DRAKE LAW REVIEW

Volume 30 1980-1981 Number 4

THE MODEL IOWA WORKERS' COMPENSATION ACT—TIME FOR CHANGE

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* The Council of State Governments' *Workmen's Compensation and Rehabilition Law* is reprinted in this Article. The author's commentary on the act immediately follows the corresponding sections of the act in this Article as an aid to the researching practitioner.

Introduction

The Council of State Governments has long had an interest in helping the states to improve and perfect their programs for workers' compensation. In the mid-1960s the Council's advisory committee on workmen's compensation prepared a *Workmen's Compensation and Rehabilitation Law.* This law was drafted over a period of four years and was published with a section by section commentary by Arthur Larson, chairman of the advisory committee.[1]

The Occupational Safety and Health Act of 1970[2] established the National Commission on State Workmen's Compensation Laws, which submitted its report to the Congress and to the President on July 31, 1972. The report criticized many aspects of state workmen's compensation programs and made eighty-four specific recommendations for a modern workmen's compensation program. Nineteen of the recommendations were designated

1. Author of A. Larson, The Law of Workmen's Compensation (rev. ed. 1979), (James Duke Professor of Law, Duke University).

2. 29 U.S.C. § 661 (1976 & Supp. III 1979).

as essential. The National Commission urged that compliance of the states with the nineteen recommendations should be evaluated on July 1, 1975 and, if necessary, Congress with no further delay in the effective date should guarantee compliance with these essential recommendations.[3]

The report of the National Commission has had a salutary effect on state workmen's compensation programs. The National Commission, however, did not attempt to translate its recommendations into statutory language. Further, a number of the recommendations were either not covered in, or were at least partially inconsistent with, the language in the Workmen's Compensation and Rehabilitation Law as published in the 1960s. A new advisory committee was constituted to revise the original law solely to the extent necessary to accomplish the recommendations of the National Commission.[4] This advisory committee did not consider the merits of the recommendations of the National Commission. Its purpose was strictly to provide language which would permit a state to follow the recommendations of the National Commission if it wished to do so.

It is time for the Iowa General Assembly to pass an entirely new workers' compensation act, and the Council of State Governments' proposed legislation should serve as the basis for it. The Iowa workers' compensation and occupational disease laws are due for complete revision to serve several purposes:

(1) The Iowa law is like the Model T automobile. Its parts have been replaced, body polished and motor tuned up, but it is still old. There are gaps in the sections, related sections are far removed from each other, and it lacks order.

(2) To use sound language which has uniform interpretation in the decisions of courts and commissions in other states.

(3) To make improvements in matters of substance as well as form where unconstitutional, inconsistent and unreasonable language has crept into the act.

The purpose of this article is not to recommend major innovations that do not carry out the purpose of the present workers' compensation act as established by the General Assembly and decided by the courts.

Background

In 1912, the Governor of Iowa appointed a committee to conduct an investigation, report a plan and recommend a bill to provide compensation

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3. Report of the National Commission on State Workmen's Compensation Laws (1972). *See* Dahl, *The Iowa Workmen's Compensation Law and Federal Recommendations*, 24 Drake L. Rev. 336 (1975).

4. The Council of State Governments, *Workmen's Compensation and Rehabilitation Law* (1974). The author was a member of the Advisory Committee. *See* Dahl, *The Inter-relationship Between Law and Medicine in Workmen's Compensation: A Comparative Guide for Practitioners*, 12 Cal. W.L. Rev. 25, 43-44 (1975).

for injuries sustained by employees arising out of and in the course of employment. It filed its report in 1912;[5] included was a commission bill. The commission conducted hearings around the state so that representatives of management, labor and the legal profession had an opportunity to present their views. Thereafter, the General Assembly passed the first workers' compensation law. It was the expectation of the framers of that first law that it would be a growing and developing program consistent with its benevolent purpose.[6]

Before the passage of the Iowa Workers' Compensation act, legislative bodies had enacted specific changes for the benefit of job-injured workers, such as those depriving an employer of the old defenses of contributory negligence, assumption of the risk and the fellow-servant doctrine where there was a violation of a statute calling for safety devices.[7] The new compensation legislation abandoned the previous concern with fault, the assigning of fault to another, and the denial of help to a claimant because his own fault prevented his recovery from the employer who was at fault.

Both the majority and minority model drafts of the 1912 Iowa Commission emulated the workers' compensation law of the State of Washington. Both drafts recommended:

(1) Benefits of 55% of the worker's weekly wages;

(2) Allowance of disability benefits;

(3) Allowance of death benefits;

(4) Coverage of all workers with no exclusion for farmers and domestics;

(5) Administration by a three-member industrial commission; and

(6) An exclusive state workers' compensation insurance fund with no private insurance or self-insurance.

The bill the Iowa General Assembly passed in 1913 followed many of the provisions recommended by the commission but differed in at least three significant ways:

(1) It excluded farmers;

(2) It was administered by a single commissioner rather than a three-member commission; and

(3) It did not provide for a state-operated insurance fund, but allowed coverage only by a stock or mutual insurance company or by self-insurance.

