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NOTE

REMAINING TORT LIABILITY OF EMPLOYERS AND THIRD PARTIES UNDER WORKMEN'S COMPENSATION STATUTES

I. Introduction

Workmen's compensation is a mechanism designed to provide cash benefits to employees to recompense for loss of wages due to injuries sustained in work-connected activities. Theoretically, the cost of the program is charged to the consumer by increasing the price of goods and services sold to the public. An employee, covered by a compensation act, is entitled to payments if he is injured by an accident arising out of and in the course of his employment; and the fact that such employee was at fault or guilty of negligence himself is normally of no consequence.[1]

Compensation benefits, in contrast to damages received in common-law tort actions, reimburse only for injuries resulting in disability of a type which reduces or otherwise affects earning capacity. Thus compensation acts do not make payments for pain and suffering, loss of consortium and other losses of a like nature. A worker who is in all respects eligible for compensation receives a sum amounting to approximately one half to two thirds of his average wage, depending on the particular jurisdiction making the award.

Administration of the program is typically put in the hands of an administrative commission. Proceedings before these bodies, relative to cash benefits, are characterized by a relaxation of rules of procedure and evidence so as to achieve the beneficial purposes of the legislation.[2]

As a general proposition, an employee subject to the provisions of a compensation statute forfeits his common law right to sue the employer for damages. Compensation acts do not as a rule, however, prevent tort actions against third parties. The primary purpose of this note will be to examine the extent to which an employee can still avail himself of common-law and statutory remedies (other than compensation) in light of the limiting features embodied in various compensation schemes.

II. Liability of Employer

General Rule: As previously stated, the general rule is that as be-

1. 1 Larson, Workman's Compensation Law § 1-2 (1952).
2. *Ibid.*

tween the employer and the employee the rights provided by compensation acts constitute the only basis of recovery available to the latter.[3] This is true whether the act be compulsory or elective in nature,[4] and the principle is the same even though the compensation consists only of medical care.[5] Therefore, an employee whose claim is within the scope of the act cannot maintain a tort action[6] because he has no capacity to sue.[7]

There are, however, certain circumstances under which a workman may be able to show lack of compensation coverage with the result that he may sue his employer at common law. A case of this nature exists when either: (a) There is no basic coverage (compensation law never applies); or (b) There is basic coverage, but a special or peculiar fact situation renders inapplicable the exclusive remedy provision of the compensation statute. These two problems will be explained and analyzed in the discussion to follow.

A. No Basic Coverage

Compensation acts frequently apply only to employees engaged in certain enumerated occupational areas. If a worker is not employed in one of these areas, then he is never, under any circumstance, eligible for compensation benefits. This point is well illustrated by the case of *Davis v. W. T. Grant Co.*[8] Plaintiff, a saleswoman injured in defendant's store, sued to recover damages at law. Defendant contended that a tort action was barred by the New Hampshire Compensation Act. The court pointed out, in holding the damage action appropriate, that the Compensation Act, by very express terms, applied only to workmen engaged in "manual" or "mechanical" labor.[9] In a situation of this type, common-law remedies are still available to an injured employee as his particular job *lacks basic coverage*—it is simply not within the scope of the act.

Some compensation statutes exclude certain employers and their

3. In *Duprey v. Shane*, the court concluded: "There can be no doubt, of course, that, so far as the original injury . . . is concerned, the employer being insured, the remedy before the commission is 'the exclusive remedy against the employer for the injury.' " 39 Cal. 2d 781, 249 P.2d 8, 13 (1952). But some statutes provide otherwise. See Goetaski v. California Packing Corp., 19 N.J. Super. 460, 88 A.2d 685 (1952). The court in this case held that a seventeen year old minor could elect to pursue his remedy either at law or under the Compensation Act.

4. Standard Oil Co. v. Cheek, 278 Ky. 508, 128 S.W.2d 950 (1939); Sullivan v. City of Butte, 117 Mont. 215, 157 P.2d 479 (1945).

5. "[A]nd it is immaterial that such compensation may . . . consist of nothing more than money benefits in the form of the right to receive hospitalization or the right to receive medical treatment." Frank v. Anderson Bros., 236 Minn. 81, 51 N.W.2d 805, 807 (1952).

6. Zimmerman v. MacDermid, 130 Conn. 385, 34 A.2d 698 (1943).

7. Roberts v. Gagnon, 1 App. Div. 2d 297, 149 N.Y.S.2d 743, 748 (1956).

8. 89 N.H. 520, 2 A.2d 448 (1938).

9. *Ibid.*

employees; and an employer so excluded naturally remains liable for damages.[10] The classes of employments excluded vary considerably from jurisdiction to jurisdiction. Tennessee, which is a fairly typical state in this respect, excludes from coverage those working in the capacity of domestic servants or agricultural laborers, persons whose employment is casual, all businesses employing less than five persons, and state, county and municipal employees.[11]

The exclusion, in particular, of domestic servants is a general practice. In *Murray v. State*,[12] for example, the plaintiff, defendant's housekeeper, was injured while on a shopping expedition. Plaintiff brought an action for damages alleging the negligence of another of defendant's servants. Defendant contended that no such action would lie as his housekeeper was subject to the provisions of the Workmen's Compensation Statute. The court, in accepting plaintiff's view, noted that farm laborers and domestic servants are excepted from the provisions of the act, and were thereby entitled to pursue their common-law remedy.[13]

Cases where the injury is the result of a "disease" constitute another area where there may be no basic coverage. Many statutes make no provision for compensation payments for a disease, and thus a common-law action is the employee's sole remedy.[14] Courts give special attention to this problem if an occupational disease is involved. As a matter of fact, when a compensation act fails to furnish a specific remedy for an occupational disease, many courts simply presume that the legislature intended to preserve the common-law cause of action.[15] A suing employee cannot recover at law, of course, unless he can establish that the employer was either negligent or that he breached a statutory duty.[16]

10. Cribbs v. Southern Coatings & Chemical Co., 218 S.C. 273, 62 S.E.2d 505, 507 (1950). The court in this case held that the injured plaintiff had a common law action because the defendant company did not come within the provisions of the Compensation Act. In another jurisdiction it was held that: "Farm laborers and domestic servants, having been excepted from the provisions of the act, are thereby left in the same situation they would have been had the act not been passed. Such employees, in the event of accident or injury, are entitled to pursue their common-law remedies . . . ." Murray v. Strike, 76 Utah 118, 287 Pac. 922, 925 (1930).

