

PART 4 – STATUTORY COMPENSATION FOR INDUSTRIAL INJURY

172. The system of compensation for workmen was first introduced into New Zealand in 1900, and the Act of that year was modelled upon legislation introduced in the United Kingdom three years earlier. In direct contrast to the principles of the common law action for damages, this is a system which provides compensation irrespective of fault. It was developed as a reaction against the disadvantages of the common law which 80 years ago was hedged about by a number of technical defences, and accordingly worked even less favourably for injured plaintiffs than it does today.

173. The purpose which lay behind the legislation was to provide for misfortune, not by examining the random quality of the causes which might have occasioned it, but by attention to the condition itself. It is true that in one sense causation has relevance—the incapacity must be shown to have developed from a work-connected injury. But this test of entitlement is not designed for the negative purpose of saddling some suitable scapegoat with liability; its sole object is to ensure that those who suffer industrial injuries will qualify as *of right* for the remedy. In this way the Act has provided that entitlement should depend not upon the kind of act or omission which caused the injury but rather upon responsibility.

174. At the time it was considered that this responsibility should be accepted by industry and the compensation provided for injured workmen made to form one of the normal incidents of the costs of industry. In fact this was merely a practical means of solving what has always been a social problem, and the legislation itself is generally described here and elsewhere as the earliest example of statutory social insurance. Beveridge remarked in 1942 when referring to the position in the United Kingdom that the system had conferred great benefits in the past.⁷² Undoubtedly this has been true in New Zealand also. Nevertheless, as the law stands today the compensation process carries with it a number of serious disadvantages.

175. The most obvious of the disadvantages we have mentioned in paragraph 39 of this Report. Its benefits have been spread widely and uniformly, and this is its great justification; but for reasons of economy they have been spread so thinly on the ground that this form of compensation at least in any case of serious injury in no way can be regarded as recompense for a man's real losses. There are other problems. It is convenient, however, to provide a brief account of the scope of the Act before we consider these various matters.

⁷²Cmd. 6404, para. 78.

XIII—THE WORKERS' COMPENSATION ACT 1956

176. The Workers' Compensation Act 1956 is a consolidation of much previous legislation. It provides for payment of compensation for all persons (defined as workers) who are employed under a contract of service or apprenticeship, and for certain designated groups such as share farmers. In addition certain persons who come within the definition provided by section 98 of the Act may be covered on a voluntary basis.

177. Entitlement to compensation arises when a worker suffers personal injury by accident arising out of and in the course of his employment or is incapacitated by reason of certain industrial diseases; and the compensation is payable during periods of total or partial incapacity for work, and (in the case of death) to dependants. As is mentioned in paragraph 174, responsibility for payment of compensation is upon the employer who since 1943 has been obliged to insure in respect of his liability unless exempted on grounds of demonstrable ability to pay the compensation independently of insurance.

178. The level of compensation is related to the injured worker's earnings and is assessed for periods of temporary or permanent incapacity for work at 80 percent of his weekly earnings. There are, however, two important statutory limitations upon the amounts of compensation which can be paid in respect of any one accident. There is a maximum weekly payment of \$23.75 (it was raised from \$21.75 as from 1 December 1966); and there is a maximum period of six years over which the payments may extend.

179. Permanent partial disability entitles a worker to a proportionate part of the weekly maximum compensation, and is assessed by reference to a schedule to the Act which puts arbitrary percentages upon certain specified disabilities. Other disabilities which are not listed can be related to this schedule on the basis of an acceptable medical report. It is usual for permanent total or permanent partial incapacity payments to be capitalised and paid in a lump sum. Taking into account the limitation of six years, the maximum capitalised payment at the present time is \$7,434.

180. The ceiling put upon the weekly rate of compensation has tended to bring payments to many injured workers well below the level of 80 percent of their normal weekly earnings, particularly during the last decade or so. This fact prompted a departure in 1956 from the normal principle of compensation based upon earnings. In

that year there was introduced into the Act a provision for supplementary payments in respect of a dependent wife or child during periods of temporary incapacity for work. The supplementary weekly payments were increased on 1 December 1966 from \$2 to \$3 for a wife, and from \$1 to \$1.50 for each dependent child.

181. Claims for compensation are not disposed of in the ordinary Courts, but in a Court specially set up for the purpose. However, the Act does not deprive a worker (or his dependants in the case of his death) of the right to claim damages where it is considered that the injury or death was caused by the direct or vicarious negligence of his employer or by breach of some statutory duty. The employer is never liable to pay both damages and compensation. If the worker fails in a damages action he may apply to the Court to assess compensation. Conversely, if he succeeds in such an action he may not subsequently claim compensation under the Act.

