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# Trial Practice and Tactics in Employee Injury Cases—The Plaintiff's Viewpoint

*Benjamin Marcus\**

*The author, a practitioner with extensive experience in the workmen's compensation field, sets out a number of "do's" and "don't's" for the successful representation of plaintiffs in employee injury cases, especially with regard to the handling of medical evidence. He also points out defects in the existing law, and calls upon the bar to fulfill its social role by supporting remedial legislation.*

Before proceeding into a "bread and butter" discussion of workmen's compensation perhaps it would be helpful to summarize my general critique of the law.<sup>1</sup> Workmen's compensation laws were intended to provide a simple, speedy remedy, devoid of legalisms and certain of adequate rights. It was not long, however, before the system degenerated into one of the most complex fields of the entire body of law—so much so that the practice of workmen's compensation on either side of the fence, particularly in the urban areas, became firmly enconced in the hands of a few lawyers. Fortunately for myself, I happen to be one of those few. Cases are referred to our office by almost all of the other lawyers in our area, largely because the referring lawyer, brilliant though he may be in the general or specialized practice of law, does not know, or care to deal with, the law of workmen's compensation.

What has made this area of the law so difficult? Other participants in this Symposium have given some pertinent answers to that question.<sup>2</sup> These further factors should be considered. First, there was the intrusion of the insurance carriers into this field—the reports of the various investigating committees which between 1910 and 1930 studied and proposed the workmen's compensation laws of the various states reveal that insurance carriers in general oppose the passage of

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\*Member, Marcus, McCroskey, Finucan, Libner & Reamon, Muskegon, Michigan. This article is based on a speech delivered at the Institute on Employee Injuries at the Vanderbilt University School of Law in November of 1962.

1. I have expressed these criticisms in more detail in a speech, "Making the Law Work," delivered at the Fiftieth Anniversary Symposium, University of Wisconsin, May 9, 1961 (unpublished).

2. See Small, *The General Structure of Law Applicable to Employee Injury and Death*, 16 VAND. L. REV. 1021 (1963); Malone, *Some Recent Developments in the Substantive Law of Workmen's Compensation*, 16 VAND. L. REV. 1039 (1963).

such laws. Before the enactment of workmen's compensation laws, only about forty per cent of the premium dollar paid by employers to insurance carriers for coverage against legal liability was being paid to injured workers for benefits, including medical care. Insurance carriers, therefore, sought to protect their vested interests.

In the main, it was the employers, not the labor unions, who furthered the enactment of workmen's compensation laws. They did so not only because they thought it just, but in the hope that a larger percentage of their premium dollar would find its way into the benefit structure. They thought that a simple and adequate non-litigious remedy would greatly benefit all the parties involved.

While it is true that the retention figure in workmen's compensation may now average less than forty per cent (there is a great variance among statisticians as to just what "profits" the carriers are making), the amount retained by private carriers compares most unfavorably with the administrative costs of the other social security schemes or with the retention figure of monopolistic state funds. But what is worse, assuming that the carrier is entitled to his profit, workmen's compensation laws, aside from their unintended complexities, fail to provide the subsistence level which was guaranteed the worker as a quid pro quo for the relinquishment of his rights under the common law and pertinent statutes, however inadequate these remedies may have been. The exchange was obviously no bargain at all, and it is high time that all of the interested parties, employer, employee, and government, re-examine the bargain and its failure.<sup>3</sup>

I will now turn to a discussion of my assigned topic: "Trial Practice and Tactics." How does a plaintiff's lawyer best approach his job? What should he look for? How can he prepare and win a case?

I have repeatedly heard that it is most easy for a plaintiff to win his case, and that all he need do is lift a telephone or file a paper. I wish that were true, because that wish is consistent with the fundamental aims of those who drafted and submitted workmen's compensation laws. Instead, the plaintiff's lawyer has to work diligently and even fight to protect the rights of the injured. In each and every case it is the practice of my firm to prepare, try, and make a record as if that case would ultimately be reviewed by the supreme court of our state. As a result, our office alone has argued about seventy cases in the Supreme Court of Michigan in the last several decades, a statistic which supports the statement that workmen's compensation is the most litigious branch of either insurance or labor law.

