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WORKMEN'S COMPENSATION—WASHINGTON'S RECENT AMENDMENTS: UNIVERSAL MANDATORY COVERAGE, LIBERALIZED BENEFITS, AND A CONTROVERSIAL TWO-WAY PLAN—Ch. 289, Washington Laws of 1971; Ch. 43, Washington Laws of 1972.

In the closing hours of the 1971 First Extraordinary Session, the Washington Legislature enacted legislation substantially amending Washington's Workmen's Compensation Act.[1] The major provisions of the amendments provide for extension of mandatory coverage to virtually all workers, substantial increases in benefits in most areas of compensation, and an option allowing employers to self-insure under limited and highly restricted conditions.[2] The Act was further amended by the 1972 legislature.[3] The liberalization of coverage and benefits generally met with the approval of both industry and labor,[4] but industry was disappointed with the failure of the legislature to adopt the "three-way plan" proposed by Governor Evans. The three-way plan would have afforded employers an additional option of insuring with private insurance carriers.[5]

The scope of this note is confined to a discussion of the controversial provisions extending coverage to all workers and the adoption of

1. WASH. REV. CODE tit. 51 (1961), *as amended* Ch. 289 [1971] Wash. Laws, 1st Ex. Sess. [hereinafter referred to as Ch. 289].

2. *See* Burt, *Every Worker to Get Industrial Insurance,* Seattle Times, June 27, 1971, § A, at 17, col. 1. Approximately 600,000 workers not previously covered are covered by the new law, doubling the number of workers previously covered. Compensation payments for accidental injuries and death are to average approximately 80 percent higher than under the previous law. As examples of benefit increases, awards for permanent partial disabilities reflect a 20 percent increase: specific awards for amputation of a leg or an arm increased from $15,000 to $18,000; removal of one eye from $6,000 to $7,200. WASH. REV. CODE § 51.32.080, *as amended* Ch. 289 § 10(1) at 1551. Pensions for total disabilities were increased from $185 (for an unmarried employee) to $352) (married, five or more children), to a range of 60 percent of the worker's wage, not less than $185, up to 75 percent of a worker's wage (married, five or more children), not less than $353 per month. WASH. REV. CODE § 51.32.060 *as amended* Ch. 289, § 8 at 1549, 1550.

Note: under Ch. 289, § 8(16), the monthly payment may not exceed 75 percent of the statewide average monthly wage, currently about $621; thus the present ceiling for permanent disability pensions would be $465. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, A COMPARISON OF THE WORKMAN'S COMPENSATION LAW BEFORE AND AFTER REVISION BY THE 1971 LEGISLATURE 2 (1971).

3. Ch. 43 [1972] Wash. Laws, 2d Ex. Sess. [hereinafter referred to as Ch. 43].

4. Larson, *Insurance Bill Flies Through,* Seattle Times, May 16, 1971, § B, at 8, col. 1. There are some dissenting industry opinions, some businessmen believing that a liberal law encourages malingering.

5. *See* Mertena, *Evans and Labor Geared for an Insurance Battle,* Olympian (Olympia), Jan. 20, 1971, at 6, col. 3.

the two-way plan. These provisions have provoked much criticism of the legislation and have resulted in test litigation. Extension of coverage to all employments is necessary and was long overdue. It will be shown that the adoption of the two-way insurance plan, allowing an employer to self-insure his liability as an option to insuring with the state insurance fund is preferable to a three-way plan allowing insurance with private carriers. The two-way plan best achieves the purpose of workmen's compensation: the provision of certain and adequate compensation for employment-caused injuries[6] at the least cost to the employer.

I. BACKGROUND

Before the adoption of workmen's compensation statutes the injured workmen, their families, or the state bore the great burden of losses resulting from industrial accidents. The common law defenses of contributory negligence, assumption of risk, and the fellow servant doctrine absolved the employer of most liability for the injuries of employees working in dangerous places.[7] However, a belief that the economic loss from industrial injuries should be born by the industries as a cost of production[8] soon led to legislative action.

Workmen's compensation statutes compromised the interests of

6. State *ex rel,* Fletcher v. Carrol, 94 Wash. 531, 535, 162 P. 593, 595 (1917) (noting purpose of workmen's compensation laws).