THE INSURANCE QUESTION

182. During the years, both in New Zealand and overseas, questions had been raised concerning the propriety of permitting such a system of social insurance to be handled by private enterprise. There had been much comment also to the effect that too great a proportion of the amounts being paid into the system were retained by the insurance companies for administrative expenses and profit. Following the amendment to the Act in 1943 which required that every employer should insure against this risk, the criticisms were renewed, and led in 1947 to a further amendment which gave a monopoly of all this business to the State owned insurer. Thereafter for a period of two years from 1949 to 1951 the State Insurance Office handled the whole of the workers' compensation insurance in New Zealand.

183. There was, however, a change of Government during this period, and the new Government had committed itself to repeal the monopoly provisions in the Act. The outstanding reason for this probably lay in the fact that the State Insurance Office was a competitor of the other companies in all the remaining areas of insurance business, and by many it was considered unfair that it should be put in the position of being able to attract these other types of insurance business away from the private insurers by reason of the fact that every employer in the country had willy nilly become its customer. Accordingly the monopoly ceased on 31 March 1951, and at the present time workers' compensation insurance is spread among some 61 private insurers or mutuals in addition to the State owned concern and 48 self-insurers.⁷³

⁷³As at 8 September 1967.

XIV-DISADVANTAGES OF THE WORKERS' COMPENSATION ACT

184. The workers' compensation system has provided a more consistent remedy than the common law, and because smaller amounts of money are involved in compensation cases, there has been less contention associated with them. Nevertheless, nobody would claim that the system has proved equal to the hopes of those who first put it forward. The 41 amendments to the Statute since it was first enacted reflect the criticisms and difficulties which have surrounded it, and so do the many volumes of reported decisions upon the meaning of the classical expression "injury by accident arising out of and in the course of the employment."

DEMARCATIION PROBLEMS

185. To take only the first portion of the qualification, (that is, accident "arising out of the employment"), an injured workman must show that the accident arose because he was doing something which he was employed to do, or because the nature of the employment exposed him to some particular risk. The anomalous situation which can develop from applications of this provision are well illustrated by two cases mentioned in the report dated 1 February 1962 of the Irish Commission set up in 1955 to consider the Workmen's Compensation Act in that country.⁷⁴ In the first case a bricklayer who was working in an exposed position on a scaffold 23 ft above ground level was killed by lightning and was treated as covered by the Act;⁷⁵ but in the second a workman engaged on road work whose duties included cleaning out gullies to prevent flooding and who was killed by lightning, was not covered on the ground that there was no greater exposure to lightning to a man engaged on this work than to the general public.⁷⁶

186. But the accident must also be shown to have arisen "in the course of the employment". Accordingly, accidents which might occur to a man travelling to or from his work will leave him unprotected unless he is within the particular circumstances defined by section 5 of the Act. There is some force, in our view, in the submission that this section confers advantages upon those workers who are included within it, which probably should not be denied to others. But whether or not the scope of the provision is extended, there must necessarily be some point at which the line is to be drawn, and the fact must always cause difficulty to the Court, and no doubt hardship

⁷⁴Para. 139 of that report.

⁷⁵*Andrew v. Failsworth Industrial Society* (1904) 2 K.B., p. 32.

⁷⁶*Kelly v. Kerry County Council* (1908) 42 Ir. L. T., p. 23; 194 C.A. (Ir.).

to certain claimants. It has been said that "the dividing line between the man hurt on his way to work, and the one injured within the factory gates has, at times, been so thin as to be almost imperceptible."⁷⁷

187. Anomalous cases can arise, too, of employees who could not be regarded as working at the time of an accident, but where the circumstances are clearly related closely to the employment.

188. The Inter-departmental Committee of Government Departments provided an example of employees of the Forest Service who take part in organised recreation in off-duty hours but who are on stand-by duty in order to guard against the risk of forest fires. There are employees, too, engaged in prison and mental hospital work who are encouraged to participate in sporting activities during off-duty hours to assist the rehabilitation of the inmates. It may be doubted whether they would be covered by the Act.

189. Other difficulties arise out of the definition of the word "worker" and the exclusions which have been made from it. For most purposes the line of demarcation in these various respects is now sufficiently settled to enable litigation to be avoided. But there certainly remain borderline cases which can give rise to much heart-burning.

190. Even among the most recent decisions of the Compensation Court there are examples of the fine distinctions which the Court is obliged to draw between cases which might seem to deserve equal treatment. The first two of these are indicative of the difficulties associated with attempts to link some degenerative physical condition with employment. They are two heart cases heard by the Court in March and July 1967. In each an action was brought by the widow of a worker who had collapsed and died after engaging in strenuous activity during the course of employment. In each there was medical evidence to support and to rebut the claim that there was a causal connection between the work done by the deceased prior to his death and his subsequent collapse. One widow succeeded in recovering compensation,⁷⁸ but the other failed in her claim and received nothing.⁷⁹

⁷⁷A. F. Young, *Industrial Injuries Insurance*, 1964, p. 91.