The first Iowa law was an elective type designed to avoid disputes that had arisen in other states about a compulsory workers' compensation law depriving employers of constitutional rights.[8] Accordingly, the original Iowa act was conclusively presumed to have been elected by both employers and employees unless either chose, before the employee was injured, to reject the

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5. Report of Employers Liability Commission (1912).

6. *Id.* at 246-47. Biennial Report, Workmen's Compensation Service (1916-1918).

7. *See* W. MALONE & M. PLANT, WORKMEN'S COMPENSATION at 18-53 (1963).

8. Hawkins v. Bleakley, 243 U.S. 210 (1917); New York Cent. R.R. v. White, 243 U.S. 188 (1917); Hunter v. Colfax Consol. Coal Co., 175 Iowa 245, 154 N.W. 1037 (1916).

law.[9] In the decade after the General Assembly passed the law, a large number of employers elected out of the act, so the Industrial Commissioner and his handful of clerical workers did not have a lot to do. They usually could handle the filing of injury reports and the hearing of contested cases. By 1940 both employers and employees had learned to accept the concept of workers' compensation, few employers rejected the law, and the Industrial Commissioner was keeping busy with the work load. In 1942, the Commissioner again demanded that his administration be beefed-up by replacing the single Industrial Commissioner with a three-person commission.[10]

With the growth in business after World War II and the increased number of workers, the volume of contested workers' compensation cases increased. The General Assembly liberalized benefits. Labor, employer and insurance lobbies reacted to decisions of the Industrial Commissioner and courts which developed the workers' compensation act by seeking changes in the legislation. These special interest pressures resulted in piecemeal amendments charitably described as "patchwork." Since 1912, neither the Governor nor General Assembly has authorized an organized study by a state commission. It is time for one now to bring order out of chaos and shed light into the dark corners of this important law.

The purpose of this Article is to present a draft superimposing in an orderly fashion the provisions of the present Iowa Workers' Compensation act on the revised workers' compensation and rehabilitation law of the Council of State Governments. Some provisions of the Council of State Governments draft are not in the present Iowa workers' compensation and occupational disease laws; some should be in, some should not, and some probably could never get in anyway. All of these will be discussed if not necessarily recommended.

The revision will be considered in three categories:

(1) Introduction to the specific provisions of the revised act.

(2) The revised act itself.

(3) Section-by-section comments.

Major Substantive Provisions

The first eleven sections (Part I) relate to coverage and liability. Section 1 establishes the liability of an employer. It codifies the concept that liability may not be assigned or assumed by a subcontractor.[11] It also provides that liability may not be imposed where injury to an employee was occa-

9. Iowa Code §§ 85.3, .20 (1966).

10. 15th Biennial Report, Iowa Indus. Comm'r (1942).

11. Eagen v. K & A Truck Lines, Inc., 254 Iowa 914, 119 N.W.2d 805 (1963) (deceased driver held to be employee of truck lessor and not lessee-carrier); Daggett v. Nebraska-Eastern Express, Inc., 252 Iowa 341, 107 N.W.2d 102 (1961) (truck owner held to be employee of carrier-lessee); Elliott v. Wilkinson, 248 Iowa 667, 81 N.W.2d 925 (1957) (truck owner-lessor held to be employer of driver not carrier-lessee).

sioned solely by his intoxication, willful intention to injure or kill himself or another, or by the willful act of a third party directed against the employee for personal reasons.[12]

In the definitions section, section 2, particular attention has been paid to the definitions of "injury," "disease" and "disability."

"Injury" and "disease" are covered in the same law rather than separately, as now.[13] The definition of "injury" remains the same in not requiring "accidental injury."[14] "Disability," except for purposes of schedule losses, means a decrease in "wage-earning capacity due to injury or disease."[14.1] This is the situation under existing law. However, the calculation has been made specific and exact in light of recent decisions by the Iowa Supreme Court about the concept of disability.[15] The use of definitions at the start of the act, rather than at the end, as at present, is an improvement.[16]

Section 3 provides that every employer, private and public, of one or more employees shall be subject to the act.[17] Section 4 is the complementary section applying to employees.[18] It provides specifically for coverage of minors, whether lawfully or unlawfully employed;[19] executive officers of corporations;[20] state or local government employees;[21] volunteer firemen and reserve peace officers;[22] and persons who at other times might be employers but at the time of the injury are employees.[23]

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12. Iowa Code § 85.16 (1981).

13. *Id.* § 85.3 (injuries); ch. 85A (diseases).

14. *Id.* §§ 85.3, .61(6). *See* Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934).

14.1 Draft § 2(i).

15. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). In an unreported order denying rehearing filed by the Iowa Supreme Court on April 16, 1980, the court stated:

> Blacksmith's injury and resulting industrial disability were to his vascular system; it was only his functional disability which was temporary and limited to the left leg. As the opinion discloses, the court found from the record as a matter of law that the compensable injury was a propensity to traumatic phlebitis of which the 1977 work-connected truck-driving injury was a proximate cause, that the injury affected the body as a whole because it involved the vascular system, that it motivated the job transfer, and that it resulted in *some* reduction in earning capacity, the duration and extent of which are issues of fact to be decided by the commissioner.

