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PROPOSED PROCEDURE FOR ADMINISTERING HEART CASES UNDER THE WASHINGTON INDUSTRIAL INSURANCE ACT

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Recent and authoritative medical investigations have convinced qualified cardiologists that the great majority of cardiac patients can perform productive labor without physical harm to themselves.[1] Despite the assurance of cardiologists, many industrial concerns are reluctant to employ workmen suffering from cardiac disorders due to fear of increased industrial insurance costs.[2] The resultant nonemployment of these patients when otherwise employable not only creates needless despair for themselves and their families, but it deprives the industrial community of many skills developed over long years of training. It is the purpose of this article to review the Washington Industrial Insurance Act[3] to determine what bearing its administration may have upon the problem.

While awards for disability for cardio-vascular disorders are not large in numbers as compared with awards for other disorders, the

* Professor of Law, University of Indiana, Bloomington, Ind. The material in this article originally appeared in an analysis of the Washington Workman's Compensation Act prepared by Prof. Ivan C. Rutledge for the Washington State Heart Association under date of October 13, 1954. Believing that this material would be of interest to the Washington bar the editors of the *Law Review*, with Prof. Rutledge's consent, have revised that analysis for publication herein.

[1] Paul Dudley White, M.D. (in a paper read before the Pacific Northwest Industrial Health Conference, Portland, Oregon, September 12-13, 1955, entitled "The Cardiac Can/Should Work") points out that:

> "...The cardiac, with relatively rare exceptions, not only can but should work....
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> "Occupying himself or herself, especially in useful and remunerative activity, helps nearly every cardiac patient in body, mind, and soul. If any of these three sides of the whole man is helped there is a favorable effect on the other two...."

Eighty-four per cent of cardiac patients evaluated at the Cardiac Work Evaluation Clinic of the Washington State Heart Association were found to be able to engage in gainful employment. WASHINGTON STATE HEART ASSO. ANNUAL REPORT (1955)

[2] Leonard J. Goldwater, M.D., Professor of Occupational Medicine, Columbia University, points out:

> "The present situation presents...a paradox: on the one hand the employability of cardiacs is gaining wider and wider acceptance and on the other hand it is becoming increasingly difficult to persuade employers to engage or retain persons who have heart disease. There is little doubt that the present manner in which many workmen's compensation claims in heart disease are handled is a major factor in creating the difficulty. This has engendered considerable fear on the part of employers and insurance carriers that the employment of cardiacs will result in substantial rises in the cost of workmen's compensation insurance: ...That the present situation is chaotic and undesirable is almost universally recognized."

[3] RCW 51.

aggregate amount of such awards is large.[4] The statistical reports of the Department of Labor and Industries show that for the past ten years the cost to industry for awards in heart cases has averaged substantially in excess of $1,000,000 per biennium. Under Washington law the cost of time loss and disability awards as well as pension reserves is borne by industry alone; the workman makes no contribution with respect thereto.[5]

At the present time the Industrial Insurance Act imposes a charge of $10,785 on each employer for every case where total disability or death of his employee results from his employment.[6] This charge remains in the employer's cost account for five years and proportionately increases the premium he pays for industrial insurance.[7] This charge applies to heart cases resulting in total disability or death, and is a primary source of resistance to the employment or re-employment of any person who may be susceptible to heart attacks.

If the majority of people otherwise employable, who suffer from heart disorders, may be employed without physical harm to themselves, industry should have no hesitancy in availing itself of this pool of manpower. The risk of penalty under the Industrial Insurance Act should be avoided by the careful placement of the individual within the vocational limitations indicated by careful medical diagnosis[8]. On the other hand, notwithstanding the medical soundness of the cardiologists' position, employers may be expected to continue to resist the employment of sufferers of heart disorders if their employment results in the increase of the employers' industrial insurance costs. The allowance of claims involving heart disease by the Department of Labor and Industries, the Board of Industrial Insurance Appeals and the courts on the scale resulting in costs to industry substantially in excess of $1,000,000 per biennium invites a critical analysis of the Act and its administration to determine whether this result must necessarily follow

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[4] Severe heart attacks often involve total disability or death and claims for such attacks when allowed result in pension awards.