⁷⁸*Kean v. A. B. Wright and Sons Ltd.*, unreported, Auckland, July 1967.

⁷⁹*Powell v. Christchurch Fire Board*, unreported, Christchurch, March 1967.

191. There are two other cases of a different type which were heard in March and April 1967. Each was concerned with the status of a man who had been engaged in erecting a fence for an employer. The simple issue was whether the fencer concerned had the status of a worker or that of an independent contractor at the time of the accident. Although the nature of the work was substantially the same the Court felt bound to hold on the basis of earlier decisions that in the one case the widow of the man concerned (who unfortunately had been killed) could not recover,⁸⁰ but in the other that the claim should succeed.⁸¹

192. These cases turn, of course, on their own particular facts and the law applicable to them in terms of the body of precedent which has grown up over the years. We think, however, that those affected by the various decisions can be forgiven if they fail to share the lawyers' satisfaction that four more cases have been neatly labelled and sent on their way despite the intellectual complexities which might seem to have surrounded them in advance of the hearing. It is our opinion that difficulties like this are bound to remain for so long as it is thought appropriate to deal differently with injured workmen depending upon the cause rather than the extent of their injuries.

SCHEDULE DISABILITIES

193. Other difficulties and anomalies arise from the First Schedule to the Act (mentioned in para. 179) which on an arbitrary basis attempts to proportion certain specified disabilities to total incapacity. By reason of section 17 of the Act compensation for one of these schedule injuries is provided by taking an appropriate percentage of the aggregate of weekly payments for total disability over the full permissible period of six years less any period in respect of which amounts of compensation might have been paid for periods of temporary total incapacity resulting from the same injury.

194. A similar process of assessment is used for permanent injuries which are not specified in the schedule and which are frequently referred to as "quasi-schedule" cases. A discretion is given to the Compensation Court which enables variations to be made from this arbitrary process of assessment when it is shown that in the circumstances of the case the compensation would be inadequate and also would be substantially less than the amount of compensation that would become payable if the section did not apply.

⁸⁰Perry v. Satterthwaite (1967) N.Z.L.R. 718.

⁸¹Scott v. Trustees Executors Co. Ltd. (1967) N.Z.L.R. 725.

195. General methods of this sort are used in various forms by many countries in the assessment of permanent partial disabilities. The underlying purpose is to provide a guide which will produce broad uniformity and avoid the disparities which are inseparable from independent evaluations made by different tribunals at different times and places. However the schedule which is applied in New Zealand appears to have antecedents which go back to the statistical experience of German or Swiss insurance companies of nearly a century ago.

196. The schedule first appeared in the New Zealand legislation in the Act of 1908. The Minister of Labour at the time hoped that it would provide a speedy, and above all an accurate guide for the assessment of compensation without recourse to litigation. But even then one member of the House had forebodings, as the following extract from the debate upon the Bill discloses—

“The Hon. Mr Millar (Minister of Labour) : With the evidence before us the loss of earning power has been calculated by experience so that we can compute exactly the loss of earning power caused to any man by the loss of any specific limb or limbs mentioned in the schedule. These computations have been worked out scientifically with wonderful exactness by actuaries, medical men, and others.

Mr Wilford : Trouble would arise in different forms of employment.

The Hon. Mr Millar : That makes no difference . . .”⁸²

197. Unhappily the doubts expressed by Mr Wilford have been realised. Not only is the stated severity of certain injuries disproportionate to that of others in the schedule, but as a whole the schedule is a far less reliable guide than the Minister had hoped. The New Zealand Law Society in its submissions to this Commission regards the schedule as involving a fundamental flaw in the Act. The Society considers that this is the case because an attempt has been made by means of the schedule to lay down a scheme for payment of lump sum compensation “depending upon the severity of various injuries” without any reference to the fact as to whether or not there is associated with any such injury any loss in earning capacity.

198. This is a forceful argument, particularly as the Act stands at present. We think that the loss of physical capacity by itself, and regardless of its effect upon future earnings, is a factor which

⁸²145 N.Z. Parl. Debates, pp. 940, 941.

deserves to be compensated, and compensated by methods which will avoid extravagance and contention. But in New Zealand at present the difficulty referred to by the New Zealand Law Society is exaggerated, because the percentages in the schedule are necessarily related to restricted amounts of compensation.