16. Iowa Code § 85.61 (1981).

17. *Id.* §§ 85.2, 85.3(1) and 85.61(1). New Zealand adopted a compensation plan for everyone at work, play and hospital or driving. *See* Dahl, *Injury Compensation for Everyone? - The New Zealand Experience*, 53 J. of Urban L. 925 (1975).

18. Iowa Code § 85.61(2) (1981).

19. *Id.* § 85.61(4).

20. *Id.* § 85.61(2).

21. *Id.* § 85.61(2).

22. *Id.* §§ 85.61(8), (13); § 85.36(10)(a).

23. *Id.* § 85.61(3)(c).

Exemptions from coverage are limited by section 5, as under the present law, to any person (1) employed as a domestic in a private home who earns less than $200 in cash from the person by whom employed during 13 weeks before injury;[24] (2) employed in casual employment;[25] (3) who is an independent contractor;[26] (4) covered by a rule of liability of the United States;[27] (5) employed in agriculture by an employer who has less than a $1,000 annual payroll;[28] (6) policemen and firemen covered by their own pension funds;[29] (7) partners;[30] and (8) directors of a corporation who are not also employees.[31]

Section 6 covers the method by which an employer may elect to cover his employees exempted under section 5.[32] Section 7, pertaining to extraterritorial coverage, clarifies discrepancies that have crept into the present Iowa act.[33] It is meant to insure that an employee sustaining a work injury outside the state where he is usually employed or where he was hired shall have the right to compensation in some jurisdiction. However, it clarifies that the worker's domicile in Iowa alone is not sufficient to support application of the Iowa act.[34] The section specifically provides that an employer shall not be subject to double recovery or the threat thereof where the law of Iowa and another state are applicable.

Section 8 provides for workers' compensation for inmates confined against their will in public institutions. It adopts existing sections in the Iowa law but consolidates and simplifies them.[35]

Section 9 in the draft of the Council of State Governments provided a presumption in cases in which a claimant had been killed or was unable to testify because of his mental or physical condition. That appears to be contrary to existing Iowa law and, accordingly, the section has been used as a vehicle for tests and presumptions that exist for occupational disease cases.[36]

Section 10 provides exclusive liability if an employer secures payment of compensation as required by the act. Failure of an employer to secure compensation would subject him to a claim of compensation by the em-

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24. *Id.* § 85.1(1).
25. *Id.* §§ 85.1(2), .61(3)(a).
26. *Id.* § 85.61(3)(b). *See* Nelson v. Cities Serv. Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1966).
27. IOWA CODE § 85.1(5) (1981). *See also id.* § 85.56.
28. *Id.* § 85.1(3).
29. *Id.* § 85.1(4).
30. *Id.* § 85.61(3)(c).
31. *Id.* § 85.61(3)(c). *See* text accompanying note 20 *supra*.
32. *Id.* § 85.1(5).
33. *Id.* § 85.71.
34. *See* Kline v. Weaver Potato Chip Co., No. 14162 slip op. at 2 (Iowa Indus. Comm'r November 5, 1976) (no appeal).
35. IOWA CODE §§ 85.59, .60, .62 (1981).
36. *Id.* § 85A.11 (brucellosis); 85A.13 (pneumoconiosis).

ployee, or his heirs in case of death, and to a possible suit for damages, in which suit he would not be able to plead the common law defenses of assumption of risk, fellow-servant rule and contributory negligence. This is the state of the existing statute in Iowa, but this section brings together scattered sections and clarifies inconsistent language.[37]

The last section in this part, section 11, prescribes the respective rights and interests of the injured employee, or his dependents in the event of his death, and of the person responsible for payment of compensation in cases where third parties are liable. It amplifies provisions of the present section.[38] In no event in such cases where a third party is liable will the injured employee receive less than he would if there were no third party liability. Initially, also, he may enforce his rights against the third party. Should he fail to do so within a stipulated time, his right of action would pass to the employer or carrier who was responsible for the payment of compensation by assignment. In turn, should the employer or carrier fail to commence action, reassignment of the cause of action to the injured employee would occur. Provision is also made for the employer or carrier to share in any recovery by the injured employee to the extent of the liability of the employer or carrier. Recovery by the employer or carrier in excess of his liability would inure to the benefit of the injured employee.