[5] RCW 51.16.020; RCW 51.16.140.

[6] RCW 51.16.020. $10,785 represents 75% of the average of all pension reserves, which is the amount charged against the *individual* employer in computing his *individual* merit rate.

[7] *Ibid.* The charge is imposed even though a workman killed in an industrial accident leaves no beneficiary and hence no pension is paid. The purpose of the charge is to encourage employers to avoid injuries resulting in disability or death by penalizing the occurrence of accidents that are totally disabling or fatal.

[8] Cardiac work evaluation clinics established in many cities, including Seattle and Portland, by employing a "team approach" of cardiologists, psychiatrists, and vocational experts, are able to determine with considerable accuracy the nature of work the individual cardiac patient can perform without harm to himself.

the employment of persons suffering from heart disorders. This analysis should discover whether, within the framework of the present act, an adjustment of administrative procedures can be made that will achieve two objectives: (1) prompt allowance of meritorious claims under the law, fairly and without prolonged controversy; and (2) accurate detection of claims where the heart attack occurs spontaneously with no relation to the workman's work, so as to serve the humanitarian objective of proper vocational placement instead of the self-defeating process of unlawful compensation.

For the reasons hereinafter developed in some detail, it is believed that the employment of cardiac patients may be accomplished practically under the Act in its present form; and that such changes as are necessary to assure the success of the program may be accomplished administratively without amendatory legislation.

Under the Act, awards are made only for those disabilities that result from industrial injuries and occupational diseases.[9] Heart disease is not usually considered to be occupational under the statute. A review of the supreme court decisions demonstrates that as a general rule claims for heart attacks, when allowed, are on the basis of industrial injury rather than occupational disease.[10] As a practical matter therefore, this discussion concerns the heart attack as an industrial *injury* under the Washington decisions.

It is unnecessary here to analyze in detail the legal connection between the employment of the workman and compensable disability arising from a heart attack. It is sufficient to say that the statute[11] itself does not provide that disability arising from a heart attack is compensable per se, whether the heart attack occurs on or off the job. On the other hand, the supreme court has held that disability is compensable if a happening on the job caused the heart attack to occur at the time it did occur, notwithstanding the pre-existence of heart disease.[12] The critical problem in each case is one of cause and effect. A searching analysis of the supreme court decisions reveals the rule to be:

(a) Allowance or disallowance of a given heart claim depends upon a determination in each case whether or not a particular happening

[9] Laws of 1939 c. 41, § 2; Laws of 1951, c. 236, § 1.

[10] *Cf.* Thora K. Petersen v. Department of Labor and Industries, 40 Wn.2d 635, 245 P.2d 1161 (1952); Cyr v. Department of Labor and Industries, 147 Wash. Dec. 80, 286 P.2d 1038 (1955); Mork v. Department of Labor and Industries, 148 Wash. Dec. 67, 291 P.2d 650 (1955).

[11] Laws of 1939 c. 41, § 2.

[12] Guy F. Atkinson v. Webber, 15 Wn.2d 579, 131 P.2d 421 (1942).

occurring during employment was more likely than not a contributing factor to the onset of the heart attack at the time it occurred, and without which happening the onset of the attack would not have occurred when it did[13]; and

(b) This determination can be made only by recourse to medical opinion.[14]

It follows, therefore, that the crucial point in the administration of the Act lies at the application of medical opinion to the disposition of heart cases. Stated differently, the allowance or disallowance of any given heart claim depends directly upon the state of medical opinion as it is brought to bear upon determination of the connection between the workman's employment and his disability or death.