7. For a general history of the development of the law of workmen's compensation see WASH. REV. CODE § 51.01.010 (1961), stating a declaration of the policy of the workmen's compensation act, and 1 A. LARSON, WORKMEN'S COMPENSATION LAW §§ 4, 5 (1968) [hereinafter cited as LARSON]. *See also* E. CHEIT & M. GORDON, OCCUPATIONAL DISABILITY AND PUBLIC POLICY 17-19 (1963) [hereinafter cited as CHEIT & GORDON]. Under the common law damage recoveries were difficult and pathetically small when successful. In New York City in 1908, for example, 74 cases of industrial death were investigated. In 43 percent of these cases there was no recovery, in 41 percent recovery was under $500, and in 16 percent recovery was between $500 and $5000. *Id.*

Cf. 1 LARSON, *supra,* § 4.30 at 27, which cites German figures for the year 1907, chosen because they are unusually full and detailed, showing that 42.05 percent of the causes of industrial accidents were due to inevitable accidents connected with the employment; 5.28 percent were due to negligence of a fellow servant; 16.81 percent were due to negligence or fault of the employer; and the remaining due to an act of God or some negligence on the part of the injured employee. Under the common law, with the defenses of contributory negligence and the fellow servant rule, workers had no remedy in more than 83 percent of these cases, and the doctrine of assumption of risk would be applied to bar recovery in many of the remaining cases caused by employer negligence.

8. The basic principle underlying workmen's compensation is the recognition that accidents to workmen are inevitable, and, as a cost of production, should be passed on to the consumer in the cost of the goods. In Stertz v. Industrial Insurance Comm'n, 91 Wash. 588, 590-91, 158 P. 256, 258 (1916) the Washington Supreme Court found that

both employers and employees so both could gain. Workmen gave up the right to sue their employers and the possibility of being awarded unlimited damages to gain certain compensation protected from the risks of litigation, years of delay, and the cost of employing counsel to recover for injuries sustained.[9] The employers gave up their common law defenses, accepting limited liability for all injuries in employment.

Workmen's compensation does not place the entire cost of accidents on industry.[10] The function and purpose of workmen's compensation is to compensate for economic loss, not for physical injuries as such. Compensation for pain and suffering has never been awarded, though this limitation has been compromised slightly in allowing schedule benefits for certain disabilities, such as loss of body members, without proof of wage loss.[11]

Today there are fifty-four separate compensation statutes in the United States[12] with every state, the District of Columbia and Puerto Rico adopting its own system, plus two federal systems covering certain employees.[13] Washington's compensation plan, prior to the 1971

"[a]ll agreed that the blood of the workman was a cost of production, that the industry should bear the charge." Just as industry distributes the burden of depreciation and destruction of necessary buildings and machinery to its customers, so should the consumer bear part of the cost of repairing the human machines without which the industry cannot exist, or make partial payment as compensation for economic loss through irreparable injury or death. *Cf.* W. DITTMAR, STATE WORKMEN'S COMPENSATION LAWS 7 (2d ed. 1959).

The *Stertz* court also cited heavy judgments against employers, wasteful and slow litigation, and large remuneration to lawyers handling workmen's cases as the evils which the legislature intended to eliminate. *See also* State *ex rel.* Fletcher v. Carrol, 94 Wash. 531, 162 P. 593 (1917). The *Carrol* court stated that a reason for the adoption of workmen's compensation was that the desparate states of the parties in personal injury claims —the injured worker facing the possibility of pauperism for himself and his dependents and the employer risking large judgments against him—resulted, more than any other type of litigation, in a high incidence of unfair means, false testimony, and perjury. The Washington legislature codified this doctrine in Chapter 43.

9. Under the present appeals procedure, the workman who appeals an adverse determination of his claim may still incur the risk of litigation, years of delay, and the cost of employing counsel. But relatively few claims are appealed: in fiscal year 1971, 118,284 compensation claims were filed, of which the department ruled 5,085 invalid, on which 2,847 appeals were filed. STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES, WORKMEN'S COMPENSATION SUMMARY THROUGH JUNE 30, 1971 4 (1971).

10. "The most liberal of our compensation laws allow the injured workman two-thirds of his wage loss, and even those laws limit the period during which compensation is payable and prescribe a maximum wage for purposes of computing compensation." White, *The Theory of Workmen's Compensation,* 20 AM. LAB. LEG. REV. 411, 412 (1930).

11. *See, e.g.,* Ch. 43, § 21.

12. CHEIT & GORDON, *supra* note 7, at 48, n.l.

13. Federal Employees' Compensation Act, 5 U.S.C. § 8101, *et seq.* (1970); Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* (1970).

amendment, was unique in its combination of mandatory insurance exclusively through a state fund and its coverage of "extrahazardous" employments only. This unusual plan can be traced to its early adoption: Washington was the first state to adopt a comprehensive mandatory workmen's compensation plan in 1911.[14] In adopting a mandatory plan, Washington ignored a New York decision holding a 1910 compulsory compensation law violative of due process requirements.[15] Other states adopted voluntary plans until the United States Supreme Court upheld the constitutionality of mandatory workmen's compensation laws in 1917.[16] The Court upheld Washington's exclusive state fund system the same year in *Mountain Timber Co. v. Washington*.[17] Pre-1917 doubts of the constitutionality of a state-monopolized insurance plan had caused other states to institute insurance coverage by private carriers, in some instances in competition with a state fund,[18] and by 1917 the private insurance carriers were well established in most states.