Part II consists of three sections. Section 12 provides that the employer is to provide medical benefits; the director of the workers' compensation agency is to have the authority to determine the quantity and quality of medical services; the employer is to have the privilege of initially choosing the medical care with the right of the director or employee to make another choice under certain circumstances;[39] the employee is entitled to additional benefits while he is engaged in an authorized rehabilitation program; and an unreasonable refusal to submit to medical examination would cause the worker to lose his compensation during such period as the refusal continues.[40]

Section 13 in the Council's proposal provides for a rehabilitation panel staffed by a medical director and specialists in rehabilitation. This provision is not a part of the existing Iowa act, and requires considerable funding which is not presently available. It is not a practical proposal at this time. However, a vocational rehabilitation allowance is provided.[41]

Section 14 provides for payment of burial expenses if death results from

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37. *Id.* §§ 87.1; 87.14 (mines); 87.16-.19 (hazardous employment); 87.21-.27 (failure to insure).

38. *Id.* § 85.22.

39. *Id.* § 85.27.

40. *Id.* § 85.39.

41. *Id.* § 85.70.

injury or disease.[42]

Part III consists of seven sections. Section 15 provides that income benefits will not be paid during the first three days of disability unless the disability lasts for more than fourteen days, in which event income benefits will be payable from the date of disability. This is existing Iowa law.[43]

There is a change in the wording of the statute in section 16 designed to implement recent concepts of disability compensation expressed by the Iowa Supreme Court and the Iowa General Assembly.[44] For total disability, section 16 provides that income benefits shall be 80 percent of the employee's spendable weekly earnings during his period of disability.[45] A partially disabled worker would be paid for the decrease in wage-earning capacity during the period of disability.[46] The section also contains a schedule of payments for permanent bodily losses,[47] which payments would be in addition to income benefits payable during the period of recovery known as the "healing period."[48] These payments would vary in length in proportion to the seriousness of the bodily loss. In addition to covering limb and digit losses, the schedule also covers loss of vision and hearing,[49] disfigurement[50] and occupational deafness.[51]

Section 17, as does present Iowa law, establishes maximum and minimum income benefits for disability.[52]

Section 18 provides income benefits for death,[53] specifies to whom such benefits shall be paid, and describes the order of precedence among dependents in receiving such benefits. This is an improvement over the existing law, which provides no order of precedence.

Section 19 describes the methods of determining average weekly wage. It covers payment by certain segments of time, output and part-time employment.[54]

Section 20 describes the second injury fund. The Council of State Governments draft provides for "broad" coverage while the Iowa law provides

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42. *Id.* § 85.28.

43. *Id.* §§ 85.30, .32.

44. *See* note 15 *supra*. *See also* IOWA CODE ch. 85B (1981) (hearing loss). *See generally* IOWA CODE §§ 85.34(2), (5) (1981).

45. IOWA CODE §§ 85.34(2), .34(3), .37 (1981).

46. *See* Fischer v. Priebe & Co., 178 Iowa 512, 160 N.W. 48 (1916); REP. ATTY GEN. IOWA 57, 35 (1916) (workmen's compensation opinions approving temporary partial disability).

47. IOWA CODE § 85.34(2) (1981).

48. *Id.* § 85.34(1).

49. *Id.* §§ 85.34(2)(p), (q), (s).

50. *Id.* § 85.34(2)(t).

51. *Id.* §§ 85B.1-.15, 85.34(2)(r).

52. *Id.* §§ 85.31(1)(d)(death); 85.34(2)(permanent partial disability); 85.34(3)(permanent total disability); 85.37 (temporary disability, healing period).

53. *Id.* §§ 85.29, .31(1)(d), .42-.44; 85A.6, .7(2)-(4), .12, .13(4), .19.

54. *Id.* § 85.36.

"narrow" coverage.[55] The purpose of the fund is to encourage employment of the handicapped by protecting employers from the assessment of a heavy compensation cost if a handicapped worker suffers a subsequent injury. Change to a broad second injury fund would require increased assessments on employers and additional staff and funding for the state workers' compensation agency. Suggestions for changes in the fund are too controversial for consideration in these times of financial distress.

Section 21 of the draft provides for the adjustment of the benefit rate of any person who has been totally and continuously disabled for over two years, and any widow or widower receiving death benefits when the maximum weekly benefit rate is changed. The Iowa act, under certain circumstances, permits either a disabled worker or a surviving spouse to receive benefits for life.[56] Accordingly, the matter of adjusting benefits to avoid hardship when the cost-of-living goes up will have to be faced sometime in the future. This section authorizes a study of the situation without substantive language adjusting the benefit rate.

Procedural, Insurance, and Administrative Provisions

Part IV consists of twenty-four sections in the Council's draft. It prescribes procedures to be followed by employers, employees, the director of the workers' compensation agency, the Workers' Compensation Appeals Board and the courts to effectuate administration of the statute.