Analysis of Washington supreme court cases on the basis of the factual patterns with respect to heart disease reveals results that are inconsistent from a *medical* standpoint. A careful study of these decisions, however, on a case-to-case basis reveals no inconsistency in the rule of law applied; rather, the inconsistency arises from variant medical opinions expressed in the records. This variation of medical opinion in heart cases involving identical medical patterns results in inequitable treatment as between beneficiaries as well as in confusion, delay and uncertainty in the outcome of any given heart case. The very uncertainty of result engenders on the one hand the hope of compensation and, on the other, fear of increased industrial insurance costs, however remotely the heart attack may in fact be connected with the job.

So long as this uncertainty persists, nothing can be expected but litigation of virtually every heart case. Litigation on this basis means that there is no rational standard for assessing the facts.[15] Conse-

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[13] Thora K. Petersen v. Department of Labor and Industries, 40 Wn.2d 635, 245 P.2d 1161 (1952).

[14] *Cf.* Tonkovich v. Department of Labor and Industries, 31 Wn.2d 220, 195 P.2d 638 (1948); Higgins v. Department of Labor and Industries, 27 Wn.2d 816, 180 P.2d 559 (1947); Thora K. Petersen v. Department of Labor and Industries, 40 Wn.2d 635, 245 P.2d 1161 (1952); Cyr v. Department of Labor and Industries, 147 Wash. Dec. 80, 286 P.2d 1038 (1955); Mork v. Department of Labor and Industries, 148 Wash. Dec. 67, 291 P.2d 650 (1955). *But See* Olympia Brewing Co. v. Dept. Labor & Ind., 34 Wn.2d 498, 208 P.2d 1181 (1949); Guiles v. Department of Labor and Industries, 13, Wn.2d 605, 126 P.2d 195 (1942).

[15] An acknowledged expert in the field of occupational medicine has characterized this process as a "tournament" resulting in a "victory or defeat in a medical-legal tournament" rather than a sound medical decision. As a consequence he says:

"Most of us have given up as an almost unsolvable problem, and so we permit the experts—the pseudo-experts... who infest the workman's compensation courts to battle it out... They have developed a vocabulary, a jargon, a pattern which they developed as the result of a certain amount of custom and experience in the court room."

quently cases are tried on an emotional basis rather than upon the basis of scientific fact. Since the applicant is usually a widow badly needing economic relief, the emotion factor is accentuated. This is distasteful both to the widow and the employer. To the employer an adverse determination on this basis means the infliction of an injustice against which he feels his only practicable defense is not to risk the employment of a person susceptible to heart attack. On the other hand, if the claim is ultimately disallowed, the widow, having been subjected to false hope, now suffers cruel disappointment and often severe emotional disturbance. This experience is characterized by hostilities the community can ill afford to support and runs directly counter to the beneficent objectives of the Act as expressed in its preamble.[16]

As a practical matter, then, the problem boils down to this: how, with fairness to all parties, can the investigation of scientific fact be substituted for emotion. It is beyond the scope of this article to discuss whether the variation in medical opinion disclosed in the adjudicated cases adequately and properly reflected the state of medical opinion at the time the cases were decided, much less the best available medical opinion now. As the result of recent investigations in the cardiac field, a considerable body of knowledge has been developed regarding the effect of industrial employment on cardiac disease. Indeed the rehabilitation program of the American Heart Association and its affiliated associations, designed as it is to safely place heart patients in industrial employment, presupposes a broad area of certain knowledge directly bearing on this problem. This knowledge, however, is not readily available to nonmedical people, nor can it be reliably communicated to persons who lack the professional understanding to properly evaluate and apply it. Moreover, in their everyday practice many physicians not specializing in cardiovascular disorders are more concerned with the patient's *treatment*

Kessler, "Rehabilitation and Disability Rating," *Proc. 1946 Convention of the Int. Ass'n. of Ind. Acc. Bds. & Com's.*, U.S. DEPT. OF LABOR, DIV. OF LABOR STANDARDS, BULL. No. 87, pp. 54, 60, 61. (1947). Stefan A. Riesenfeld, Professor of Law, Minnesota Law School, points out:

> "This battle by teams of medical and legal experts, is not only demoralizing, time consuming and expensive but produces, of course, unavoidable discrepancy and incongruity of awards and, in consequence thereof, dissatisfaction."