II. MANDATORY COVERAGE EXTENDED TO ALL EMPLOYEES

Sixty years after adopting coverage for only specified extrahazardous employments[19] the legislature extended mandatory coverage to all

14. Washington and Kansas both adopted workmen's compensation laws on March 14, 1911. The Kansas act was a voluntary plan. U.S. DEP'T OF LABOR WAGE AND STANDARDS ADMIN., BULL. No. 161, STATE WORKMEN'S COMPENSATION LAWS 1 (rev. 1969) [hereinafter cited as BULL. No. 161].

15. Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 94 N.E. 431 (1911). Washington's compulsory compensation plan was upheld against a claim of unconstitutionality in Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101 (1911).

16. New York Central R.R. v. White, 243 U.S. 188 (1917).

17. 243 U.S. 219 (1917).

18. Only Washington and Ohio followed the model of the German compensation laws of 1884 under which employers discharged their obligations by payments to a state insurance fund responsible to workers for compensation payments. Other states followed the English model of 1897 under which the employer, under a new statuatory condition of liability, remained liable for compensation and he in turn could insure his risk with private insurance carriers. Brodie, *The Adequacy of Workmen's Compensation as Social Insurance, A Review of Developments and Proposals,* 1963 WIS. L. REV. 57, 61. The Washington law "is not an employer's liability act. It is not even an ordinary compensation act. It is an industrial insurance statute . . . . [T]he employee is no longer to look to the master even for the scheduled and mandatory compensation. He must look only to a fund fed by various employers." Stertz v. Industrial Insurance Comm'n, 91 Wash. 588, 594-5, 158 P. 256, 259 (1916).

19. Washington's "hazardous employments only" limitation on coverage, finally abandoned by the 1972 amendments, resulted from the legislature's pre-1917 doubt as

employments,[20] approximately doubling the number of workers covered by the plan.

The general inclusion of farm labor, domestic workers, and employees of charitable institutions places the Washington plan in the vanguard of progressive compensation systems,[21] but the legislature deemed it best to exclude certain of these employees from mandatory coverage. Section 7 of Chapter 43 enumerates the only employments exempted from mandatory coverage: domestic servants where less than two are employed in a private home; persons doing gardening, maintenance or repair work of a short duration about a private home; persons engaged in casual work which is not in the course of business of the employers; persons performing services for religious or charitable organizations in return for aid and sustenance only; sole proprietors and partners; and agricultural employees earning less than $150 a year from the one employer.[22]

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to whether a statute not so restricted would be found a constitutionally proper exercise of the police power of the state. That doubt was dispelled in New York Central R.R. v. White, 243 U.S. 188 (1917). The limitation of coverage to "hazardous" or "extrahazardous" employments has been severely criticized as defeating much of the purpose of workmen's compensation since many workers are not covered under such classification (approximately one-half of the Washington labor force was excluded before the 1971 amendment) and because hairsplitting distinctions do not contribute to "fast and sure" compensation, causing an appalling waste of judicial time and effort, and a continuing unpredictability of coverage. *See* 1A LARSON, *supra note* 7, § 55.24. *See also* Malone, *Hazardous Business and Employments Under the Louisiana Workmen's Compensation Law*, 22 TUL. L. REV. 412 (1948).

20. Ch. 289, § 3 extended coverage to virtually all employments by expediently deeming all employments "extrahazardous." In Ch. 43, § 6, the legislature finally abandoned the "extrahazardous" classification, recognizing simply "[t]hat there is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state." Ten states (Illinois, Kansas, Louisiana, Maryland, Montana, New Mexico, New York, North Dakota, Oklahoma and Wyoming) still retain specified extrahazardous-employment-only coverage. BULL. No. 161, *supra* note 14, at 13.

21. For example, only eight other states and Puerto Rico do not categorically exempt domestic workers from workmen's compensation coverage. Of these, all but Puerto Rico, Alaska, Connecticut, and Massachusetts have broader exceptions than the Washington rule exempting employers of "less than two employees regularly employed forty or more hours a week." BULL. No. 161, *supra* note 14, at 16-17.

22. Additionally, employees within the state covered by federal compensation statutes are not entitled to state coverage. WASH. REV. CODE §§ 51.12.090-.100 (1961) *as amended* Ch. 43, §§ 10, 11, exempts maritime workers and employees of enterprises engaged in interstate or foreign commerce.