Section 22 requires every employer to keep a record of injury to all employees.[57]

Section 23 requires that an employer report to the director all injuries resulting in death, permanent disability or total disability longer than three days, whether payment of compensation will be made voluntarily or will be controverted.[58] Willful failure or refusal to file the report may lead to the assessment of a penalty. All reports are confidential and are not admissible except for purposes presently permitted.[59]

Procedures with respect to method and time of payment of compensation are set forth in section 24, which changes the present concept of payment. At present, Iowa is a so-called "agreement" state, wherein it is assumed that after an injury the employer and employee sit down and discuss whether or not payments will be made and the amount of the payment. If an agreement is reached, the theory goes, a memorandum of agreement is filed in writing with the Industrial Commissioner and payments are made.[60] The memorandum of agreement establishes as a matter of law that the

55. *Id.* §§ 85.53-.69.
56. *Id.* §§ 85.33 (temporary disability), .34(2)(5), .34(3).
57. *Id.* § 86.11.
58. *Id.* §§ 86.11-.12.
59. *Id.* § 86.11.
60. *Id.* § 86.13.

claimant was an employee and sustained injuries arising out of and in the course of the employment.[61] It can be expunged only by action of the court, not by the Industrial Commissioner.[62] If it had such a powerful effect, employers and insurance carriers would be reluctant to file a memorandum of agreement or make payments of disability compensation without a complete investigation. The present act permits so-called "voluntary" payments to be paid to a claimant pending investigation, but the section has fallen into disrepute because of uncertainty about its effect if prescribed procedures are not followed exactly.[63]

Section 24 adopts a "direct" payment scheme whereby after an injury occurs the employer or insurance carrier is required to pay disability benefits within the time prescribed, or notify the employee that the case is controverted.[64] If the employer or carrier makes payments, and after investigation finds there is doubt about the compensability of the case, the employer or carrier may controvert it, and the payments already made shall not be considered a binding determination of the employer's obligation, but shall be deemed a credit in the event of a subsequent settlement or award.

Section 25 requires that an employer receive notice or knowledge of an injury or disease within ninety days after its occurrence. An injury occurs when the employee or his dependents knows the nature of the injury or disease and the relationship of the injury to the employment.[65]

Section 26 establishes a two-year statute of limitations within which claims for compensation must be filed. The time may be extended if the employee or dependents did not reasonably know the nature of the injury or disease or its relationship to the employment.[66] There is a three-year limitation for filing after disability benefits have been paid.[67]

Section 27 prescribes the time limits within which payments of compensation must be made, and further requires that the director be notified when final payment of compensation has been made.[68]

Section 28 authorizes payment of compensation for a minor or incompetent person to a guardian or other legal representative, or to a person caring for such minor or incompetent. This is a modification of the existing statute, and is an improvement because it does away with the necessity for court action in ordinary cases.[69]

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61. Freeman v. Luppes Transp. Co., 227 N.W.2d 143 (Iowa 1975).

62. Whitters & Son, Inc. v. Karr, 180 N.W.2d 444 (Iowa 1970).

63. IOWA CODE § 86.20 (1981).

64. *See* W. MALONE, M. PLANT & J. LITTLE, WORKERS' COMPENSATION AND EMPLOYMENT RIGHTS at 403-04 (2d ed. 1980).

65. IOWA CODE §§ 85.23-.25 (1981).

66. *Id.* §§ 85.26(1), 85A.12 (radiation disease).

67. *Id.* § 85.26(2).

68. *Id.* §§ 85.30, .32, 86.13 (start of compensation). *See also* IOWA AD. CODE § 500-3.1(2)(3).

69. IOWA CODE §§ 85.49-.50 (1981).

Section 29 requires that all carriers keep a record of all payments of compensation.[70]

Section 30 declares invalid any agreement by an employee to pay any part of his insurance premium, or to contribute to any fund or department maintained by an employer for providing compensation,[71] or to waive his rights to compensation except, as now permitted, for a pre-existing condition which may increase the chances of injury.[72]

Assignment and release of benefits are prohibited by Section 31.[73]

Section 32 declares that liability for compensation is superior to all other claims or liens, except for wages and taxes in case of insolvency or bankruptcy of an employer or carrier.[74]

Section 33 authorizes the director or workers' compensation judges to hold hearings.[75] The director is required to adopt rules and regulations of practice and procedure for the hearing, disposition and adjudication of cases,[76] including rules for procedures that will facilitate disposing of cases informally.[77] The provisions of the Council's act are similar to those in the Iowa Administrative Procedure Act, which is adopted here.[78]

Section 34 establishes the right of a party in interest to appeal a compensation order to the workers' compensation appeals board, and prescribes the review powers and functions of the board. The workers' compensation appeals board is a new agency adopted to expedite hearings and relieve the director, who occupies the same position as the present Industrial Commissioner, of appellate functions in contested workers' compensation cases.[79]

Section 35 authorizes the director to review a compensation case, and prescribes grounds on which such review may be had.[80]

Section 36 grants the director and the appeals board the power to hold hearings, and confers all necessary powers on them.[81]

Section 37 provides for judicial review of the board decisions on matters of law only, as now.[82]

Section 38 describes methods by which payments in default would be enforced.[83]

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70. There is no present statute similar to this. Carriers, as a matter of good business practice, record the payments anyway.
71. IOWA CODE § 85.34 (1981).
72. *Id.* § 85.55.
73. *Id.* § 627.13.
74. *Id.* § 87.8.
75. *Id.* §§ 86.14, .17, 17A.12(1).
76. *Id.* §§ 86.8(1), .14, 17A.1, .2(7), .3. *See also* IOWA AD. CODE § 500, ch. 7.
77. IOWA CODE §§ 17A.3(1)(b), .10(1) (1981).
78. *Id.* ch. 17A.
79. *Id.* §§ 86.24, 17A.15. *See also* IOWA AD. CODE § 500-5.24-.30.
80. IOWA CODE § 86.14(2) (1981).
81. *Id.* §§ 86.17, 17A.13(1).
82. *Id.* §§ 17A.19, 86.26, .29-.30.
83. *Id.* §§ 86.42-.43.