This continuous fight to further the injured worker's rights is a thankless task. I use the term "thankless" advisedly, not because our

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3. Marcus, *Advocating the Rights of the Injured*, 61 MICH. L. REV. 921 (1963).

clients do not appreciate the benefits that come with victory, but because in some meaningful ways the plaintiff's lawyer often works alone, without any substantial assistance from organized labor. There are too many men of authority, particularly of lesser authority, in the ranks of labor who think of lawyers (even those who materially assist the cause of labor) as parasites upon society; who believe that the workers should obtain workmen's compensation benefits without payment at all for the expert assistance provided by the lawyer; and who would like to eliminate the need for legal representation. Unfortunately this attitude effectively eliminated the plaintiff's lawyer during the first two decades of workmen's compensation, leaving the field entirely to the special pleaders for industry and the insurance carriers, who naturally and in due time plastered the structure of the workmen's compensation laws with a coating of legalisms similar to the covering that previously impeded justice at common law.

One of the objections to plaintiff's attorneys revolves around the question of costs and fees. I firmly believe that it is most unfair that the injured worker, who at best receives a wholly inadequate amount of compensation, should be required to pay the costs of litigation. Some states have remedied this, providing that some of the costs be taxed against the employer-carrier. In Michigan, as is true in most other states, fees are strictly regulated. I wholly agree with this principle. In fact, I participated in the movement in Michigan about twenty years ago to reduce the existing level of attorney fees to a reasonable figure. On the other hand in some states, at the urging of both employer and labor, attorney fees have been made so inadequate that the injured worker finds it difficult, if not impossible, to obtain representation of comparable quality to that obtained by the employer-carrier.

It was the result of such unilateral advocacy that workmen's compensation during its first two decades was plunged into what has been described by Justice Cardozo as a "Serbonian bog."<sup>4</sup> Only when the plaintiff's bar sprang into existence in the 1930's, staffed by competent, well-motivated lawyers, was the tide turned; then the basic principles of workmen's compensation reappeared in the decisions of administrative tribunals and courts, with particular regard to increased coverage for all injuries caused or contributed to by the employment.

I suggest that without the plaintiff's lawyer buttressing the hollow structure of workmen's compensation by pressing for more liberal decisions, we would today again consider following the example of England in workmen's compensation by integrating work injuries into the social security system, as did that country under the Beveridge

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4. *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 499 (1934).

Plan. It was the same highly litigious nature of workmen's compensation laws which promoted this plan. Professor Robson of the University of London, who helped lay the foundation of the Beveridge Plan, wrote thereof as follows:

Money, time and professional skill were squandered for more than half a century in a scandalously wasteful manner in settling these claims. The fundamental reason was that, instead of a claim for compensation being determined on the grounds of public interest, it was opposed and obstructed at every stage by the adverse interest of the employer or his insurance company. The resources of numerous legal and medical practitioners were devoted to resisting the payment of compensation to an injured workman or the dependents of one who had been killed, regardless of the human and social issues involved.

These were the considerations which led me to conclude in 1942, that "the system of workmen's compensation as it now exists is indefensible, and such it will remain until the adverse interest of the employer or his insurance company or mutual trade association is removed, and the determination of the claim carried out by an administrative tribunal or commission having regard only to the public interest in the injured man or his dependents."<sup>5</sup>

The Robson critique applies to the American scene as well, although there presently appears to be, as indicated elsewhere in this Symposium,<sup>6</sup> a greater awareness of a public conscience by the insurance carriers and organized medicine, and an understanding of the social value of workmen's compensation, not merely of its profit structure.