11. TENN. CODE ANN. § 50-906 (1956).

12. 76 Utah 118, 287 Pac. 922 (1930).

13. *Ibid.*

14. The employee here suffered a lung injury from exposure to fumes of a chromic acid solution. This kind of injury was not listed in the schedule contained in the Compensation Act. Therefore, the court held that plaintiff had a common law action for damages. Shoemaker v. Electric Autolite Co., 69 Ohio App. 169, 41 N.E.2d 433, 435 (1942).

15. Biglioli v. Durotest Corp., 44 N.J. Super. 93, 129 A.2d 727 (1957).

16. In this case the plaintiff brought action for damages based on an injury due to an occupational disease contracted from escaping carbon monoxide. Plaintiff alleged that the employer's negligence resulted in defective machines that allowed the gas to escape. The court ruled that plaintiff had made a prima facie case. Dixon v. Gasco Pump & Burner Mfg. Co., 183 Okla. 279, 80 P.2d 678, 682 (1937).

An employee also retains a common-law or statutory right of action if he has declined, in states where election is possible, to be subject to the compensation act[17]—again there is no basic coverage. When an employee has so chosen, the employer can be sued for damages even if he has accepted and complied with all terms of the statute.[18] A tort action is also open to an employee in cases where the employer has either rejected the act or failed to comply with all of its provisions.[19] But if both parties have declined coverage, then, as a general rule, both are relegated to their common-law rights.[20]

B. Particular Situation Makes Compensation Law Inapplicable

Often, even when there is basic coverage, the circumstances of an accident may render the resulting injury non-compensable, and thus a common-law action is possible. This situation is most likely to arise where the employee suffers injury while *not* engaged in the performance of his duties, or when he is not acting within the scope of his employment.[21] In *Olguin v. Thygesen*,[22] plaintiff employee was a "flare man," having the duty to put out flares to protect highway traffic against collision with men, equipment and material on the road job. The accident in question occurred while the plaintiff was taking a fellow employee to work. The New Mexico court stated:

> We hold that the suit was properly brought as a common law action for damages for negligence. The Workmen's Compensation Act had no application since plaintiff was not at the time working 'in or about the premises occupied, used, or controlled by the employer,' nor did the injury occur elsewhere while plaintiff was at work in any place where his employer's business required his presence.[23]

But compensation acts usually prohibit a damage suit where injury was caused by the employer's violation of a statutory regulation. In other words, an act of this nature will not make inapplicable otherwise valid compensation coverage; and the aforementioned general rule holds true even though the violation is so serious that it subjects

17. Industrial Comm'n v. Orizaba Mining Co., 61 Ariz. 152, 145 P.2d 850 (1944). See also Dalton Foundries v. Jefferies, 114 Ind. App. 271, 51 N.E.2d 13 (1943). Here the court reasoned that a purpose of an occupational disease act, which gave a damage action to an employee who elected not to operate under the Compensation Statute, was to encourage an employee to accept compensation so as to prevent his action from being met by the defenses of assumption of risk and negligence of a fellow servant. Also see Pressley v. Industrial Comm'n, 73 Ariz. 22, 236 P.2d 1011 (1951), pointing out that in some jurisdictions the employee must reject the act at the time he is initially employed.

18. Gay v. Hocking Coal Co., 184 Iowa 949, 169 N.W. 360 (1918).

19. Kramer v. Globe Brewing Co., 175 Md. 461, 2 A.2d 634 (1938) (compliance by employer as soon as legally feasible bars an employee's suit). Walker v. Sheffield Steel Corporation, 224 Mo. App. 849, 27 S.W.2d 44 (1930).

20. Lester v. Auto Haulaway, 260 Mich. 16, 244 N.W. 213 (1932).

21. Levin v. Twin Tanners, Inc., 318 Mass. 13, 60 N.E.2d 6 (1945); Yeager v. Chapman, 233 Minn. 1, 45 N.W.2d 776 (1951).

22. 47 N.M. 377, 143 P.2d 585, 590 (1943).

23. *Ibid.*

the employer to a criminal prosecution.[24] A recent Pennsylvania decision, *Hyzy v. Pittsburgh Coal Co.*,[25] is a good example of the attitude of a majority of courts with respect to misconduct that constitutes a willful failure to obey safety orders or to provide safety devices. In this case a minor was killed from a cave-in resulting from defendant's neglect of a statutory requirement. The court sustained defendant's demurrer on the ground that plaintiff's exclusive remedy was under the Workmen's Compensation Act.[26] In every other state where a similar situation has occurred, an identical result has been reached.[27]

On the other hand, where an intentional wrongful act of the employer causes the injury, proceedings for compensation are not always the exclusive remedy.[28] In situations like that in *Boek v. Wong Hing*,[29] where the employer personally committed a malicious assault upon the employee, some courts will hold the injury outside the scope of the statute. Nothing short of a malicious and deliberate intent to injure, however, falls within this exception; thus gross or even wanton negligence will not suffice to justify a common-law action.[30] It must be noted at this point that there is an inconsistency in the reasoning of courts which prohibit a tort action where the employer has willfully failed to install a safety device, but allow an action to be maintained for an intentional affirmative act causing injury. Courts also make a rather artificial distinction between an assault by an individual employer and a similar act by a supervisor working for a corporate employer. "Thus even in those states which create this type of judicial exception the rule would seem to require that there be both an *assault* and *personal participation by an individual employer* for the exception to apply."[31]

24. Schmidt & German, *Employers Misconduct As Affecting the Exclusiveness of Workmen's Compensation*, 18 U. PITT. L. REV. 81, 88 (1956).
25. 384 Pa. 316, 121 A.2d 85 (1956).
26. *Ibid.*
27. Shultz v. Lion Oil Co., 106 F. Supp. 119 (W.D. Ark. 1952) held that the Arkansas Workmen's Compensation Act precluded a common-law suit for damages by an employee against her employer on the ground of alleged negligence in using a chemical spray. Selby v. Sykes, 189 F.2d 770 (7th Cir. 1951) affirmed the dismissal of a complaint which alleged that the plaintiff employee was injured by the defendant employer's negligence in violating the Indiana Dangerous Occupation Act. The court stated that the only penalty for violation of this statute was fine or imprisonment and that an injury caused by said violation was within the exclusive coverage of the Indiana Workmen's Compensation Act. Breimhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719 (1949). Curran v. Mackay Radio & Telephone Co., 123 F. Supp. 83 (S.D.N.Y. 1954), held that the New York Compensation Act was the exclusive remedy even though death allegedly resulted from defective appliances installed in violation of the Federal Communications Act of 1934. See also Freese v. John Morrell & Co., 58 S.D. 634, 237 N.W. 886 (1931); Beck v. Hamann, 263 Wis. 131, 56 N.W.2d 837 (1953).
28. See *supra* note 24.
29. 180 Minn. 470, 231 N.W. 233 (1930).
30. Heikkilla v. Ewen Transfer Co., 135 Ore. 631, 297 Pac. 373 (1931).
31. See *supra* note 24, at 91.