199. The maximum weekly compensation that can be paid and in particular the six-year restriction during which the payments may continue combine to produce an artificially low figure for total disability. Because of this it was thought necessary to give a high severity rating to relatively minor disabilities in order that the sum paid out in respect of them might not become so small as to be quite unacceptable. In the result these payments are disproportionate when put beside the relatively modest amounts due in respect of much more serious injuries. All this has the effect of magnifying the disparities which are criticised by the New Zealand Law Society.

200. There are great advantages in using some broad schedule method of assessing these cases in order to achieve a fair and reasonably predetermined level of compensation. It should be accepted that while the method will not enable absolute justice to be achieved, nevertheless the speed and certainty of assessment must far outweigh the expense and effort which would be associated with attempting to make the most meticulous adjustments in every case. In any event we think it unlikely that assessments of such delicacy are possible if broad uniformity is to be realised up and down the country. Indeed, if each case had to be separately evaluated without the advantage of clear and general guide lines then many of the advantages of a scheme of comprehensive insurance would disappear.

201. The problem of assessing permanent partial disabilities and the provision of an appropriate schedule is difficult. We regard it as one of the more perplexing issues in the whole field of compensation, but we are equally satisfied that the approach must be retained in any general scheme. Having said this it must be added that there is much room for improvement in both the pattern and the detail of the schedule at present in force in New Zealand, and without doubt it should be radically amended in both respects.

ADVERSARY PROCEDURES

202. In 1942 Beveridge was critical of the fact that in the last resort the compensation scheme then in force in the United Kingdom rested on the threat or practice of litigation.⁸³ Today nobody would argue

⁸³Op. cit. Cmd. 6404, para. 79 (i).

that the regular administrative decisions required in any new social programme should be resolved by the techniques of private litigation. But the compensation scheme in New Zealand still has to accommodate itself to adversary procedures and attitudes. It retains the employer as a notional defendant, and refers to claims and to plaintiffs, and still clings to common law ideas of establishing liability when it would be more accurate and less contentious to talk of the statutory rights of injured workers and the acceptance of statutory responsibilities in respect of them.

203. All this is due to the origins of the Act and the need at that time to find somebody who could be made responsible for the social costs of industrial accident. It has continued until now because each employer is permitted to find an insurer of his own choice to stand behind him, and who then has a direct interest in the outcome—this despite the fact that the insurance scheme is now compulsory and that the overall costs are finally borne by the whole community.

204. It is true that long experience has enabled those who handle the claims to arrange settlements out of Court in the great majority of cases. However compromises cannot always be in the best interests of the injured workman, nor can they always avoid contention or friction with the employer. For both reasons the system cannot be desirable. If a sick employee is assisted by the general health scheme, employers have no feeling that their interests are directly affected, although all contribute to the scheme by means of direct taxation. The costs of injury are equally spread today, and we think that employers should not be implicated in the decisions required to distribute amounts which might become due to their injured employees.

205. But even if employers are excluded from compensation proceedings the adversary atmosphere will remain for so long as private enterprise has a stake in the outcome of each of the claims. Private organisations cannot reasonably be expected to disburse their stock-in-trade (in this case their funds) on the basis that the injured man should be treated generously or given the benefit of most reasonable doubts. For the reasons shortly contained in the following paragraphs we are firmly of the opinion that the time has arrived to make a clean break.

206. The logical, and we think the inevitable conclusion, is that an independent agency of the central Government should handle the whole comprehensive scheme of loss sharing. Independence would be necessary to enable this body to work with detachment in the new field; and given a constitution wide enough to ensure that its

decisions would never become illiberal and would always be made upon the real merits and justice of the case, we do not doubt that it would receive the same measure of public confidence which has supported similar boards in Canada for the past 50 years. All this, together with our recommendation that there should be a right of appeal to the Supreme Court upon a point of law, is given some further attention in Part 6 of the Report.

THE INSURERS

207. In paragraphs 182 and 183 there is brief reference to the insurance question which in 1949 led to a monopoly of this business in the hands of the State owned insurer. But there had been similar discussions in other countries for many years prior to this, and 50 years ago in Canada monopolies were set up in the provinces although in a different way. It was felt strongly that there was a need "to get rid of the nuisance of litigation" as Sir William Meredith described it.⁸⁴ For this reason, and also because it was considered that the social costs of industrial injury should be met by the cheapest form of comprehensive insurance which could be provided, decisions were taken to set up *ad hoc* bodies, the sole responsibility of which would be to give attention to the prevention of accidents, the rehabilitation of injured work people, and the collection of appropriate levies from employers, and disbursement of the fund so set up by non-contentious administrative procedures to those entitled.