All of this may be true and even interesting, but it does not tell you how to prepare and win a compensation case. First, you can't win a case until you have a client. How do you get a client? That may depend upon the area in which you practice. If you are in a large urban area which is highly industrialized and highly unionized, the chances are that you cannot break into the inner circle of representation unless you have proper connections with labor unions. One of my partners devotes his time largely to labor relations work. As a result, there has arisen a firm bond between our firm and labor unions, and when a compensation claim is brought to the attention of union personnel they usually recommend our office to their members, a recommendation which is, I trust, based upon our past performance. Once you have established yourself as qualified in the field, you will undoubtedly receive a good deal of referral work from other attorneys, many of whom have found workmen's compensation to be too difficult and unrewarding.

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5. ROBSON, *JUSTICE AND ADMINISTRATIVE LAW: A STUDY OF THE BRITISH CONSTITUTION* 210-12 (3d ed. 1951).

6. The concern of organized medicine, for example, is shown by the organization of the Committee on Medical Rating of Physical Impairment by the American Medical Association, discussed in Palmer, *Medical Evaluation of Impairment—Not Disability*, 16 *VAND. L. REV.* 1107 (1963).

In any event, the injured employee arrives at your office. What information is necessary? I would suggest the following items for your interview sheet. First, inquire about prior employment and work experience, items which relate not only to a possible cause of his disability but also to your client's ability to rehabilitate himself. These items may be extremely important in occupational disease cases, especially those which involve diseases and disabilities caused by long and repeated exposure. Another important item is the history of your client's previous illnesses and injuries. Too often I have seen a lawyer lose the case because he had not been informed about a client's prior injury and had presented the claim based entirely on the last injury or employment.

When you consider that an aggravation of an old injury may be fully compensable, it is foolhardy not to allege the prior injury or disease. The failure of your client to fully disclose these pertinent facts often gives the defense an opportunity to make a liar out of him on the witness stand and possibly destroy his entire claim. If the worker had only told you the whole truth, you might have found it easy to show that because of his prior injury there existed a lower threshold for trauma or disease, which made your client more susceptible to subsequent injury. I remember one case where the client had a compensable knee injury with some residual disability; the controversy concerned only the amount of this disability. While I was preparing for trial, my client belatedly informed me that he had also injured his back. I promptly amended. The carrier in due course took x-rays which indicated the presence of lipiodol. They were then able to demonstrate that my client was not telling the truth and that he had had a myelogram performed for an injury ten years before, incurred while working for the WPA. I lost that case, not because the knee was not disabled, but because my client had failed to tell the truth about a prior injury.

Be sure to get a complete medical history, including the names of all doctors and hospitals visited during the preceding ten years. Obtain and check medical and hospital records since they are more accurate, particularly as to time, than your client's memory. Sometimes you may get a more accurate history which, in turn, may help you better to establish your claim. But keep in mind that histories taken by medical personnel very often omit data which is significant and pertinent to a compensation claim, particularly in failing to relate the disease or injury to the patient's occupation.

Do not forget to have your client sign medical authorizations. I suggest that your form contain the following language: "All authorizations given to those other than my herein designated attorneys are

hereby revoked." Often a compensation carrier or even another insurance company has had your client sign a general authorization. These authorizations are then photostated and exchanged between carriers for multiple use. Your medical authorization should therefore revoke and cancel this earlier release of confidential information. Moreover, the carrier's representative may use the authorization not only to examine and copy records but also to consult with the attending physician and perhaps influence his ultimate opinion in the case. I therefore suggest adding the following language to medical authorization: "Confidential relationship is not waived except to the extent herein specifically designated." If the opposing counsel or the carrier wishes to confer with the client's physician, I may, whenever it is desirable and proper, arrange for a meeting with the doctor at which both the opposing counsel and I are present.

Obtain all information you can about notice of your client's injury and claim made of the employer, names of witnesses, the man's work history, and his wages. Bear in mind that you want a record of his true wages, including overtime and fringe benefits; a man often does not know just how much he is really making. Obtain details of all monies paid by the employer-carrier to him, either by way of workmen's compensation or group insurance benefits; if compensation was paid and stopped, find out why it was stopped. Find out the date the man returned to employment, the type of work he received after he was re-employed, and his wage record since his re-employment. If his subsequent employment has been terminated, find out the reasons therefor and the history of your client's efforts to obtain other employment compatible with his disability.