Sections 39 and 40 relate to administrative and judicial review proceedings. Section 39 deals with witnesses and fees in administrative proceedings;[84] and section 40 deals with costs in cases of judicial review.[85] Section 41 authorizes the hearing authority to assess costs of contested case proceedings.[86]

Section 42 authorizes the director to institute proceedings to enforce civil penalties and require deposits in certain cases.

Section 43 deals with compensation payable to an alien dependent, generally the same amount as provided for residents, except where the law of the alien's native land provides that compensation for citizens of the United States must be reduced.[87]

Section 44, the first section of Part V, requires that every employer secure payment of compensation by insuring his obligation, or by receiving authorization to self-insure.[88] The section brings together in one place the several methods by which an employer may insure his obligation.[89]

Section 45 relates to the posting of signs by an employer in the work place concerning whether or not he has secured payment of compensation.[90]

Section 46 provides that every policy or contract for the insurance of compensation under the act must conform with the provisions of the act, and extends coverage under it.[91]

Section 47 provides a penalty for failure to secure compensation.[92]

Section 48 establishes a special fund, to be used for the second injury fund.[93] The special fund would be available for other purposes, such as cost-of-living increases, if such a bill were pased by the General Assembly.

Section 49 provides for the establishment of the agency to administer the act.[94] A full-time director appointed by the Governor is authorized. All employees of the agency shall be employed under a merit and classification system.[95] All hearing officers must be lawyers licensed to practice in the state, and must devote full-time to their duties.[96] To reflect their important functions, they are called workers' compensation judges, although they are

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84. *Id.* § 86.41.
85. *Id.* § 86.32.
86. *Id.* §§ 86.40, .19 (shorthand reporter).
87. *Id.* §§ 85.31(5), .51-.52.
88. *Id.* § 87.1.
89. *Id.* §§ 87.1, .4-.7, .11, .16.
90. *Id.* §§ 87.1-.2, .17.
91. *Id.* §§ 87.8-.10.
92. *Id.* §§ 87.14-.15, .19. Sections 87.21-.27 provide civil remedies.
93. *Id.* §§ 85.65-.69.
94. *Id.* §§ 86.1, .7-.8.
95. *Id.* § 17A.11(2).
96. *Id.* §§ 86.2-.3.

not employed in the judicial branch of government.

Section 50 provides for the creation and composition of the new workers' compensation appeals board. This section suggests a maximum of three members, each of whom is a lawyer, who serve full-time, and are appointed by the Governor. The board would be within the workers' compensation agency for budgetary and administrative purposes only, but would not otherwise come under the agency's supervision.[97]

Section 51 authorizes the director and the board to adopt rules and regulations.[98]

Section 52 relates to the seal of the administrative agency and the board.[99]

Section 53 provides that the agency and board shall be financed by general appropriation of the General Assembly.[100]

Section 54 requires the director to make an annual report to the Governor and General Assembly about the operation of the agency and board.[101]

Section 55 authorizes the director to enter into cooperative agreements with other state agencies, and federal and private agencies to further the purposes of the act.[102]

The last three sections, 56, 57 and 58, relate respectively to severability, repeal of laws and effective date.

PART I

Coverage and Liability

Section 1 Liability for Compensation.

(a) Every employer subject to this act shall be liable for compensation, for injury, disease or death without regard to fault as a cause of the injury, disease or death.

(b) A contractor who subcontracts all or any part of a contract and his carrier shall not be liable for the payment of compensation to the employees of the subcontractor and the subcontractor shall secure the payment of compensation as provided for in this act.

(c) Liability for compensation shall not apply where injury to the employee was proximately caused by his intoxication or by his willful intention to injure or kill himself or another, or by the willful act of a third party directed against the employee for reasons personal to the employee.

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97. *Id.* § 86.24.

98. *Id.* § 96.8(1).

99. *Id.* § 86.8(6).

100. The agency is financed by general appropriation now, but there is no statutory provision for it.

101. IOWA CODE §§ 86.8(3), .9 (1981).

102. *Id.* § 86.8.

Section 1 commentary

Subsection (a) This subsection states the basic operating principal of workers' compensation which has never been expressed in the Iowa act. But, in the interest of clarity, this draft begins where an act ought to begin, by declaring the fundamental liability created by the statute. This simple statement imposes upon employers compulsory workers' compensation liability, as does the existing law.