Riesenfeld, *Basic Problems in the Administration of Workmen's Compensation,* 8 NACCA LAW JOURNAL 21, 37 (1951).

[16] *Cf.* Dawson, *Problems of Workmen's Compensation Administration,* U.S. DEPT. OF LABOR, BUR. OF LABOR STATISTICS, BULL. No. 672, p. 127 (1940):

> "The most serious and common defect in the conduct of compensation hearings in the States arises from . . . prolonged medical controversies . . . If some injured

after the attack than with its *cause*, and hence do not generally keep abreast of the most recent findings of cardiologists with respect to the *causative* factors, including industrial effort, in heart disease.

This difference in approach between the physicians specializing in heart disease and others could adequately account for much of the seeming inconsistency in disposition of heart cases, both at the administrative and judicial levels. The proper resolution of this variation of medical opinion would appear to lie in making available in each heart case the best current knowledge of research specialists in the field. If it is true that each heart case presents a question of cause and effect to be determined in each case by medical opinion, and if it is true that a considerable body of knowledge can be brought to bear on the problem of the effect of industrial employment on cardiac disease, then it would seem that the avenue for bringing this knowledge to bear in any case would be through physicians specializing in cardio-vascular disorders, who would be expected to possess greater experience with and understanding of the findings of research specialists in the field than could normally be found among general practitioners. It must follow that each heart claim should be given special attention by way of a careful and objective evaluation by a committee of unbiased physicians specializing in heart diseases *prior* to administrative allowance or disallowance of the claim. It would further follow, of course, that this group should be supplied with complete and accurate factual information needed to reach a considered opinion. If the workman is living, they should examine him; if not, an autopsy should be performed. Their opinion should be deferred until all necessary information is made available.

Although substantial advances have been made in medical knowledge concerning the relationship of effort to heart attacks, there are areas of uncertainty remaining. It is reasonable to assume, however, that by using the most advanced knowledge in the field, physicians specializing in cardio-vascular diseases will concur in most cases. The result should be a sharp reduction in the area of disagreement, and controverted cases would be confined to those where there is substantial conflict in the medical history (including the workman's activities and other occurrences prior to the heart attack) or those

workmen are not already 'shell shocked' or neurotic before they attend a hearing and listen to the medical testimony, they are hardy and nonsuggestible if they leave the hearings in other than a hopeless state of mind."

The hearing process actually undermines the assurance supplied by the injured workman's own physician.

where substantial differences of opinion reasonably exist among those best qualified to know. This conclusion assumes, of course, that in assessing the case the members of the committee will bring to bear their medical knowledge upon the causal relationship between industrial effort and the heart attack, uncomplicated by speculation or pre-conceived misunderstanding of the legal provisions of the Act or its policies, matters which properly concern the legislature, the courts, and the administrator rather than the medical expert.[17]

The fundamental basis for the formulation of any plan under Washington law is the recognition that some heart attacks are compensable and some are not. A practical approach to the problem of cardiacs in industry must be made on this basis, and should undertake a resolution of the problem by adjustment of administration without amending the Industrial Insurance Act and without obstructing or denying access to a fair hearing and, if demanded, adversary contest. A plan meeting these requirements would incorporate the following features:

(a) All parties concerned should recognize once and for all that the relationship between industrial effort and heart attack is a medical, not a legal problem;

(b) The present confusion of responsibility between the medical profession, the administrator and the legal profession should cease;

(c) Minimum medical criteria should be developed to guide in the determination of individual cases. This criteria should be established in the light of advanced medical investigations by persons possessing adequate professional qualifications. The establishment of such criteria might well be a project of the Washington State Heart Association, the State Society of Internal Medicine or the University Medical School;[18]

(d) A statewide panel of practicing physicians expert within the field of cardio-vascular diseases should be established from which a