Inquire as to his rights and status under existing pension plans. If such a plan exists, consult the pension committee. Initiate a claim therefor if indicated, but in so doing take into consideration all factors, with particular reference to the date of filing, which might vary the monthly amount of the pension. Examine the important provisions of any pension plan that may be provided by union contract or otherwise. Some contain set-off provisions deducting workmen's compensation payments from the pension benefits. The time of payment of compensation and the time of application for pension benefits may be important factors affecting the total amount your client may recover.

Consider Old Age, Survivors, and Disability Insurance, whether early retirement is advisable, and whether the client is sufficiently disabled to obtain permanent disability benefits. If so, provide the Social Security Administration with pertinent copies of your medical reports. Depending upon the relevant statute, the client may or may not be entitled to unemployment benefits, either with or without regard to

the workmen's compensation claim; advise him accordingly. If he is entitled to unemployment benefits where partially disabled, be sure that he represents his disability correctly in his application.

Examine his insurance policies, both group and otherwise. Many provide waiver of premium and other disability and medical benefits. The employer's group policy should receive special attention. Employers too often substitute group insurance for workmen's compensation. This is sheer fraud in many instances. Group insurance is usually a fringe benefit provided in lieu of extra wages; its abuse by the employer is actually an abuse of the employee's rights to obtain maximum benefits under the insurance plan. If our office learns that an employer has substituted group insurance for workmen's compensation, we refuse to reimburse the group carrier when we succeed in obtaining workmen's compensation benefits. If, on the other hand, reimbursement is equitably required because of honest mistake we make suitable arrangements for repayments after proper deduction of the costs and attorney fees involved in enforcing the worker's right to workmen's compensation.

Find out about disability benefits being paid or payable to the client as a war veteran. At times it may be advantageous to settle the compensation claim for a lump sum rather than have it paid weekly, since the income level of the veteran may affect his right to a government pension.

Of course, all of this presupposes that you are going to win the case and collect compensation benefits for your client. Collection comes before disbursement, but important steps must be taken for preparation and trial of the claim.

Get in touch with all of the witnesses. If they are fellow employees, ask the union steward or committeeman to arrange for the witnesses to call at your office. If this procedure is inadequate, perhaps because there is no union involved, write the witnesses letters setting up an appointment. If you obtain no response, a telephone call may yield sufficient information. As a last resort, call upon the prospective witness and interview him at his home, if he has not called at your office. In our experience the great majority of fellow-employee witnesses are cooperative so long as they are aware that their job security will not be impaired.

Next, establish a proper rapport with the treating physician. Write him, enclosing the proper authorization. Follow this with a telephone call if no report is received in due time. By all means pay the doctor out of the proceeds of the case not only for his report, but for all unpaid medical bills, letting him know in advance of your intentions. If he testifies, be sure his expert witness fee is paid, win or lose. This



technique often converts unfriendly doctors to cooperative ones. In cases where the treating physician is the physician for the employer-carrier, or where his bill has been paid by them, the doctor may be reluctant to give you a report. Remind him that the method of payment has nothing to do with the establishment of the confidential relationship between doctor and patient, that the right to pertinent information is the right of your client; emphasize that unauthorized disclosure of confidential information to the employer-carrier may be a violation of both the law and the physician's code of ethics.

Treat bills from a hospital and its staff in the same manner as bills from a doctor. During a year you may be able to collect thousands of dollars of unpaid bills for the hospital. Cooperation may then become the pattern of conduct.

Welfare agencies should be given similar consideration, for many a case begins in a welfare office. Studies have shown that a substantial percentage of the unemployed have sustained industrial injuries. If indicated, we request the client to sign a repayment agreement with the welfare agency, so that pending litigation he will have some means of support, which will be repaid, in whole or in part, from the proceeds of a favorable award of compensation benefits. This may influence welfare agencies to give assistance to your clients, and often leads to information that may be of value in furtherance of the claim.