Another area in which an employer may be denied the protection normally afforded him by compensation law concerns illegally employed minors. Rights and remedies of this group are sometimes covered explicitly by statutory enactments.[32] Many such statutes merely add a penalty in the form of increased compensation for minors;[33] but other acts give the injured party an option to claim compensation or damages.[34] A number of statutes are not explicit concerning this problem; and, as a result, there is a considerable amount of case law on the subject, with many decisions holding that the minor is within the compensation act, and about an equal number deciding to the contrary.[35] Since the employment of persons under a prescribed minimum age violates the public policy of the federal and state governments alike, it would appear that the preferable plan would be the one calculated to most effectively discourage employers from such illegal hiring practices. Giving the minor a choice to proceed either at common law or for compensation under the statute would impose the maximum monetary penalty on violators, and probably presents the most desirable solution.

Likewise, the failure of an employer to secure adequate compensation insurance can subject him in some states to an employee's action for damages.[36] There are at least four different views on this subject. First of all, in many states, an action at law is the only remedy available if the employer fails to insure.[37] In others, the employee is still relegated to his rights within the compensation statute.[38] A few states allow the employee an election to sue for damages or compensation.[39] And one jurisdiction, California, permits

32. 1 LARSON, WORKMEN'S COMPENSATION LAW § 47.52(a) (1952).

33. Alabama, Florida, Indiana, Massachusetts, Mississippi, New Hampshire, New Jersey and Utah give double. California and Illinois give 50% more.

34. The statutes of Kentucky and North Dakota are examples of this type.

35. Cases recognizing coverage and thus avoiding a damage suit include: Lockard v. St. Marie's Lumber Co., 761 Idaho 506, 285 P.2d 473 (1955); Noreen v. William Vogel & Bros., 231 N.Y. 317, 132 N.E. 102 (1921); Foundry Appliance Co. v. Ratliff, 113 Ohio St. 337, 148 N.E. 237 (1925); Humphries v. Boxley Bros. Co., 146 Va. 91, 135 S.E. 890 (1926); Rasi v. Howard Mfg. Co., 109 Wash. 524, 187 Pac. 327 (1920). Cases *contra* include: Messmer v. Industrial Board of Illinois, 282 Ill. 562, 118 N.E. 993 (1918); *In re* Stoner, 74 Ind. App. 324, 128 N.E. 938 (1920); Hadley v. Security Elevator Co., 175 Kan. 395, 264 P.2d 1076 (1953); Galloway v. Lumbermen's Indemnity Exchange, 227 S.W. 536 (Tex. Civ. App. 1921).

Most cases of this nature arise in damage suits with the minor trying to escape from the scope of the compensation act. In Bartley v. Couture, 55 A.2d 438 (Me. 1947), the court in awarding compensation to an illegally employed minor points out that the employment could have been legalized by obtaining a permit, and draws a distinction between such illegality and illegality in the form of working children at prohibited tasks for which certificates could not under any circumstances be obtained.

36. Addison v. Tessier, 62 N.M. 120, 305 P.2d 1067 (1957).

37. Utah Idaho Sugar Co. v. Temmey, 68 S.D. 623, 5 N.W.2d 486 (1942).

38. Gowey v. Seattle Lighting Co., 108 Wash. 479, 184 Pac. 339 (1919).

39. See Conway v. Park, 108 Ind. App. 562, 31 N.E.2d 79 (1941); Riddle v. Cagle's Estate, 227 Miss. 305, 85 So. 2d 926 (1956); Peterson v. Sorensen, 91 Utah 507, 65 P.2d 12 (1937).

simultaneous proceeding under the compensation statute and at common law.[40]

The question arose in the last mentioned jurisdiction in *Marshall v. Foote.*[41] The plaintiff was employed as a nurse in the defendant's hospital. During the course of her employment she was injured by a fall down a flight of stairs. At the time of the accident defendant had not complied with all provisions concerning the securing of compensation payments, and plaintiff brought an action for damages. In finding for plaintiff the court stated: "[T]he injured employee may, at his option, pursue the single remedy before the commission, or the single one at law for damages, or both."[42] The court did not consider the question whether, in case of recovery of compensation and damages, plaintiff would be allowed to retain the proceeds of both. It is probable this question would have been answered in the negative, since otherwise there would be double recovery.

Compensation acts frequently require a subscribing employer to post notices informing his employees of the compensation coverage,[43] and failure to comply with this requirement can leave an injured workman free to bring a tort suit.[44] However, imposing common-law liability for such an infraction is quite stringent and courts often look to the whole statute in attempting to find language that will justify a different result.[45]

Although failing to comply with statutory mandates relative to obtaining insurance can cost the employer his immunity from tort actions, such is not the case if the employer merely fails to pay the compensation.[46] In fact, in this latter circumstance, the employer will only be liable at common law if he abandons an existing agreement to pay a stipulated sum to the injured worker.[47]