[17] As pointed out in WASHINGTON BOARD OF INDUSTRIAL INSURANCE APPEALS FIRST BIENNIAL REPORT (1951) p. 6, too often the trial technique employed in contested cases is to "pit one doctor's *legal* conclusion against another doctor's legal conclusion ... under the *guise* of opinion evidence with insufficient factual bases." *Cf.*, Brandt v. Department of Labor and Industries, 44 Wn.2d 138, 265 P.2d 1037 (1954); Cyr v. Department of Labor and Industries, 147 Wash. Dec. 80, 286 P.2d 1038 (1955). This practice, of course, is wrong in principle and has been condemned as invading the judicial function. JONES, COMMENTARIES ON EVIDENCE, (2d ed.) Vol. 3, p. 2417. Much of the existing confusion would be eliminated if *both* doctors and lawyers confined their activities to their respective fields. *Cf.* Daily, "Medical Aspects of Workmen's Compensation," *Proc. of the 1946 Convention of the Int. Ass'n. of Ind. Acc. Bds. & Com's.*, U.S. DEPT. OF LABOR, DIV. OF LABOR STANDARDS, BULL. No. 87, p. 70 (1947).

[18] A committee of physicians representing the Washington State Heart Association formulated suggested minimum medical criteria which have been approved by the Seattle, Tacoma and Spokane Academies of Internal Medicine. The criteria are published in an appendix to Aronson, *Effect of Effort on the Diseased Heart*, 55 NORTHWEST MEDICINE 54 (January, 1956).

commission could be selected to review each heart claim. The members of the panel should possess the utmost in fairness, objectivity, and professional qualification, and they should be selected in such a manner as to merit the confidence and support of both labor and industry;

(e) When a heart claim is presented to the Department of Labor and Industries, at least two members of the panel should be selected to review the case. They should be clearly advised that they are not being called upon to support or oppose the claim; that their *only* duty is to study the case and give an impartial, objective medical opinion regarding the relationship between the activities of the workman in his job and the heart attack. This commission of two or more should review the case in the light of advanced medical knowledge and the previously established medical criteria. All relevant information including medical history, the workman's activity before, during, and after work should be supplied. The commission should examine the workman if he is living. In death cases, an autopsy report should be supplied. If any significant information is lacking, the commission should defer its opinion until the deficiency is supplied;

(f) The commission should write a report of its findings and conclusion, in nontechnical language so far as possible. In nonfatal cases, the report should state in what employments the workman can be placed without further physical harm to himself. This report should go to the Department of Labor and Industries, which should forward copies to the workman or beneficiary, the employer, and the workman's attending physician;

(g) The members of the commission should be called as witnesses before any reviewing tribunal if the claim is contested. They should not be called, however, in support of or in opposition to a claim, or for or against any interested party. Their testimony should be unbiased and designed primarily to assist the tribunal to arrive at a correct judgment. The traditional legal method to test the accuracy of testimony is cross examination. The accuracy of the factual foundation for the conclusion of the commission, when necessary, should be subject to this test. Unless interested parties are afforded the right of reasonable cross-examination, due process of law is denied, and the procedure would fall under the condemnation of both state and federal constitutions.[19] The design of the plan and its essential requirements are not to deny or obstruct access to a full and complete hearing in any contested case, but rather to assure the mobilization of all of the factual information and scientific knowledge available in doing justice in the individual case.[20]

The foregoing plan could be adopted by the Department of Labor and Industries without amendment to the existing law. It is harmo-

[19] Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218 (1916); Hunter v. Zenith Dredge Co., 220 Minn. 318, 19 N.W.2d 795 (1945).

[20] *Cf.* Karlen v. Department of Labor and Industries, 41 Wn.2d 301, 249 P.2d 364 (1951).

nious with the policy and procedure of the Industrial Insurance Act. Its essence is the application of a body of advanced medical knowledge to each individual case to produce as accurate and therefore consistent results as that knowledge permits. Ultimately this should bring order out of chaos, remove existing fears of undue and unjust burdens upon industry, and thus advance the program of securing employment within industry of workmen suffering from cardiac disorders.