Proceed to obtain relevant information from the employer, such as reports of the accident, first aid and medical records, employment record, etc. The method you use depends upon your statute, but do not proceed upon your case to any major extent unless you have the company records concerning your client.

If you have not as yet done so, you must by now frame the theory of liability upon which you base your claim and in which context the factual proofs must be presented. In those jurisdictions where there is comprehensive occupational coverage, you should not neglect the possible advantages which might result if you pressed the claim either as an occupational disease or as a so-called accidental injury, or as both. In matters concerning chronic conditions or diseases, such as cardiac involvement, ruptured disc, and bursitis, the condition may well be due to repeated harmful exposures in the occupation rather than to a single episode. It is then most important to allege and press the occupational rather than, or as well as, the accidental nature of the injury.<sup>7</sup>

Examining and obtaining information concerning facts of past occurrence are good, but not good enough. You must continue to marshal

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7. See Marcus, *Compensability of Heart Disease—Legal Aspects*, 1962 *INS. L.J.* 341; Rodes, *Workmen's Compensation—Survey: 1955-56*, 11 *RUTGERS L. REV.* 140 (1956).

them correctly and to supplement them by your own knowledge and imagination. I have found that the man who has been chronically ill may also have an attendant personality problem which may have been caused, aggravated, or precipitated by the injury or disease, or by the consequences of his disability. In such cases, particularly where the disability seems to exceed that justified by the physical findings, refer your client to a psychiatrist for evaluation. You will find that in many cases the injured client has a psychoneurotic or functional disability which is not only real but disabling and compensable. But do not neglect the other specialties. Wherever reasonable or practicable refer your client to qualified experts such as neurosurgeons, orthopedic surgeons, or internists. Match the defendant's panel of experts with your own qualified specialists.

Before trial date and when you are thoroughly prepared, submit your claim, amply documented, to your adversary. I believe that it may be more profitable to persuade an intelligent opponent, rather than the hearing officer, who may only be a politician in disguise, of the worth and validity of your claim. Even if you cannot agree with the defendant on payment or settlement you may be able to narrow the issues of fact and law in dispute.

When the trial date is set, notify or subpoena your witnesses. If practicable, set the exact time of the day when the doctor can most conveniently appear. Never waste his time by having him wait to be called to the witness stand. Regarding fellow-employee witnesses, you can often have them on call by telephone so that they need not forego a full day's wages. Note that the testimony of a fellow employee may prove unnecessary because the client's own story, properly corroborated by the employer's records and medical reports, is sufficient.

Let us review the presentation of medical testimony, since most workmen's compensation cases involve, often decisively, medical testimony. Almost ninety per cent of the litigated cases involve the nature and extent of disability and the ways in which the man's occupation could have caused the disease or disability, either entirely or by precipitating or aggravating it. Even when the job has aggravated the condition, the question remains as to whether the aggravation was temporary or permanent. Do not depend too strongly on the treating physician, unless he is quite competent. In the larger urban areas the industrial physician usually meets the treating physician at medical society meetings, hospitals, and country clubs, where casual conversation can become a mode of influence. The latter is often afraid to oppose his brother physicians, who are so well maintained by the elite of industry. The treating physician's testimony may thus be ineffective or even damaging. This is another reason why a specialist

should be retained to examine your client, review the case and testify.<sup>8</sup>

Hypothetical questions and their answers may be troublesome. The phrase "reasonable medical certainty" bothers the courts, as it should, since it may be almost meaningless when applied to the reality of proving your case. In *Powers v. Allstate Insurance Co.*,<sup>9</sup> the court denounced that phrase, stating that the reasonable "belief" of the doctor was enough for proof of cause. At times the doctor may be unwilling to express a favorable opinion because he does not believe that it is "proof." Advise him that the standards of so-called "scientific proof" are not required. All he need testify to is his reasonable belief, employing the same standards that he would when he decides upon the best of many possible diagnoses in private practice. His so-called "guess" in ordinary practice usually leads to treatment, surgery, and often cures, attended by the payment of fees. Why cannot the same educated guess be used to prove compensability?