C. Election of Remedies

Even when an employee is entitled to a tort suit, by virtue of his

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40. Marshall v. Foote, 81 Cal. App. 98, 252 Pac. 1075, 1077 (1927).
41. *Ibid.*
42. *Ibid.*
43. Jeune v. Del E Webb Const. Co., 76 Ariz. 418, 265 P.2d 1076 (1954).
44. *Ibid.* In this case an injured employee brought a common law negligence action against his employer. The suit was maintained under a compensation statute authorizing such actions by injured employees if the employer fails to post workmen's compensation notices in conspicuous places at the work site. But the Arizona Supreme Court held the negative testimony of the employee's witnesses that they had not seen any posted notices was insufficient proof that notices were not posted.
45. Arnold v. Wright, 80 N.Y.S.2d 808 (Sup. Ct. 1948).
46. In *Pecor v. Norton-Tilly Co.*, the court stated: "It is the contention of appellant that this failure to pay constitutes a failure to 'secure the payment of compensation' . . . and that this gives him a right to bring his action at law. . . . We are of the opinion that this contention . . . is without merit . . . ." 111 Cal. App. 241, 295 Pac. 582, 583 (1931).
47. Montgomery Ward & Co. v. Beller, 276 P.2d 932 (Okla. 1954).

case falling within one of the previously discussed exceptions, he is relegated to a compensation remedy once an election has been made to so proceed.[48] Despite the fact that this rule appears clear and unambiguous, it is difficult to apply. The problem arises in trying to ascertain what particular acts of the employee are enough to constitute an election to forego common-law rights.

It is generally held that instituting proceedings to secure compensation is a sufficient act, and this is true even if the right to compensation is contested by the employer.[49] Accepting compensation or other benefits, such as medical service or hospitalization, will also prevent a tort suit.[50] Then, too, usually there is no rule of public policy which prevents the workman from contracting in advance with his employer to reject common-law remedies and accept the award of a compensation commission.[51] It is not even arguable, of course, that a workman

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48. "These sections of the Workmen's Compensation Act, to which we have referred, give to an injured employee full, adequate and complete methods of redress, even when the employer has not complied with the provisions of the act. The penalty imposed upon the employer for such noncompliance is the liability to respond in damages in a civil action. But certainly this liability does not hold where the claimant has elected to pursue the alternative remedy which the statutes provide he may select as an alternative." Geller v. Epstein, 66 Ohio App. 354, 34 N.E.2d 66, 67 (1940). See also 34 U. DET. L.J. 443 (1957).

49. Harris v. Louisville & N. R. Co., 237 Ala. 366, 186 So. 771 (1939).

50. Talge Mahogany Co. v. Burrows, 191 Ind. 167, 130 N.E. 865 (1921); Stamo v. Wiener, 328 Mass. 651, 101 N.E.2d 379 (1951); Neff v. Baiotto Coal Co., 361 Mo. 304, 234 S.W.2d 578 (1950).

51. Fuller v. Wright, 106 Kan. 676, 189 Pac. 142 (1920): "In Associated Indemnity Corp. v. Landers, 159 Okl. 190, 14 P.2d 250, we said: 'Among the other requirements essential to the application of the rule of election of remedies is knowledge of the facts indicating a choice between inconsistent remedies, and, in the absence of knowledge of the facts, these cannot be a successful plea of election of remedies.' In Noble Drilling Co. v. Murphy, 131 Okl. 34, 267 P. 659 we quoted with approval from Spread v. Morgan, 11 H.L. Cas. 588, 615, 11 Reprint, 1461, as follows: 'In order that a person who is put to his election should be concluded by it, two things are necessary: First, a full knowledge of the nature of the inconsistent rights. . . . Second, an intention to elect manifested, either expressly or by acts which imply choice and acquiescence.'" McAlester Corp. v. Wheeler, 205 Okla. 446, 239 P.2d 409, 412 (1951).

Neither is a cause of action in tort abrogated by compensation proceedings: if there was fraud in procuring the employee's signature to the compensation application; or where the employment is not within the act; or if the employee appears before the board to attack its jurisdiction; or where the employer has elected not to operate under the act. An employee who is in doubt as to whether his injury was sustained in the course of employment can be sure that his claim will be heard before the right tribunal by filing a civil action in court, as well as an application before the compensation commission. See Waters v. Guile, 234 Fed. 532 (1916); Heagney v. Brooklyn Eastern Dist. Terminal, 91 F. Supp. 775 (E.D.N.Y. 1950); Freire v. Matson Nav. Co., 19 Cal.2d 8, 118 P.2d 809 (1941); Louisville Woolen Mills v. Kindgen, 191 Ky. 568, 231 S.W. 202 (1921); Byrne v. Vanderbilt, 187 N.E. 731 (Ohio Ct. App. 1933); Utah Idaho Sugar Co. v. Temmey, 68 S.D. 623, 5 N.W.2d 486 (1942).

Some courts have denied an employee a right of action for damages even though the compensation commission dismissed his claim for payments. Other jurisdictions allow a damage suit, when compensation is denied because the employment is not within the act, the theory being that there can be no

should receive compensation and damages, for this would constitute recovery twice for the same injury. On the other hand, denying an injured employee a damage action because he applied for or even received compensation payments gives the employer a very unfair advantage. An incapacitated worker, more likely than not, needs funds immediately; and, where quick payments are the rule in compensation proceedings, they are the exception in personal injury suits. Why not permit the employee to proceed with both actions, and then upon recovery at law the amount of compensation received could be applied against the amount of damages due?

D. Employer's Defenses

In common-law actions by employees, the employer can usually avail himself of the defenses of contributory negligence, assumption of risk, and negligence of a fellow servant; but, as a general proposition, these defenses are totally abrogated in compensation proceedings. Further, employers who have the option to operate under a compensation act and elect not to do so, as well as those required to so operate who fail to comply, are deprived of the above mentioned defenses in tort actions.[52]

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election of remedies unless alternate remedies are in fact possible. In these states the fact that the employee mistook his remedy does not present a common law action. This certainly seems to be proper reasoning when one considers the underlying philosophy of workmen's compensation. Murphy v. American Enka Corp., 213 N.C. 218, 195 S.E. 536 (1938). See generally Comment, 9 MERCER L. REV. 351 (1958).

In *Davis v. W. T. Grant Co.*, the court said: "Neither is there any general rule of law . . . which bars the plaintiff from proceeding with her common-law action. Her previous unsuccessful attempt to recover under the statute does not prevent her from now pursuing the only remedy which she ever in fact possessed. The reason for this is that there can be no election between remedies unless alternate remedies are available. . . . In attempting to recover under that statute she mistook her remedy, but this gives rise to no estoppel against her." 89 N.H. 520, 2 A.2d 448, 449 (1938).