Subsection (b) About forty state workers' compensation statutes contain "statutory employer" or "contractor-under" provisions. The purpose of this provision is to protect employees from irresponsible subcontractors whose operations may be so small or so poorly established that the normal provisions of workers' compensation insurance might be neglected. Another purpose of this provision is to impose an incentive upon the general contractor to ensure that his subcontractors obtain workers' compensation insurance.

Iowa's statute does not impose workers' compensation liability on a contractor when the employee of an insured subcontractor is injured. The workers' compensation agency and court have looked only to the issue of whether there was a contract of hire between the injured worker and the alleged employer. The issue arises most often when a truck owner (lessor) leases his vehicle. If the lessee is the driver and is injured, he has been held to be an employee.[103] If the lessee hires a driver who is injured, the lessee is generally held to be the employer of the driver while the lessor is not.[104]

The problem also arises when a lessee does not insure. The claimant cannot recover from the lessor. The draft codifies, not changes, the existing law.

Subsection (c) This subsection contains the principal specific exceptions to the irrelevance of fault in the causation of the injury. The defenses are limited to cases in which the injury was proximately caused by intoxication,[105] willful intention to injure or kill himself or another,[106] and by the willful act of a third party directed against the employee for reasons personal to such employee.[107] The intoxication offense has not been successfully exerted in cases either before the Iowa agency or the courts.[108]

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103. Eagen v. K & A Truck Lines, Inc., 254 Iowa 914, 119 N.W.2d 805 (1963). *See* Davis, *The Iowa Law of Workmen's Compensation* 19-27 (Univ. of Iowa 1967).

104. Daggett v. Nebraska-Eastern Express, Inc., 252 Iowa 341, 107 N.W.2d 102 (1961); Elliott v. Wilkinson, 248 Iowa 667, 81 N.W.2d 925 (1957).

105. IOWA CODE § 85.16(2) (1981).

106. *Id.* § 85.16(1).

107. *Id.* § 85.16(3).

108. Lamb v. Standard Oil Co., 250 Iowa 911, 917, 96 N.W.2d 730, 733 (1959) Blood sample from decedent was 196 mg of alcohol per 100 cc. of blood, but witness testified decedent had only one bottle of beer between 10:30 and midnight. Decedent's widow received compensation. *Id.*; Danico v. Davenport Chamber of Commerce, 232 Iowa 318, 5 N.W.2d 619 (1942); Birch v. Malvern Cold Storage Co., 230 Iowa 357, 364, 297 N.W. 818, 821 (1941); Reddick v. Grand

The second exclusion applies in cases where the defense asserted is that the employee committed suicide, or was the aggressor in a fight which led to his injury. As a rule, an aggressor is not entitled to workers' compensation benefits unless the fighters were thrown together by their work, and that proximity and argument about the work led to the fight.[109]

The third defense arises in cases where the person batters an employee in the course of his employment for reasons personal to them only. A good example is a fight on the work premises between two workers over the hand of a lover whom both had been wooing while away from work.[110]

Section 2 Definitions.

As used in this act unless the context otherwise requires:

(a) "Injury" means any harmful change in the human organism resulting from an acute traumatic episode arising out of and in the course of employment, including damage to an artificial member or orthopaedic appliance.

(b) "Disease" means any harmful change in the human organism resulting from a cause arising out of and in the course of the employment other than an injury, but does not include a communicable disease unless the risk of contracting such disease is increased by the nature of the employment.

(c) "Death" means death resulting from an injury or disease.

(d) "Carrier" means any insurer, or legal representative thereof, authorized to insure the liabilities of employers under this act and includes a self-insurer.

(e) "Self-insurer" is an employer who has been authorized under the provisions of this act to carry his own liability to his employees covered by this act.

(f) "Agency" means the Workers' Compensation Department.

(g) "Director" means the director of the Workers' Compensation Department.

(h) "Board" means the Workers' Compensation Appeals Board.

(i) "Disability" means, except for purposes of Section 16(c) relating to scheduled losses, the decrease of wage-earning capacity due to injury or disease. Wage-earning capacity prior to the occurrence of the injury or disease shall be the average weekly wage as calculated under Section 19. Wage-earning capacity after the injury shall be presumed to be actual earnings after the injury. This presumption may be overcome by showing that these earnings after injury do not fairly and reasonably represent wage-earning capacity, and in such cases, wage-earning capacity shall be determined in the light of all factors and circumstances in the case which

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Union Tea Co., 230 Iowa 108, 117, 296 N.W. 800, 804 (1941); Young v. Mississippi River Power Co., 191 Iowa 650, 180 N.W. 986 (1921); American Bridge Co. v. Funk, 187 Iowa 397, 173 N.W. 119 (1919).

109. Califore v. Ry, 220 Iowa 676, 263 N.W. 29 (1935); O'Callaghan v. Dermedy, 197 Iowa 632, 196 N.W. 10 (1923); Martin v. Chase, 194 Iowa 409, 189 N.W. 958 (1922).