Make full use of medical treatises in the preparation of your case, in conference with your medical witnesses, and in cross-examination of the defendant's witnesses. There are several reasons why authoritative writings may stand you in good stead. First, the changing nature of industrial processes creates new hazards, whose exact effects are little known to many. Second, most research in industrial medicine is done by industry or by those whom it can influence or control. As a result, the toxic effect of a chemical or material used in industry may not be fully disclosed at the compensation hearing. But medical articles, often from abroad, may provide clues to helpful guiding information, useful not only in cross-examination, but also in "educating" your own medical witness. In *Freedom of the Mind*, Justice William O. Douglas pointed out that facts concerning dangerous toxic materials are not always disclosed to the public, and that the companies involved in their manufacture and distribution, who have powerful political alliances, have often influenced or even corrupted some educational institutions.<sup>10</sup>

In cross-examining your opponent's doctor, bear in mind that he may be a medical advocate. Do not let him argue or give long speeches. Do not allow him to evade the question. When he talks of "other

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8. I recommend for your reading Marcus, *Preparation and Presentation of Medical Testimony*, 1961 INS. L.J. 455, and Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473 (1962), for comprehensive surveys as to the preparation and presentation of medical testimony. In these articles ample authority is cited for the admission of medical and hospital records, almost in their entirety, including opinions as to diagnosis and cause.

9. 10 Wis. 2d 78, 102 N.W.2d 393 (1960).

10. DOUGLAS, *FREEDOM OF THE MIND* 9 (Am. Lib. Ass'n, Reading for an Age of Change No. 3, 1962).

likely causes" of the condition involved, *i.e.*, other than the compensable cause, indicate the lack of proof for such a differential diagnosis, and characterize it as based upon sheer speculation. When he speaks of cause, make sure he does not limit his answer to primary cause and thereby eliminate aggravating or precipitating factors. This may be quite important since many doctors believe that the concept of liability for aggravation is wrong, and that industry should pay only for diseases and disabilities caused primarily by industry. Their opinions and testimony are shaped not only by their economic ties with industry but by their distorted views on workmen's compensation. Organized medicine's hostility to social security is an excellent indicator of their bias against government-sponsored insurance schemes, of which workmen's compensation is the very first.

If you are confronted by a wall of hostile medical witnesses, do not despair. Logic, reason, and common sense are worthy weapons. If the sequence of events and the logic of the situation demand a favorable decision, you may win your case, not only without the benefit of favorable medical testimony, but even if it is all arrayed against you.<sup>11</sup>

In closing, let me remind you of the role you may play, not only as a trial advocate, but as a lobbyist. True, as Arthur Larson has stated, the courts have done a great deal for the injured worker by applying meaningful interpretations to the statute, rivalling the legislature in furthering the basic aims of workmen's compensation.<sup>12</sup> It appears that progress at this time can best be made before compensation tribunals and courts. However, it may some day be true that legislative bodies will no longer be controlled by the power elite, representative of special interests, but rather by the population at large, voting under a proper apportionment plan. Until then, and even afterwards, lend your ability, wisdom, and experience to those committees and agencies who plan revisions of the workmen's compensation laws. Unfortunately, the injured worker is at present inadequately represented on such groups. Because of this lack of representation, which results in unilateral advocacy in these groups, much of the decisional progress made by and for the injured worker may be wiped out. I strongly urge that labor unions give their injured members the same quality of representation in legislative matters dealing with workmen's compensation that they now do when dealing with wages, hours, and conditions of employment.

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11. See Mareus, *supra* note 8; Rheingold, *supra* note 8.

12. Larson, *Foreword to Symposium—Workmen's Compensation in Ohio*, 19 OHIO ST. L.J. 537, 539 (1958).