The exclusion of certain employments is not an unmixed boon to the employer, as an injured worker can sue and recover substantial damages when he can prove negligence on the part of the employer. When workmen's compensation does not cover the employment the employer may be liable in a tort action for the full measure of damages suffered by his employees, *See, e.g.*, Hopper v. Galland, 46 Wn.2d 552,

The exemptions for domestic workers, persons performing service for religious institutions and persons working about private homes are not inconsistent with the basic workmen's compensation concept of passing the cost of industrial injuries to consumers since there is no large consumer public to whom the risk may be distributed. Farm labor is categorically exempted from coverage in most states.[23] The exclusion was originally founded on the theory that farming was a way of life and not a hazardous employment[24] and has been maintained because of the remaining large number of small farms and the casual nature of farm labor which presents administrative difficulties in maintaining the necessary records.[25] Modern trends in farming have largely negated the reasons for the exclusion. The trends toward larger farms, specialization of crops, and the mechanization of agriculture place the modern farmworker in much the same situation as the industrial worker. The bookkeeping burdens placed on the employer are no more onerous than the burdens of income tax, F.I.C.A. assessments, unemployment insurance and personal liability or voluntary workmen's insurance accounting already falling on farmers and householder-employers. Some thirty states have excluded "casual" employment from coverage[26] because of the difficulty of keeping records of past earnings when employment is not regular and sustained. Employment is generally considered "casual" when it is irregular,

282 P.2d 1049 (1955). In *Hopper* a farmworker was awarded $2000 general damages and $1734 special damages when he lost several fingers when his hand slipped into a belt of a wheat combine, the court finding employer negligence in failure to provide a safe place to work and in failure to properly warn and instruct the plaintiff of the danger. Under WASH. REV. CODE § 51.12.110 (1917), the elective adoption provision, any employer not within the mandatory coverage of the workmen's compensation law may elect to so cover his employees upon application and notice. Under this option, the farmer in *Hooper* would have been assessed a premium of only $0.078 per man-hour worked for absolution from liability. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL No. 206, AGRICULTURAL WORKERS AND COMPENSATION 3, 9 n.7 (1959), [hereinafter cited as BULL. No. 206]. *Cf.* Ch. 219 [1949] Wash. Laws, by which the injured employee would have received only $1,450 in compensation for the loss of all fingers on one hand.

23. In 1959 only California, Hawaii and Puerto Rico provided compulsory coverage for farmworkers, with 35 compensation plans specifically exempting farmworkers from coverage. BULL. No. 206, *supra* note 22, at 5. In 1968, 21 states and Puerto Rico gave some coverage by law to agricultural workers, but only 14 covered them in approximately the same way as other workers. BULL. No. 161, *supra* note 14, Table 3 at 14.

24. BULL. No. 206, *supra* note 22, at 2. This theory reflects the strength of the farm lobby and the commonly held notion of the "family farm."

25. *See* 1A LARSON, *supra* note 7, § 53.20.

26. *Id.*, § 51.11.

unpredictable, sporadic and brief in nature.[27] Washington joins most of these states in exempting casual labor only if the employment is not in the usual course of business of the employer.[28] Although exemptions for farm and casual labor are rationalized on the grounds of administrative impracticability, it should be noted that such exemptions are actually politically expedient. Farm labor, for example, is no more "sporadic" in nature than the construction and building trades and other employments which are not exempted from coverage.

In removing the general exemption for charities and religious organizations,[29] the Washington legislature joined only California in extending an exemption for those "employees" of charitable organizations being compensated solely with aid and sustenance.[30] Charities were exempted from coverage on the rationale that under the common law they have no liability for negligence and they cannot pass the cost of liability on to consumers. The common law doctrine of tort immunity for charities has been abrogated in Washington,[31] based in part on the finding that charities can distribute risks to the public benefitting from their services. The Washington exemption for persons being compensated by aid and sustenance only is consistent with the spirit of workmen's compensation and is a reasonable codification of the principle of not covering "relief workers".[32] They are not

27. *Id.*, § 51.00. The term "casual labor" is difficult to define. Larson defines it as "the sort of thing no one could confidently rely on as a regular source of income. *Id.* at 910, citing Cierpik v. Borough of Manasguan, 2 N.J. Super. 110, 64 A.2d 890 (1949). Mere brevity of employment is not conclusive, if there is a reasonable probability of regular recurrence or continuance for a substantial period. *See* 1A LARSON, *supra* note 7, § 51.12.

It should be noted that the test applied is whether the *employment* is casual, not whether the particular employee's relation to the employment is casual (is the particular employment a casual incident of the employer's business?). If the work done is central to the employer's business its brevity should not bring it within the "casual" exception. *Id.*

28. Ch. 289, § 3(3), requires that, to be exempted, "the employment is not in the course of the trade, business, or profession of [the] employer." If the employee is engaged in a regular part of the employer's business he is covered, regardless of how brief or sporadic his employment may be. *See* 1A LARSON § 51.21. *See also, e.g.,* Farnum v. Linden Hills Congregational Church, 267 Minn. 84, 149 N.W.2d 689 (1967), where the trimming of trees on church premises was held to be in the usual course of business of the church.