52. A non-accepting employer is deprived of his common law defenses as against a non-accepting employee. This is the rule because the employee can have no election in advance of the employer's decision to be subject to a compensation statute. But common-law defenses are not abrogated if the workman has rejected the act while the employer has accepted it, and is complying with all provisions thereof. Then, too, whole classes of employers generally retain their common law defenses. Among these are employers to whom the compensation statute was not meant to apply, those that are expressly exempt from coverage, and employers of persons engaged in casual employment.

See Deitz v. Big Muddy Coal & Iron Co., 263 Ill. 480, 105 N.E. 289 (1914); Foster v. Carle, 160 S.W.2d 999 (Tex. Civ. App. 1942).

In Walls v. McKinney, 139 W. Va. 866, 81 S.E.2d 901 (1954), plaintiff brought a damage action for injuries sustained while he was driving a truck belonging to defendant. The court held that where defendant, engaged in business, had employed plaintiff as a truck driver for two years and had not elected to come under the Workmen's Compensation Act, that his (plaintiff's) defenses of contributory negligence and assumption of risk were not available.

The policy of the law is to preserve the common law defenses to an employer who elects to come under the act, as to an employee who does not, as a constitutional method of coercing both parties to accept the benefits and

Some of the reasons for abrogation of common law defenses in personal injury actions are rooted deep in the history and philosophy of workmen's compensation.[53] There are also, however, some very practical purposes, the most important of which is a desire to induce employers who have an election to adopt the compensation program; and, in addition, to impose a costly penalty on those who vary from its mandatory provisions.[54]

III. LIABILITY OF THIRD PARTIES

General Rule: A basic concept concerning actions by injured employees against third parties is the idea that any loss from wrongdoing should ultimately fall on the wrongdoer. Almost every workable loss-adjusting mechanism must achieve two aims: it must make the injured person whole, and it must seek out the wrongdoer. Compensation law, while concentrating on the former, does not overlook the latter. Social policy has dispensed with, in the case of compensation, the necessity of showing fault to merit recovery; but such disregard goes no further and once compensation is assured, the normal quest of the law for the actual wrongdoer proceeds in the usual manner. Thus when a stranger's (third party's) negligence is the cause of an employee's injury that stranger will not be absolved of his normal obligation to pay damages.[55]

A. Definition of "Third Party"

Granting that a third party can be reached in a common-law suit, compensation statutes notwithstanding, the problem of defining "third party" remains. According to Larson, the definitions fall into four main categories: (1) There are those jurisdictions which limit immunity from damage actions to only the employer—thus any person other than a *single* employer is a third party; (2) Other jurisdictions extend such protection to include co-employees; (3) Many state laws

burdens of the act. Mitchell v. J.A. Tobin Const. Co., 236 Mo. App. 910, 159 S.W.2d 709 (1942); Karny v. Northwestern Malleable Iron Co., 160 Wis. 316, 151 N.W. 786 (1915). See also Price v. Railway Exp. Agency, 322 Mass. 476, 78 N.E.2d 13 (1948).

Where employers were not subject to provisions of the Compensation Act, then knowledge of the danger may not be considered in determining the propriety of an order of nonsuit in actions against them under an Employer's Liability Act. Vick v. Merton, 172 Kan. 87, 238 P.2d 467 (1951); Ludwig v. Zidell, 167 Ore. 488, 118 P.2d 1073 (1941); Thoni v. Hayborn, 37 Tenn. App. 56, 260 S.W.2d 376 (1953); City of Tyler v. Texas Employers' Ins. Ass'n, 288 S.W. 409 (Tex. Comm'n of App. 1926).

53. 1 LARSON, WORKMEN'S COMPENSATION LAW § 2 (1952).

54. The policy of many states is to attempt to draw all employers into the compensation system by putting those who remain outside it under legal disadvantages in tort actions. Maciejewski v. Graton & Knight Co., 231 Mass. 165, 70 N.E.2d 796 (1947).

55. 2 LARSON, WORKMEN'S COMPENSATION LAW § 71.10 (1952).

encompass the two aforementioned groups plus all contractors and their employees engaged upon a common project; (4) Three jurisdictions exempt from common-law suits all persons, whether employers or employees, subject to their state's compensation system.[56]

Immunity from an action at law is extended to the employer *only,* under decisions in several states,[57] and therefore an injured workman can sue even a co-employee.[58] This result has been justified, in the absence of explicit statutory language, by reference to the principle that a tortfeasor should not escape the consequences of his wrong, and by the argument that employees should be made aware that they are not immune from the consequences of their negligence.[59]

Many states protect co-employees, as well as employers, from being categorized as third parties. Virginia is typical of the states having this kind of legislation. In the Virginia case of *Coker v. Gunter,*[60] the plaintiff was permanently injured by the negligent act of a fellow servant, and he proceeded to bring separate actions against the employer and the workman. The Supreme Court of Appeals held that the evidence established that the driver of the vehicle, at the time he ran over plaintiff, was also an employee of plaintiff's employer; therefore, plaintiff was precluded from maintaining a common-law action.[61]

This immunity attaches to the co-employee, however, only when he is acting in the course of his employment. If a "fellow servant" was in any manner deviating from the course of employment at the time of the injury, then he is liable at common law despite the fact that both parties, under proper conditions, would be within the scope of an applicable compensation act.[62] This point is well illustrated by

56. *Id.* § 72.

57. Stulginski v. Cizauskas, 125 Conn. 293, 5 A.2d 10 (1939); Sylcox v. National Lead Co., 225 Mo. App. 543, 38 S.W.2d 497 (1931); Tscheiller v. National Weaving Co., 214 N.C. 449, 199 S.E. 623 (1938); Merchants Mut. Cas. Co. v. Tuttle, 98 N.H. 349, 101 A.2d 262 (1953); Churchill v. Stephens, 102 Atl. 657 (N.J. 1917); Lacaria v. Hetzel, 373 Pa. 309, 96 A.2d 132 (1953); Zimmer v. Casey, 296 Pa. 529, 146 Atl. 130 (1929); McGonigle v. Gryphan, 201 Wis. 269, 229 N.W. 81 (1930).

58. Zimmer v. Casey, *supra* note 57.

59. "It is said that the defendant is not a 'third person' within the meaning of the act. We see no reason for attributing to the words 'third person' any other meaning than the usual one. It must mean, as indeed the subsequent language of the section makes perfectly plain, a person other than the employer or employee." Churchill v. Stephens, 102 Atl. 657, 658 (N.J. 1917).