208. Since 1914 this form of monopoly has operated to the general satisfaction of all concerned in Ontario, and since 1916 in British Columbia following upon the presentation of the Report of the Commission of Investigation on Workmen's Compensation Laws appointed on 27 September 1915 under the chairmanship of Avarad B. Pineo. All the other Canadian provinces have adopted the same system. A similar step was taken between 1913 and 1915 by a number of the United States, and at the present time seven jurisdictions have exclusive funds and require that all workmen's compensation insurance be sold through them, although two of these, Ohio and West Virginia, permit self-insurance.⁸⁵ We make some further reference to this matter in Part 6 of the Report, but it needs to be said at this point that during our inquiries in North America we were left in no doubt that the admirable precedent recommended by Sir William Meredith in 1913 and which has been operating in much the same form ever since is widely regarded as a model system.

⁸⁴See para. 131 *supra*.

⁸⁵Somers and Somers, *Workmen's Compensation*, 1954, p. 96.

209. It is said that the State should hesitate before interfering with private enterprise in what is claimed to be a legitimate field of operation. However, we think there is much confusion of thought about this matter. It is our opinion that private enterprise can have no claim to handle a fund such as the compulsory fund in New Zealand which has arisen not because employers have been persuaded to provide the business, but because Parliament has ordained that employers must do so.

210. Exactly similar considerations apply, of course, to the compulsory insurance scheme in respect of road accidents. In other areas of insurance the private insurers compete among themselves for the available business, but in addition they are properly able to remark that it is their enterprise which has made the business available at all. In each of the fields of workers' compensation and motor vehicle third-party insurance, however, the only competition can be for shares in a fund already required by the Act. This is the answer to those who might wish to argue that for an agency of the central Government to take over the administration of the scheme would amount to a form of socialisation of business which legitimately should be left to others. It is, we think, an important distinction which needs to be kept in mind when decisions are taken as to whether or not the North American example should be followed in New Zealand.

211. A further matter deserves emphasis. In any real sense this is not an insurance scheme at all. It has always been treated as such in New Zealand, but in truth it is a compulsory and universal method of sharing one of the costs of social activity. The interpolation of private enterprise between the group of beneficiaries and the ordained fund has arisen simply because the contributions to the fund have been required and collected, not in the form of tax from employers as a general class, but as individuals and in terms of individual risks.

212. This conception is not in accord with other schemes of social insurance such as the health service and universal superannuation, and provision for the interruption of work by reason of sickness or unemployment.⁸⁶ People in New Zealand would be astonished if the administration of the funds required for these purposes was to be handed to business organisations. In respect of general industrial injury there can be no difference in principle, as Beveridge recognised in 1942—a view which thereupon was accepted and acted upon by the British Government. It is not always remembered that for 20

⁸⁶See, for example, Beveridge Report, para. 25; Abel-Smith, *The Reform of Social Security*, p. 15.

years in Great Britain industrial injury insurance has been handled not by the private companies but as a branch of a unified social service.

213. But these arguments do not stand alone. Other considerations relate to the cost of handling workers' compensation by present methods. In Canada *ad hoc* bodies have been set up by the provincial Governments as we have mentioned, and the evidence is conclusive that they need no more than approximately 10 percent of levies made upon employers to cover all the costs of administration; and this includes a significant annual amount for education in the prevention of accidents. During the six-year period 1960 to 1965 inclusive the experience of the Ontario Board, for example, given in terms of percentages of administration costs to total costs was as follows:⁸⁷

	1960	1961	1962	1963	1964	1965
Injured workmen	89.3	89.7	89.4	89.5	89.6	89.9
Accident prevention	2.9	2.9	3.1	3.3	3.5	3.6
Administration	7.8	7.4	7.5	7.2	6.9	6.5

We understand that the figures in respect of the 1966 year (which were awaiting audit when we inquired about them) are comparable with the 1963 results. It will be observed that administrative expenses during the period range from 6.5 percent of total levies to 7.8 percent, and that it has been possible for the Board to make contributions for accident prevention which in some cases are more than half the item for administration.

214. The cost of maintaining the present system in New Zealand should be compared with these figures. The premiums which may be charged here by private insurers and the mutuels are controlled by the Workers' Compensation Board on a ratio intended to permit the insurers to retain 30 percent of the total amount collected for administration and profit. This 30:70 ratio results in the retention by the insurers of an amount equal to approximately 40 percent of the aggregate sum needed for compensation; and it is unnecessary to dissect or find reasons for the retained amount in order to appreciate that it is four times as much as is required by the Workmen's Compensation Board in Ontario for administration and accident prevention combined. The New Zealand method of handling the whole problem by 62 individual insurance companies results in much inevitable duplication of organisation up and down the country. This diversion of energy, time, and money together with the normal processes of competition makes it inevitable that the ratio of expenses to compensation must be high. Although, it is necessary to add that,

⁸⁷1966 Royal Commission on the Workmen's Compensation Act. Brief of the Ontario Board, October, 1966, p. 15.

neither in the United Kingdom (where in 1923 the 30:70 ratio was proposed to the Government there by the insurers) nor in New South Wales (where it was later adopted) nor in this country (which in turn adopted it from New South Wales in 1950), has there ever been an independent examination of the costs of the insurance industry which might demonstrate that the costs-claims ratio of 30:70 is in fact justified. And we have not undertaken this task ourselves because in our view the overriding need to supplant the adversary system and provide a universal and compulsory system of compensation makes it inevitable that private enterprise should be replaced by a detached (and independent) agency of the State.