29. Ch. 289, § 3(4).

30. 3 LARSON, *supra* note 7, Appendix A, Table 3, at 514, 515.

31. *See* Friend v. Cove Methodist Church, Inc., 65 Wn.2d 174, 396 P.2d 546 (1964) (abrogating the doctrine of charitable immunity in its entirety).

32. *See* Blake v. Department of Labor and Industries, 196 Wash. 681, 84 P.2d 365 (1938), which held that the distinction of "relief work" is generally based on whether the

employees in the true sense; compensation is not paid under a contract for hire, but rather relief is extended under a duty to care for the poor. If the charity continues to grant care and sustenance to the injured "employee" he has sustained no economic loss.[33]

III. THE SELF-INSURANCE PROVISION

Sections 26 through 36 of the 1971 amendatory act[34] grant Washington employers a highly restricted and limited right to self-insure as an alternative to the exclusive state fund.[35] The same statutes, claims procedures, and benefit schedules apply to the self-insurer as to state fund employers, so the effect on the employee is negligible. Some employers may find certain economic and personnel relations benefits in administering their own programs, determining the merit of claims (subject to the right of appeal), and absorbing the costs directly, rather than paying premiums to the Department of Labor and Industries which administers the state fund and issues checks in payment of compensation.[36]

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claimant would continue to receive the same sustenance whether he worked or not, as opposed to a person whose compensation is dependent on and in proportion to his labor.

33. Charitable institutions might prefer to limit their liability under workmen's compensation rather than risk full tort liability which is possible when workmen's compensation does not cover the employment. *See* note 22, *supra*.

34. Now codified as WASH. REV. CODE §§ 51.14.010-.110 (1971).

35. All workmen's compensation systems but five (Nevada, North Dakota, Puerto Rico, Texas, and Wyoming) permit employers to self-insure. Washington joins Ohio and West Virginia in recognizing self-insurance as an alternative to their otherwise exclusive state funds. 3 LARSON, *supra* note 7, § 92.10, Table 7 at 522-3.

36. The exercise of the right of an employer to administer his own compensation plan as a self-insurer can be of advantage or disadvantage. The self-insurance program is generally beneficial to an employer who has losses below the average for his industry. Prior to the 1971 amendments this advantage would have been minimized by Washington's "cost experience rating" system by which employers experiencing injury rates higher or lower than the average for their class paid respectively higher or lower premiums. *See* WASH. REV. CODE § 51.16.020 (1961), repealed by Ch. 289, § 89. Self-administration may produce further economies. However, the apparent economies of self-administration are minimized by the necessity of the self-insurer maintaining a staff within his organization in order to properly administer and manage the workmen's compensation plan, while the state fund employer benefits from the state administration of claims of his employees, with corresponding economies of scale.

Labor relations benefits can be gained or lost in the integration of the employer's compensation policies with his labor relations and safety programs. While employee good will can be gained by prompt and proper allowance and payment of compensation, establishing a reputation for fairness and concern, primary administration can be a disadvantage in that the self-insurer will not be able to blame the "bureaucrat" for claims which are filed and denied, and hence may incur employee antagonism. The state fund was recognized as an advantage in this respect in 1911: "When the employer, for

To safeguard the purposes of workmen's compensation the Act requires such strict conditions for self-insuring as to render the option of little advantage to most employers.[37] A prospective self-insurer must satisfy the director that he is financially able to make prompt payment according to the law,[38] including long term compensation payment to disabled workers or their widows and dependents.[39] The employer may also be required to pay his share of any existing deficit within the employer's class account which may have been incurred while the employer was within the state fund.[40] Section 28[41] requires the employer to file (a) an itemized sworn statement indicating liquid assets sufficient to meet estimated liabilities as a self-insurer; (b) evidence of an effective safety organization within his establishment; and (c) a description of his administrative organization, including qualifications of personnel, to be used in reporting injuries, authorizing medical care, and handling claims and payment of compensation to the satisfaction of the director.

Section 27(5)[42] allows a self-insurer to reinsure up to eighty per-

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his part, pays his share into this fund, all obligation on his part to anybody is ended. Let a claim be rejected by the commission, the latter and not the employer is sued." Stertz v. Industrial Insurance Comm'n, 91 Wash. 588, 595, 158 P. 256, 259 (1916).

37. As of January 1, 1972, only 53 employers had been approved to self-insure. Letter to the author from the Statistical Research Division, Industrial Insurance Division, Washington State Dept. of Labor and Industries, Olympia. *Compare* OHIO REV. CODE § 4123.35 (1965) which permits employers:

> who will abide by the rules of the commission and who may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees . . . equal to or greater than is provided for in [the provision for payment by the state fund] . . . upon a finding of such facts by the commission [to] elect to pay individually such compensation . . . . The commission may require such security or bond from said employers . . . as it deems proper, adequate, and sufficient to compel, or secure to such injured employees, or to the dependents of such employees . . . the payment of such compensation and expenses, which shall in no event be less than that paid or furnished out of the state insurance fund in similar cases to injured employees . . . whose employers contribute to said fund . . . .