"To hold otherwise would unjustly confer upon every employee freedom to neglect his duty toward a fellow employee and thus escape with impunity from all liability for damages proximately caused by his own negligence." Rehn v. Bingaman, 151 Neb. 196, 36 N.W.2d 856, 860 (1949).

60. Coker v. Gunter, 191 Va. 747, 63 S.E.2d 15 (1951).

61. *Ibid.*

62. D'Agostino v. Wagenaar, 183 Misc. 184, 48 N.Y.S.2d 410 (1944). See also Anderson v. Meyer, 338 Ill. App. 414, 87 N.E.2d 787 (1949). Here a grain truck driver unloaded the last load of corn for the day and drove the empty truck toward the place where it was kept by the employer. But he deviated slightly from this route to pick up his mail. The court held that he was not in the course of employment at the time of the collision. Thus the administrix

the New York case of *D'Agostino v. Wagenaar*[63] where a night watchman, while off duty, ran into and injured a gardener on their employer's premises. It was held that the two were not in the same employ at the time of the accident and that the plaintiff still had a cause of action for damages.[64]

More than forty states now have "statutory-employer" acts.[65] A statute of this nature makes a general contractor liable for compensation payments to injured employees of a subcontractor. Courts reason, quite understandably, that a principal contractor in such a situation should be immune from suit as a third party.[66] The only exception to this rule of any consequence is that if the subcontractor should happen to be insured, then the general contractor remains amenable to a suit at law.[67] Some text writers feel that this result is unjust.

> A sounder result would seem to be a holding that the over-all responsibility of the general contractor for getting sub-contractors insured, and his latent liability for compensation if he does not, should be sufficient to remove him from the category of "third party." He is under a continuing potential liability; he has thus assumed a burden in exchange for which he might well be entitled to immunity from damage suits, regardless of whether on the facts of a particular case actual liability exists.[68]

In three states compensation acts immunize all those covered by the workmen's compensation program from tort suits by workmen covered by the act.[69] In Alabama a third party not under the act is liable for full tort damages, but a defendant who is within the act is liable only up to the amount of compensation which would be paya-

of the estate of the driver of a cattle truck was *not* precluded from maintaining a damage action against the grain truck driver.

63. 183 Misc. 184, 48 N.Y.S.2d 410 (Sup. Ct. 1944).

64. *Ibid.*

65. 2 LARSON, WORKMEN'S COMPENSATION LAW § 72.31 (1952).

66. State to Use of Reynolds v. City of Baltimore, 199 Md. 289, 86 A.2d 618 (1952). This was a suit against the City of Baltimore for pain and suffering and death of one Weidman, deceased employee of a subcontractor. The court held that the defendant was a statutory employer and thereby immune from suit.

67. General Shale Products Corp. v. Reese, 35 Tenn. App. 423, 245 S.W.2d 788 (1951).

68. 2 LARSON, *op. cit. supra* note 65, § 72.31.

69. "Such agreement or the election hereinafter provided for shall be a surrender by the parties thereto of their rights to any other method, form, or amount of compensation or damages for any injury occasioned by any accident proximately resulting from and while engaged in the actual performance of the duties of his employment, and from a cause originating in such employment or determination thereof than as provided in this article . . . and shall bind the employee himself, and for compensation for his death shall bind his personal representative, the surviving spouse and next of kin, as well as the employer and those conducting his business during bankruptcy or insolvency, for compensation for death or injury . . . ." ALA. CODE ANN. tit. 26, § 271 (1940). See also ILL. ANN. STAT. c. 48, § 143 (Smith-Hurd 1950); WASH. REV. CODE § 51.24 (1957).

ble. Washington's legislation is even more restrictive in that neither employer nor employee may sue in tort any person who is subject to the compensation act in any manner.[70]

B. Subrogation of Employer

Generally speaking, even if an injured employee should be eligible to maintain both a compensation action and a third party tort suit, he will not be permitted to retain the full proceeds of both. This result is usually accomplished by subrogating the employer or other payer of compensation to the rights of the employee, in so far as they relate to damages recovered or recoverable from third parties.

Subrogation laws can be roughly divided into five groups: (1) First of all there are a small number of states that have no subrogation legislation. Since subrogation, in the kind of employer-employee relationship being considered here, is purely a statutory device, the employer has no right of action against a third party;[71] (2) At the other pole are the states which unconditionally assign the employee's cause of action to the employer;[72] (3) Then there are a few states which permit either the employer or employee to bring suit against a third party, but allow for a joinder of one in an action started by the other;[73] (4) In addition to the aforementioned kinds of statutes there is the type in effect in New York—which gives the employee a period of six months after compensation is awarded to institute a third party tort suit.[74] If he fails to so act within the allotted time, his

70. See generally Note, 11 OKLA. L. REV. 108 (1958); Note, 43 IOWA L. REV. 352 (1958).

71. In *Touscon Steel Co. v. Trumbull Cliffs Furnace Co.*, the court held that an employer, whether self-insured or otherwise, could not recover from any source any sum to reimburse an amount paid under the Workmen's Compensation Law. Specifically the court stated: "Nothing could be clearer than that the Legislature, by the provisions of this section, indicated its intention to prevent the reimbursement of the employer for any amount paid pursuant to the provisions of the Workmen's Compensation Act to an injured employee." 120 Ohio St. 394, 166 N.E. 368, 369 (1929).

72. "The applicable sections of the Michigan statute are 17.189 and 17.212 Comp. Laws 1948, §§ 413.15, 416.1, which read as follows . . . . 'Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the employer for compensation under this act, but not against both, and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk . . . the liability of such other person.'" Dinardo v. Consumers Power Co., 181 F.2d 104, 105 (6th Cir. 1950).

73. Kandelin v. Lee Moor Contracting Co., 37 N.M. 479, 24 P.2d 731 (1933).

74. "If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation and medical benefits under this chapter or to pursue his remedy against such other but may take such compensation and medical benefits and at any time prior thereto or within six months after the awarding of compensation, pursue his remedy against such other subject to the

rights are then assigned to the employer;[75] (5) The Massachusetts subrogation statute is like that of New York, except that it is the employer who has the first opportunity to commence a suit.[76]

Most subrogation statutes provide for the reimbursement of the employer for the amount of his compensation expenditure as a first claim upon the proceeds of a third party recovery. Any excess naturally goes to the employee, or, in case of death, to his dependents. But while this is the customary practice in a majority of jurisdictions, there are several interesting variations. In Massachusetts, for example, the employee gets only four-fifths of the excess.[77] Perhaps the legislature selected this as a method to insure that the employer, who has the duty to institute an action, will sue, if possible, for more than the bare amount necessary to cover his outlay in compensation.