215. However, whether the method justifies the full amount of the retentions is not the issue in this context. Whatever may be the answer, the process as it stands must be regarded as extremely expensive. For example, almost \$15 million was collected in premiums in the year ended 31 March 1967, of which \$10.25 million was required to meet claims or provide for claims outstanding. If the administration of such a fund could be handled within the expense ratio regarded as sufficient by the Ontario Board, the total of claims plus the necessary 10 percent for administration and safety education would have been a little more than \$11.25 million, and the overall saving something in the vicinity of \$3.75 million. The disbursement of additional amounts of this magnitude could be justified only if the advantages which followed from it were great. In fact the balance of advantage falls heavily in the other direction.

216. Private enterprise plays no part in obtaining the business. The system itself can offer no central impetus in the important areas of accident prevention and rehabilitation. It is operating in an area which ordinarily would be handled by the central Government as a social service. It is involved with all the adversary problems to which we have referred. And it is very expensive—not because the system is mismanaged, but because the system makes this inevitable.

217. For too long the more serious cases have been neglected in New Zealand for apparent lack of funds, and this we believe must be changed at once, as we mention in the following paragraphs. The cost of badly needed and belated increases in compensation must come from somewhere, and savings which can be achieved by a co-ordinated type of administration are able to meet the added cost which otherwise would become a further charge against employers. If a co-ordinated system is adopted employers would not be asked to provide any further amounts at all. Taking all this into account and the present financial restraints the conclusion is inevitable that

the economic waste associated with the present method of handling these matters can no longer be accepted. For this reason, as well as for the others mentioned, it should be discontinued.

BENEFITS UNDER THE ACT

218. The Workers' Compensation Act has never attempted to replace all the losses of injured workers for three valid reasons. First, once a work-connected injury can be demonstrated then there is certainty of compensation to follow. Second, if the compensation is provided on a suitably generous basis it seems fair to leave part of the loss with the man himself. Third, it is in accord with public opinion that some margin of effort should be left to injured workers as an incentive to get well and back to productive work.

219. Reasonable men may differ about the proportion of loss which should be left with the injured workman, but few would argue with the general principle, and for the most part this was the trend of the submissions put to us. Most fair-minded people who qualify under a scheme of this sort are perfectly prepared to meet part of their own losses. Nonetheless, the validity of the principle and its acceptance by the individual concerned depends upon its practical application. If society should not be asked to bear the whole of a man's loss, neither should the man himself be expected to bear an undue proportion of it, and the graver and more prolonged his incapacity, so much more is this argument reinforced.

220. However, one of the most striking aspects of the compensation process is the way in which the value of benefits has gradually been eroded (particularly over the last 20 years), and the accompanying tendency to move away from the strict compensation principle towards payments which have been levelled out in a fashion akin to the social security system. Such a tendency certainly must be reversed if real recompense for individual losses is to be offered to injured workmen.

221. This leads to the arbitrary restrictions which have been put upon the compensation process. On the face of it compensation assessed at four-fifths of earnings for periods of total incapacity seems attractive. It is, however, an extremely superficial attraction whenever the incapacity lasts for any length of time or is accompanied by some form of permanent physical disability. The reasons have been mentioned. They are the artificial limit of six years during which the benefit may be paid, and the low maximum weekly payments which are permitted. In the case of short-term incapacities or minor physical handicaps (even when the latter are permanent), these

qualifications do not present problems which cannot be overcome by individual initiative. In cases of more serious injury, and particularly in cases where a man is put out of action perhaps for years, the effect can be drastic.

222. Limitations of time during which compensation payments may continue have been applied in compensation schemes by numbers of countries overseas. But it is a practice which has never been generally accepted, and it ignores the International Labour Office Convention 121 adopted on 8 July 1964,⁸⁸ which stipulates that benefits shall be granted throughout the whole period of the contingency, subject only to some short waiting period.