38. WASH. REV. CODE §§ 51.15.020, .030 (1971) provides that a prospective self-insurer may establish financial ability by a deposit of money or securities in an escrow account in a depository designated by the director or by a security bond of not less than $100,000; the director, in determining the amount of deposit or bond, is to consider the financial ability of the employer, the amount of annual claims against him, and his probable continuity of operations.

39. A recognized problem with self-insurance is the assurance of future solvency of the employer in order that he can pay long-term compensation obligations despite disastrous accidents and business depressions. *See* 3 LARSON, *supra* note 7, at § 92.10.

40. WASH. REV. CODE § 51.14.020 (1971) *as amended* Ch. 43, § 16(4).

41. WASH. REV. CODE § 51.14.030 (1971).

42. WASH. REV. CODE § 51.14.020(5) (1971).

cent of his liability with an authorized private carrier. This section also provides that such reinsurer may not in any way participate in the administration of the responsibilities of the self-insurer, which prevents opening a loophole that could result, in effect, in a "three-way system" with the state fund indirectly competing with private carriers in administrating workmen's compensation.

In adopting the "two-way plan" the legislature rejected a "three-way plan" proposed by Governor Evans and strongly supported by the business lobby.[43] The proposed three-way plan would have granted employers the option of insuring with private carriers in addition to the present options of insuring with the state fund or self-insuring.[44]

In theory, allowing private insurance as an alternative to the state fund should have advantages for all. Business wanted the private insurance option because private insurers perform many services for the employers which the state fund does not.[45] Private insurance would give relief to employers having accident rates below the industry average, and the competitive factor of low premiums would give employers incentive to reduce injuries and minimize their economic consequences. Insurance administration could be integrated with the employers' personnel programs to minimize the alienation of employees from impersonal relationships and, assuming that a state monopoly is inefficient, competition would force the state fund to improve services to employers, reduce premiums, and to expedite the disposition of claims.

The labor lobby opposed the private insurance option principally because private insurance costs more with no greater protection for the workers.[46] In addition to paying federal, state, and local taxes,

43. *See* Seattle Post-Intelligencer, March 31, 1971, at 4, col. 7. *See also* Nelson, *Workmen's Compensation Bill—House Votes Yes; Senate . . .?*, Olympian (Olympia), March 31, 1971, at 8, col. 1.

44. Only four of the workmen's compensation statutes now require insurance in an exclusive state fund (Nevada, North Dakota, Puerto Rico and Wyoming). Washington, Ohio and West Virginia give employers an option to self-insure. All other plans permit insurance with private carriers either exclusively or in competition with the state funds. 3 LARSON, *supra* note 7, Table 7 at 522. *See also* note 35, *supra*.

45. Private carriers provide inspection and safety services, publication and records and assist the employer in administering his safety and compensation plans. State funds have been criticized as not adequately providing such services. *See* CHEIT & GORDON, *supra* note 7, at 99, 121. *See also* text accompanying note 48, *infra*.

46. *See* Clayman, *In Defense of State Workmen's Compensation Funds*, 31 ROCKY MT. L. REV. 428, 433 (1959) [hereinafter cited as Clayman]. Administrative waste in workmen's compensation is substantial. Thomas Dewey stated in 1953 that "less than 40 cents of every dollar paid by employers for workmen's compensation ever reaches the

private carriers must allow for profit and contingencies and incur acquisition costs (commissions, brokerage fees, and "sales" and collection expenses) not common to state funds enjoying a monopoly.[47]

Another disadvantage of offering a private insurance option and another reason why labor vehemently opposed the plan, is that the presence of an alternative would raise the cost of the state plan. The cost of compensation insurance provided by a state monopoly is less than similar insurance provided by private carriers or by competing state funds.[48] It is foreseen that once private insurance becomes established in the state its lobby will press to make the state plan truly compete with them for the same market and urge an end to the substantial tax exemptions enjoyed by the state fund.[49] A state fund not enjoying a complete monopoly would have to actively solicit accounts, incurring substantial acquisition costs in employing "salesmen" to seek out clients. Permitting private carriers to share the market would reduce the economies of scale enjoyed by the state fund by reducing the number of covered workers; would result in duplication of safety investigation, accident prevention research programs and medical re-

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insured workman and his dependents. The remaining 60 cents out of every dollar is absorbed by charges of the insurance companies, administration, hospital charges, medical costs, lawyer's fees and other costs. Thus the rights of labor to adequate benefits under the law are adversely affected by the high cost of insurance." *Cf.* BUREAU OF THE CENSUS, UNITED STATES DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 447 at 295 (1970) which states the total cost of workmen's compensation nationally in 1968 as 1.07 percent of the covered payroll, while benefits paid averaged 0.63 percent of the covered payroll.