In New York, where the employee has the first option to sue, he gets all in excess of the amount paid in compensation by the employer, if such employee is the plaintiff; but he gets only two-thirds if the employer is the plaintiff.[78] This statute thereby provides the employee with a motive to bring the action himself, rather than wait for the employer to act. Also the employer is encouraged, if the cause of action does pass to him, to obtain the largest possible recovery. Another unusual formula is that of Wisconsin[79] which provides that the employee must always get at least one third of the amount of damages recovered in a third party action, and he is awarded this minimum even if it cuts into funds needed to reimburse the employer for his compensation outlay.[80]

provisions of this chapter. . . . If such injured employee, or in case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefor . . . such failure shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation." N.Y. WORKMEN'S COMP. § 29.

75. *Ibid.*

76. "If compensation be paid under this chapter, the insurer may enforce, in the name of the employee or in its own name and for its own benefit, the liability of such other person, and if, in any case where the employee has claimed or received compensation within six months of the injury, the insurer does not proceed to enforce such liability within a period of nine months after said injury, the employee may so proceed." MASS. ANN. LAWS c. 152, § 15 (1957).

77. "If the insurer brings the action four-fifths of the excess shall be paid to the employee, and if the employee brings the action he shall retain the entire excess." MASS. ANN. LAWS c. 152, § 15 (1957).

78. N.Y. WORKMEN'S COMP. § 29.

79. "After deducting the reasonable cost of collection, one-third of the remainder shall in any event be paid to the injured employee or his personal representative. . . . Out of the balance remaining, the employer or insurance carrier shall be reimbursed for all payments made by it. . . . Any balance remaining shall be paid to the employee or his personal representatives . . . ." WIS. STAT. § 102.29 (1957).

80. When the cause of action against a third party has passed to the subrogee (employer), he is often the only necessary party plaintiff and the suit

Subrogation statutes and the provisions for apportioning funds recovered from a third party promulgated thereunder were developed with the view in mind of expediting maximum recovery for both employer and employee. But a basic dilemma remains, because, regardless of whether the third party action is brought by the employer or the employee, there is little motivation in either case for one party to protect the pecuniary interests of the other. For instance, if it is the employer's prerogative to bring suit, why should he seek damages in excess of the amount needed to reimburse him for the compensation paid? And if the employee has the duty to bring action and the damages are likely to amount to less than the sum he has received in compensation, what motive is there for him to pursue the suit with due diligence? The above discussed New York and Massachusetts acts might, of course, solve the problem if the damages in question constitute a large sum. Perhaps the best solution is that of California, where either employer or employee can institute a suit, but can be joined by the other.

C. Third Party Defenses

The defenses available to a third party, when a subrogee-employer is involved, depend largely on the extent to which the employer's suit is deemed to be derived from the employee's cause of action. If the statute in question *assigns* the employee's cause of action to the employer, then courts will usually hold that the "two" actions are the same—therefore any defense good as against the employee will also be valid against his employer.[81] But if a statute simply states that the employer shall have the "right to maintain an action in tort" it is then possible that the court will conclude that a new cause of action has been created, and the employer is not subject to defenses a third party might use in a suit brought by the employee.[82]

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can be prosecuted in his name alone. Several states permit suit to be brought in the insurer's name, while still others require that the action be pursued in the employer's name. Some states provide for suit to be brought by the subrogee in the employee's name, and in many states the employer and employee may join as plaintiffs, as well as intervene in actions started by the others. Wise v. Morgan-Mack Motor Co., 173 Kan. 372, 246 P.2d 303 (1952); Michigan Boiler & Sheet Iron Works v. Dressler, 286 Mich. 502, 282 N.W. 222 (1938); Western Surety Co. v. Addy, 73 S.D. 322, 42 N.W.2d 660 (1950); Johannsen v. Peter P. Woboril, Inc., 260 Wis. 341, 51 N.W.2d 53 (1952).

See for general information on subrogation the following law review articles: 33 NOTRE DAME LAW. 506 (1958); and 43 MINN. L. REV. 170 (1958).

81. "If we now hold that the plaintiff may maintain this action though the original cause of action or remedy of the personal representative or dependent of the employee no longer exists, we must find, from the language of the statute, a legislative intent that the insurance carrier, upon the making of the award, should be vested with a new cause of action for which the Legislature has provided no statutory period of limitation. The language of the statute fails to show such intent. . . ." Exchange Mutual Indemnity Ins. Co. v. Central Hudson Gas & Electric Co., 243 N.Y. 75, 152 N.E. 470, 471 (1926).

82. Western Casualty & Surety Co. v. Shafton, 231 Wis. 1, 283 N.W. 806

The issue which probably most often precipitates the necessity for defining the exact nature of a third party action is concerned with the effect of contributory negligence on the part of either the employer or employee. Now if it is the employee who is negligent, and the particular jurisdiction accepts the concept that a third party suit is the employee's cause of action, there is no problem, for contributory negligence is a good defense, just as in any other tort action.[83]

But a more difficult situation is presented in cases where the employer's negligence was a contributing factor in causing the employee's injury. The general rule is, if the action is maintained by the employee *himself,* then he cannot be defeated by a defense which alleges his own employer's negligence.[84] Application of this rule permits an employer, whose negligence contributed to the injury, to profit from the suit by recovering the amount of his compensation expenditure—a seemingly unjust result. However, if the rule were to the contrary an injured workman would be prohibited from pursuing an otherwise valid and justifiable tort action.

Many jurisdictions, possibly a majority, hold that the employer's concurrent negligence will not bar a tort action against a third party, even when suit is brought by that employer.[85] These decisions can only be justified if the court adheres to the theory that the employer is actually asserting an assigned cause of action. Other courts prevent the employer from recovering on these facts, reasoning that the cause of justice is not best served by allowing a concurrently negligent employer to reimburse himself at the expense of an also negligent third party.[86]

IV. Liability of Employer to Third Party

One final problem deserves to be mentioned in this "remaining tort liability" maze, and this is the liability of the employer to a third party. "Perhaps the most evenly balanced controversy in all of com-

(1939). See also General Box Co. v. Missouri Utilities Co., 331 Mo. 845, 55 S.W.2d 442 (1932).