223. In the course of submissions put before us Mr I. B. Campbell, Secretary of the Workers' Compensation Board, remarked in connection with the six-year limitation that in his view it was "incredible how long this severe limitation on compensation for the relatively few seriously injured has gone virtually unchallenged by the trade union movement". This may have been the position in the past, but there were strong submissions to us that the time had come to remove the limitation on grounds that it is quite out of line with international trends (leaving New Zealand as one of the few countries in the world with such a restriction), and also because it is unfair and indefensible.

224. There can be no doubt that these submissions should be accepted. In our view the practice of putting arbitrary limits upon the time during which payments of compensation may continue must be regarded as unjustified in principle and quite illogical in practice. It is wrong in principle, first because it affects only those whose needs and whose claims are greatest; and second, because it is a rejection of the theory that compensation should provide some adjustment for the whole of a man's losses. If at the end of six years a gravely incapacitated workman is suddenly left to carry his burden without assistance, it can hardly be said to do this. Then, it is demonstrably wrong in practice because the saving it achieves is derisory when compared with the total amounts of compensation expended annually over the whole work force.

225. The second of the restrictions which is open to criticism is the low maximum weekly payment which can be paid and which has the effect of bringing compensation much below four-fifths of normal earnings in all but a few cases. This fact led to the provision in 1956 of the supplementary allowances in cases where there are

⁸⁸Sec Article 9.

dependent wives or children. This in itself is a serious reflection on the value of the benefit, and in our view it is an unwelcome departure from the whole principle that compensation should be related to actual losses.

226. In the final analysis matters of this sort will be decided upon a financial argument. It becomes necessary to measure the extent of the resources that can be made available. At present, however, we think the priorities have not been recognised. Clearly the need for meaningful compensation increases to the extent that incapacity is severe or is protracted. By levelling out the compensation over the whole field of injury the available resources have been spread so thinly that whenever a man's capacity to work is interrupted for any length of time he is put under increasingly pressing financial strain. If there must be priorities in the compensation field as distinct from priorities between various social services, then they should go in favour of providing for the larger losses, and we believe that no slightly injured New Zealander would begrudge his seriously crippled fellow worker some preference.

227. The low maximum level of the benefit and its restricted duration have had the effect of pushing the compensation process in the direction of a system of flat rate payments. Together with the provision of flat rate supplements for dependants the trend is in accord with the social assistance principle that need should be the test for assistance rather than loss the measure of recompense.

228. All widows of deceased workers receive the same lump sum payment from the scheme regardless of their husband's past earning history. The same flat rate payment is made to all workers suffering a similar permanent disability, regardless of likely loss of income, occupation, or age. Dependants' allowances are paid, but subject to this the maximum weekly payment tends to be a minimum as well. And the anomaly arises that it is possible for some men who are entitled to the dependants' allowances to receive by way of compensation as much as 97 percent of the net income they had been earning at work.

229. All this needs to be changed. It has arisen from pressures designed to control the aggregate amount of compensation which must be found each year, and from well-intentioned attempts to divide the fund fairly among as many injured workers as possible. Nevertheless there has been a failure to appreciate that a process of averaging has been followed and that this has distorted the whole system in favour of minimal and at the expense of major problems.

The strain has had to be taken by those suffering long-term incapacities and by those whose wage losses have been most grievous. It is clear from the calculations in Appendix 7 that on the basis of the recommendations contained in this Report this emphasis can be reversed (as clearly it should be) while still leaving ample for the minor cases and without involving significant increases in the total costs involved.

230. It is wrong that the short-term or minor incapacities should be preferred to protracted or serious ones. It is indefensible to provide a man with 97 percent of his wages during a fortnight's absence from work while leaving the long-term victim of a crippling accident without assistance after six years. It is disheartening for an energetic and skilled tradesman to find that the compensation he must accept in respect of his lost wages is the same as that provided for the most recent recruit to the industry earning half his income and facing half his losses. There are not many real passengers in the work force but those who exist will not be discouraged by a system which gives them the bulk of their wages during some short-term incapacity. Instead there should be a system of wage-related payments kept to a fair but sensible level for the minor case and greatly increased for all others.

DOUBLE COMPENSATION

231. Most compensation cases and all common law claims are settled by lump-sum payments which involve the personal disadvantages mentioned in paragraph 116. However, the public interest is adversely affected as well, for they permit a situation where the social security fund will give additional assistance in respect of the same injury. As an instance, a widow with three children is entitled at present to receive from the fund weekly payments totalling \$22, and (if her husband was killed in an industrial accident) a further capital sum of \$6,807 under the provisions of the Workers' Compensation Act. Each of these systems ignores the other, as Sir Richard Wild has pointed out in an address on the subject entitled "Social Progress and the Legal Process", delivered while he was Solicitor-General.⁸⁹

232. He illustrates this form of double compensation by the further example of a recent case heard by the Court of Appeal:⁹⁰

"A lady aged 40 was left widowed with four children. Her husband's wages and pension, with the family benefit, had brought

⁸⁹K. J. Scott Memorial Lecture 1964, 27 *N.Z. Journal of Public Administration*, March 1965, p. 9.

