first payment of compensation is forty-three days. For cancer cases, this period is 260 days. In cases involving dust diseases, the period is 390 days. Occupational Disease Hearings 240 (Statement of Dr. Peter S. Barth).

revised to provide that the United States District Court, located in the jurisdiction in which cases are originally decided, be the forum for review of state decisions.

Section 8 also provides that a successful petitioner for supplemental compensation is to be awarded reasonable costs and expenses of litigation, including attorney's fees. In fact, this provision was contained in S. 2018, the predecessor to S. 3060. In his testimony on S. 2018, the former Chairman of the National Commission of State Workmen's Compensation Laws commented regarding this provision: "There is no such recommendation among the eighty-four contained in the report of the National Commission."[15/] Therefore, we recommend that this provision be deleted.

Finally, this section of the bill provides that a petition may be filed with the Benefits Review Board within ninety days after the order or award of the state agency becomes final. Although finality is defined in the bill, there is wide discretion given to the Benefits Review Board to relax the rule. Since there should be very few good

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15/ Proposed National Workers' Compensation Standards Act: Hearings on S. 2018 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess. 71 (1976) (Statement of John F. Burton, Jr.).

reasons to delay filing an appeal, such discretion should be narrowed.

VIII. COMPROMISE, WAIVER, OR RELEASE

Section 4(o) of the bill provides that no compromise or release of any compensation shall be effective unless approved by the state workers' compensation agency, based on a determination that such compromise or release is in the best interest of the claimant. Compromise of medical and rehabilitation benefits is also subject to the added determination that compromise will sufficiently provide for future medical and rehabilitation cases. Waiver of any compensation right not yet accrued shall be void. We see no good reason to forbid compromise of medical and rehabilitation benefits if liability for all compensation is disputed. Therefore, this portion of the bill should be stricken.

IX. EMPLOYMENT DISCRIMINATION

Section 9 of the bill prohibits employers from discharging or in any manner discriminating against any employee who has taken action under the Act. The employer may be fined up to $1,000 for a violation of this section. The employee discriminated against must be restored to employment and compensated by the employer for any loss of wages, including fringe benefits, arising out of such discrimination.

This section is objectionable because it provides the possibility that individuals returned to work under the rehabilitation sections of this bill may enjoy greater job security than anyone else. Consequently, it should be deleted.

CONCLUSION

The proposed National Workers' Compensation Standards Act does address some of the shortcomings of the fifty state sytems that compensate workers for occupational injury and disease. However, it falls far short of accomplishing three very important goals: reducing disparity of treatment among similarly situated claimants, increasing the speed of benefit delivery, and eliminating, as much as is practical, opportunities for abuse of the system.

If these discrepancies remain in the bill, they will generate much litigation, by both claimants and employers. This litigation will result in further disparities, as fifty state agencies, the Benefits Review Board, and numerous circuit courts attempt to divine the meaning of undefined terms, differing burdens of proof and the effect of state and federal presumptions. This process, in turn, will result in even greater delay in benefit delivery.

Federal reform of workers' compensation law, to be effective, must be comprehensive and provide uniformity. Unless and until that happens, no effort at reform of compensation law can be meaningful.

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The CHAIRMAN. We will adjourn.
[Whereupon, at 5 : 30 p.m., the subcommittee was adjourned.]

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