See also Olympian, Feb. 24, 1971, *infra* note 48, which paraphrases Joe Davis, labor lobby president, as saying that "insurance firms would pay only about 60 per cent of premiums back out in claims, whereas the present state system pays 102 per cent (because of interest on investments [*sic*]."

47. Commission and brokerage expenses are high—11 percent of the total premiums for all stock companies writing workmen's compensation in 1960. CHEIT & GORDON, *supra* note 7, at 109. Acquisition costs are reported to run to 17½ percent of premiums. Clayman, *supra* note 46, at 435.

48. St. Clair, *The Case for Private Insurance of Workmen's Compensation,* 31 ROCKY MT. L. REV. 397, 413 (1959) [hereinafter cited as St. Clair]. Labor objects to private insurance carriers, as interested parties, having the power to allow or deny claims, subject to review only on appeal by the workman, a party who may be reluctant because of financial reasons or employer influence to pursue his claim.

Another ground for opposition is that benefits tend to be lower in states which permit private insurance, possibly attributable to the strength of the insurance lobby in these states, resisting higher benefits. *See* Olympian (Olympia), Feb. 24, 1971, at 4, col. 3.

49. The state plan pays no direct federal, state and local taxes. *See* St. Clair, *supra* note 48, at 411. It is probable that state funds receive other substantial support from the state in the form of office space in state buildings and ancillary services from other state agencies.

search; and would cause reductions in the state's research budget in order to meet the competition of private carriers.[50]

The cost of compensation is a legitimate concern of labor. Though the cost of compensation is, in theory, passed on to the consumer, the price of the goods produced must be competitive and the price reflects other costs of labor such as wages, pensions and other fringe benefits. Put simply, reduction of waste in the expenses of insuring and administering compensation[51] will result in savings which can be used to increase compensation benefits, or, if premiums are reduced, the savings could be applied to higher wages or other compensation to labor.

The state insurance monopoly has been criticized as infringing on free enterprise.[52] While there are valid reasons for advocating private insurance, the opponents of the state fund seem to be principally the private insurance carriers and their agents, asserting their right to compete for a commission. The private enterprise argument has been given no credence in any other types of social insurance in America such as old age and survivors' insurance and unemployment compensation.[53] Germany's pioneering compensation law of 1884 established the principle of state-administered social insurance and Washington adopted that principle in 1911. "It is now commonly conceded that

50. The activities of private carriers in preventing injuries and minimizing their consequences is an oft-cited justification for private insurance carriers. Private insurance safety work includes inspection and consultative service for employers and research into accident causes, work procedures, and occupational disease hazards. Some of the larger carriers maintain their own research laboratories; others use the facilities of an insurance association or of private research organizations. *See* CHEIT & GORDON, *supra* note 7, at 99; *see also* St. Clair, *supra* note 48, at 407-08. The expenditures of the Washington Industrial Insurance Commission for safety work averages 2 percent of compensation premiums collected annually, approximately equal to the percentage of premiums spent by private carriers. *Id.* at 408-09.

51. *See* Nelson, *Workmen's Compensation Bill—House Votes Yes; Senate . . .?*, Olympian (Olympia), March 31, 1971, at 8, col. 1, reporting that the bill proposed by labor (which would retain the state monopoly) would pump $85 million annually into the accident fund at a cost to employers of $109 million, while the three-way plan proposed by industry would put $56.2 million into the fund at an estimated cost to employers of $108.2 million.

The administrative cost of the fund will probably increase as a percentage of premiums due to the extension of coverage. Employments which are now covered and which were not formerly considered to be extrahazardous should have far lower claims per man-hour. Administration costs in collecting the lower premiums from these employers will be a higher percentage of the premiums than would be the collection costs of the higher premium rates.

52. *See* Seattle Times, Jan. 4, 1971, § B, at 2, col. 1. In an oral opinion Judge Baker, criticizing the 1971 amendments (though not finding them unconstitutional), said: "I personally feel this is another nail in the coffin of free enterprise, which we do not need."

53. *See* Clayman, *supra* note 46, at 430-33, attacking the free enterprise argument.

the ideal of protecting the public interest and the security of the individual supersedes the principle of free enterprise."[54] Private insurance plans were initiated in other states as a result of an erroneous interpretation of the Constitution.[55] After sixty years, criticism of the Washington plan on this basis seems misplaced.