⁹⁰*Wood v. Attorney-General* (1963), N.Z.L.R., p. 39.

the family an income of £21 9s. per week. On her common law claim she received £9,250 in general damages, an amount which the Court of Appeal had no difficulty in judging to be quite sufficient in itself, despite an allowance of 20 percent for contributory negligence, to make good the financial loss the family had sustained. But in addition, from superannuation and State benefits including a war widow's pension . . . she received £18 12s. 6d. per week, so that there was only £2 16s. 6d. less coming into the home with one mouth less to feed. But the £9,250 award ignored all this. In the existing state of the law the Court of Appeal could only say that it was not its function so to apportion the damages between the widow and children as to promote a review of the State benefits”.

233. This part of the address concludes with a reference to the Beveridge Report to the effect that a person should not have the same need met twice over.⁹¹ The remarks which then follow, in our opinion, sum up the whole situation :

“. . . It may be that our community approves it. But I doubt whether the community is aware of the fact. I do not think it is realised that, in such cases, the community is now to a large extent meeting the same need twice over, paying once through taxes and once through insurance premiums added to its purchases. I doubt whether Parliament, in its regular concentration on the amounts rather than on the equity of distribution of State benefits, has ever faced this problem . . . Its existence provides another weighty reason for discarding lump sums in favour of periodic payments.”⁹²

234. Some faint suggestion was made during the course of our inquiry that such double payments gave injured workers no more than the amounts to which they were entitled. The argument is that contributions are made on their behalf by employers to the Workers' Compensation fund and by themselves in the form of direct taxation to the Social Security fund. It is a fallacious form of reasoning. The whole community provides the Workers' Compensation fund in the final analysis; while the taxes which support all the various social security benefits are not provided as a form of personal investment which can be redeemed by individuals regardless of other claims. Clearly enough general taxes collected for the benefit of all cannot be equated with contributions to an insurance fund intended as a form of personal insurance.⁹³

⁹¹See also para. 41 *supra*.

⁹²Loc. cit. p. 9, cf. Report of Mr Justice McGillivray, Workmen's Compensation Act, Ontario, September 1967, pp. 23-30.

⁹³See also the Beveridge Report (Op. cit. para. 272).

GENERAL

235. In the preceding paragraphs we have discussed some of the disadvantages and difficulties associated with the Act in its present form. A large number of other problems have been referred to us in submissions during the course of the inquiry.

236. They include, for example, the difficult position of volunteers who assist in rescue operations. A Cabinet Minute⁹⁴ enables those of them who suffer injury while taking part in organised search and rescue work to be given grants equivalent to payments under the Workers' Compensation Act for similar incapacities. But there is a need to consider the position of those who act independently.

237. Then the method of assessing payments which might become due in respect of apprentices is a matter in issue; and there is the more general problem of students under training. Anomalies exist in regard to independent contractors and some special groups such as jockeys. There are difficulties in defining certain industrial diseases and the evidence which should be accepted in respect of them. Questions arise as to whether risks in individual industries should continue to be measured in order that differing levies or premiums should be assessed in respect of them. There are claims by chiropractors that they should be recognised beside the medical profession. There is the basic problem of the way in which benefits in general should be defined.

238. All these and other important matters are more conveniently dealt with in parts 6 and 7 of this Report which outline the scope and form of the comprehensive scheme which is recommended.

⁹⁴CM (58) 55.

XV-CONCLUSIONS CONCERNING THE WORKERS' COMPENSATION ACT

239. It will be recalled that 25 years ago Lord Beveridge offered the downright criticism that the workers' compensation legislation had been put forward on a wrong principle and had since been dominated by a wrong outlook.⁹⁵ The criticism is justified and it is equally applicable in New Zealand.

240. The position is due to the unfortunate compromises which mark the legislation. It had been hoped that it would overcome the procedural problems of the common law, and yet it has adopted all the forms of litigation. It was designed to provide a consistent and certain remedy, but offers no more than partial compensation. It was put forward principally because of the difficulties which accompany serious injury, and yet its emphasis goes in favour of short-term or minor problems. It is handled by private enterprise but it affects a social responsibility. It is a costly process, and yet the system can do nothing effective in the field of prevention of accidents or the physical and vocational restoration of the injured. In short, in its present form the Act works upon a limited principle, it is formal in procedure, it is meagre in its awards, and it is ineffective in two of the important areas which should be at the forefront of any general scheme of compensation.

⁹⁵Op. cit., para. 80; see also para. 48 *supra*.