83. Smith v. Henger, 148 Tex. 456, 226 S.W.2d 425 (1950), was originally an action by Haskell Smith, the employee, against W. C. Henger, doing business as the Henger Construction Company. The Texas Employers Insurance Association intervened as a party plaintiff. This Company was subrogated to the rights of Smith to the extent that it had paid Smith compensation. The Texas Supreme Court held that questions of negligence concerning Henger's employees, including Smith, were properly submitted to the jury.

84. Nyguist v. Batcher, 235 Minn. 491, 51 N.W.2d 566 (1952); Bristol Telephone Co. v. Weaver, 146 Tenn. 511, 243 S.W. 299 (1921).

85. Employer's Mutual Liability Ins. Co. v. Refined Syrups Sales Corp., 184 Misc. 941, 53 N.Y.S.2d 835 (Sup. Ct. 1945).

86. Foster & Glassell Co. v. Knight Bros., 152 La. 596, 93 So. 913 (1922); Hekman Biscuit Co. v. Commercial Credit Co., 291 Mich. 156, 289 N.W. 113 (1939); Hartford Accident & Indemnity Co. v. Procter & Gamble Co., 91 Ohio App. 573, 109 N.E.2d 287 (1952); J. F. Elkins Construction Co. v. Naill Bros., 168 Tenn. 165, 76 S.W.2d 326 (1934).

pensation law is the question whether a third party in an action by the employee can get contribution . . . from the employer, when the employer's negligence has caused or contributed to the injury."[87]

A majority of jurisdictions have concluded that such an employer cannot be sued or joined as a tortfeasor, whether under contribution statutes or at common law.[88] The reasoning of the majority usually follows one of two patterns: (1) Since the employer is not jointly liable to the employee in tort, he can never be a joint tortfeasor; or (2) while the employee's claim against a third party is for damages, his claim against the employer is for compensation payments since the two actions are of an entirely different nature and cannot result in a common liability.[89]

V. Conclusion

The workmen's compensation program was effected primarily for the benefit of the employee, but due to the resulting abrogation of tort suits, his cause is as likely to be damaged by the system as it is to be helped. If an injury is only temporary and the worker will soon be back on the job, then compensation payments are adequate to "tide him over." However, in cases where earning capacity is permanently impaired or destroyed, few if any states provide adequate compensation. Even those jurisdictions which grant compensation for an indefinite time give too small an amount to provide even a minimum subsistence over an extended period.[90]

87. 2 Larson, Workmen's Compensation Law § 76.10 (1952).

88. Williams Brothers Lumber Co. v. Meisel, 85 Ga. App. 72, 68 S.E.2d 384 (1951).

89. *Ibid.*

90. When the law in a certain jurisdiction is such that an injured employee is relegated solely to his rights under the workmen's compensation statute, that employee will receive in most instances, a considerably lesser sum than could have been recovered in a common law negligence action for the same injury. This is especially true when the injury is permanent in nature.

The Arkansas statute, for example, provides that compensation payable to an employee cannot exceed 65% of his average weekly wage and the maximum amount the injured workman can receive in any one week is $35.00. Compensation can be paid for only 450 weeks and the total amount a workman can receive is $12,500.00. Ark. Stat. Ann. § 81-1310 (Supp. 1957).

New York has a much more liberal schedule of payments, especially in the case of total disability. If the total disability is adjudged to be permanent the employee receives 66⅔% of his average weekly wage during the continuance of the disability. And there is no ceiling on the amount of compensation payable. When the total disability is only temporary in nature, the employee is still paid 66⅔% of his average wage, but can receive a maximum of $6,500 in compensation. N.Y. Workmen's Comp. Law § 15.

The Arizona statute allows the injured party compensation in the amount of 65% of his average monthly wage if the disability is temporary, compensation being paid at a slightly higher rate if the employee has dependents. No payments are made, however, after 100 months. If permanent total disability results from the injury, the employee receives 65% of his average salary for life. Ariz. Rev. Stat. Ann. § 23-1045 (1956).

Iowa's compensation law clearly indicates the inadequacy of payments

It is true that there are several rather hazily defined exceptions to the tort-abolishing general rule; but the fact remains that even should an employee have a potential tort suit he is likely to do some act which constitutes an election to waive his common-law remedies. The cold facts are that most incapacitated employees need immediate and assured financial assistance, and this the compensation program does furnish.

The whole system is unfair enough when only a worker's immediate employer is exempt from an action at law, but as has been noted before, some states exempt any person (employer or employee) encompassed by their compensation statute, thus seriously restricting the possibility of a third party tort suit.

There are at least three feasible solutions to the above stated problem. One would be to increase the amount of compensation payments so that an eligible employee would receive approximately the same sum, minus recovery for such intangibles as pain and suffering, in a compensation proceeding as would be recoverable for a like injury at common law. A less drastic possibility would be to retain "loss of earning capacity" as the scale of recovery, but to increase payments thereunder so that they, in fact, represent a sum actually comparable to total wages lost. The third proposed solution is to keep the present compensation scale as is, but to permit a common-law action in any case where a tort has been committed. This would mean that even an "immediate" employer, covered by compensation, would be subject to suit as a third party. Under this plan the employee could apply for and receive compensation pending final judgment in the tort action. Compensation received could then be subtracted from the award, if any, given in the damage suit.

Certainly it cannot be denied that the adoption of any one of these proposals would result in an increase in compensation insurance rates; at least this is true if an employer chose to be fully protected. But, as is the case with present insurance, the expense could be passed on to the consumer by increasing the price of goods. And in the final analysis, an adequate workmen's compensation program would probably not cost society any more than it is presently appropriating to maintain these incapacitated workmen as wards of the state.

BEN F. LOEB, JR.

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provided for by some states. When death results for instance, the dependents of the deceased employee get compensation for a mere 300 weeks. IOWA CODE ANN. § 85.31 (1946). Also, for any type of temporary disability, compensation is payable for a like period; and even if the injury is total and permanent, payments are made for only 500 weeks. IOWA CODE ANN. §§ 85.33, 85.34 (Supp. 1958).