CONCLUSION

The 1971 amendments to the workmen's compensation act were long overdue. The extension of coverage to all employments, including farmworkers, must be regarded as the most important provision. The general increase of benefits was the first since 1965 and was necessary to bring the plan into line with increases in the cost of living and wages generally, more equitably compensating injured workmen for their economic losses.

But the recent amendments have left work undone. The primary purpose of workmen's compensation is to provide the workman with a certain, prompt and adequate remedy. The remedy in Washington has not in all cases been prompt. The average length of time for an appealed claim to be processed to completion has been sixty-nine weeks.[56] The lack of a speedy adjudication of claims does more than place economic hardship on the disabled workman and his dependents, for in many cases the denial of funds results in improper medical care, defeating the objective of workmen's compensation of restoring the employee to a normal, useful life. Under the present appeals procedure,[57] largely unchanged by the 1971 amendments,[58] there can be appeals from three levels of factual determination. Questions of fact are determined by the supervisor of industrial insurance, from whom the order can be appealed to either the Board of Industrial Insurance Appeals[59] or to the hearing examiner for the Board, at the option of the appel-

54. *Id.* at 431.
55. *See* notes 15-16 and accompanying text, *supra.*
56. Seattle Times, Dec. 22, 1969, § D, at 4, col. 1. The Board of Industrial Insurance Appeals has recently undertaken some moves to speed up the process to reduce the average time from two years to 69 weeks. *See* Seattle Times, Dec. 21, 1969, § A, at 20, col. 1, finding instances of delays of over 4 years in receiving compensation.
57. WASH. REV. CODE Ch. 51.52 (1961).
58. *See* Ch. 289, §§ 68-71.
59. For a description and analysis of the work of the Board see Rutledge, *A New Tribunal of the State of Washington,* 26 WASH. L. REV. 196 (1951).

lant,[60] and finally to a court of general jurisdiction for a jury trial de novo,[61] from which questions of law can be appealed. Counsel for the workmen accrue fees at each separate step, the result further defeating the purpose of the compensation law.[62]

A solution to the problems of the appeals procedure is not obvious. The procedure could be abbreviated by eliminating one level of determination of fact, either the Board or hearing examiner or the court of general jurisdiction. Because of the expertise of the Board and the examiner in the subject area and the fact that they hear witnesses and therefore have an opportunity to weigh their credibility,[63] it would be desirable to limit appeals from the Board to questions of law without a jury trial. But there are historical and political obstacles to removing juries from the appellate structure;[64] the legislature and labor favor the right to a jury trial.

It is not necessary to have de novo determinations of fact at the two levels, particularly since the jury deciding on record has the effect of overruling any determination in the procedure below. It would seem expedient and more equitable to allow the appellant to select his procedure, to appeal to the Board with its determination of fact not subject to review, or to appeal directly to a jury trial in a superior court

60. Both the claimant (a workman or his beneficiary) and the employer have standing to appeal. WASH. REV. CODE § 51.52.050 (1961).

61. The superior court's inquiry is limited to questions actually decided by the Board. *See* Luntz v. Department of Labor and Industries, 50 Wn.2d 273, 310 P.2d 880 (1957).

62. *See* Seattle Post-Intelligencer, Dec. 8, 1966, at 29, col. 1, citing a case in which a claimant was awarded compensation for his losses in the amount of $5308, from which had to be deducted $4000 in attorney's fees and $435 for medical witnesses.

63. *See* Wollett, *The Board of Industrial Insurance Appeals After Nine Years: A Partial Evaluation,* 33 WASH. L. REV. 80, 85 (1958). A jury in superior court hears no witnesses, as the evidence before it consists entirely of the record before the Board. WASH. REV. CODE § 51.52.115 (1961). The hearing in the superior court is to be de novo, but the court is to admit no evidence other than that included in the record of the hearing before the Board. The record is read to the jury, giving the jury little opportunity to draw secondary inferences such as the meaning of testimony, the credibility of witnesses, and the weight to give evidence. *See* Wollett, *supra,* at 85, 87. *See also* Alfredson v. Department of Labor and Industries, 5 Wn.2d 648, 651, 102 P.2d 37, 38-39 (1940), the first case construing this amendment, in which the court commented:

> The provisions of the statute are somewhat unique, in that the verdict of the jury is made final upon evidence produced from typewritten or printed pages, and not from the mouths of witnesses present at a trial wherein they may be seen and heard and their demeanor considered by the jury. Much value is always attached to the verdict of the jury because of the fact that the witnesses are seen and heard during the trial, where the weight of the evidence and the credibility of the various witnesses may be considered . . . .

64. *See* Wollett, *supra* note 63, at 80.

from the Supervisor of Industrial Insurance. Neither claimant nor employer would suffer loss of due process, and the efficiency of the appeals procedure would be greatly advanced. An "either/or" procedure would reduce the case load of both the Board and the superior courts.