110. Everts v. Jorgensen, 227 Iowa 818, 289 N.W. 11 (1939).

may affect the injured worker's capacity to earn wages. If the employee voluntarily limits his income, or fails to accept employment commensurate with his abilities, his wage-earning capacity after the injury shall be deemed to be the amount which he would have earned if he did not limit his income or if he accepted appropriate employment. Wage-earning capactiy after the occurrence of the injury or disease shall not be less than the amount of actual earnings, including earnings from sheltered employment. In determining wage-earning capacity no consideration shall be given to the age, sex, race or national origin of the employee.

(j) "Income benefits" means payments made under the provisions of this act to the injured worker or his dependents in case of death, excluding medical and related benefits.

(k) "Medical and related benefits" means payments made for medical, hospital, burial and other services and supplies as provided in this act other than income benefits.

(l) "Compensation" means all payments made under the provisions of this act, representing the sum of income benefits and medical and related benefits.

(m) "Medical services" means medical, surgical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing and ambulance services.

(n) "Person" means any individual, firm, association, trust, corporation, or legal representative thereof.

(o) "Wages" means, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging, fuel or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

(p) "Agriculture" means the operation of farm premises, including the planting, cultivating, producing, growing and harvesting of agricultural or horticultural commodities thereon, the raising of livestock and poultry thereon, and any work performed as an incident to or in conjunction with such farm operations. It shall not include the processing, packing, drying, storing, or canning of such commodities for market, or making cheese or butter or other dairy products for market.

(q) "United States," when used in a geographic sense, means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone and the Territories of the United States.

(r) "Alien" means a person who is not a citizen, a national or a resident of the United States. Any person not a citizen or national of the United States who relinquishes or is about to relinquish his residence in the United State shall be regarded as an alien.

(s) "Beneficiary" means any person who is entitled to income benefits or medical and related benefits under this act.

(t) "Actually dependent" means dependent in fact upon the employee, and refers only to a person who received more than half of his support from the employee and whose dependency is not the result of failure to make reasonable efforts to secure suitable employment. When used as a noun, the word "dependent" means any person entitled to death benefits under Section 18, or any person for whom added benefits

for disability are provided under Section 16.

(u) As used in Sections 16 and 18:

(1) "Surviving spouse" means only the deceased employee's spouse living with or actually dependent on the employee at the time of the occurrence of the employee's injury, disease or death, or living apart for justifiable cause or by reason of the employee's desertion.

(2) "Child" means a child under 18 years of age; or a child 18 years of age or over and physically or mentally incapable of self-support; or any child 18 years of age or over who is actually dependent; or any child between 18 and 25 years of age who is enrolled as a full-time student in any accredited educational institution. The term "child" includes a posthumous child, a child legally adopted or for whom adoption proceedings are pending at the time of death, an actually dependent child in relation to whom the deceased employee stood in the place of a parent for at least one year prior to the time of death, an actually dependent stepchild or an actually dependent acknowledged illegitimate child. "Child" does not include a married child unless receiving substantially entire support from the employee. "Grandchild" means a child, as above defined, of a child as above defined, except that as to the latter child, the limitations as to age in the above definition do not apply.

(3) All questions of relationship and dependency shall be determined as of the time of the occurrence of injury or disease for income benefits.

(v) As used in Sections 16, 17 and 18:

(1) "Pay period" means that period of employment for which the employer customarily or regularly makes payments to his employees for work performed or services rendered.

(2) "Payroll taxes" means the following:

(a) An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under the Internal Revenue Code of 1954, and regulations pursuant thereto, as amended to July 1, 1976, as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness and old age to which the employee is entitled on the date on which he was injured, and

(b) An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under chapter 422, and any rules pursuant thereto, as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness and old age to which the employee is entitled on the date on which he was injured; and

(c) An amount equal to the amount required on July 1 preceding the injury by the Social Security Act of 1935 as amended to July 1, 1976, to be deducted or withheld from the amount of earnings of the employee at the time of the injury as if the earnings were earned at the beginning of the calendar year in which he was injured.

(3) "Spendable weekly earnings" is that amount remaining after payroll taxes are deducted from gross weekly earnings.

(4) "Gross earnings" means recurring payments by employer to

the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

(w) The terms "employee" or "worker" shall include the singular and plural of both sexes.

(x) The term "personal injury arising out of and in the course of the employment" shall include injuries to employees whose services are being performed on, in or about the premises which are occupied, used or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

Section 2 commentary

The suggested act provides at the outset a careful definition of a number of key terms, and then uses these terms to convey a specific meaning, without thereafter repeating any of the qualifying words in the definition. For example, once the word "injury" has been limited, these limiting words are not thereafter repeated or abbreviated. This is a cardinal rule of statutory draftsmanship which often has been violated in amendments to the Iowa Workers' Compensation Law, resulting in slightly different definitions of what is apparently intended to be the same term, and leading to doubt about which of the two definitions is controlling.

Subsections (a) and (b) The Iowa statute has never required that an injury arise by "accident" in order to be compensable.[111] Some diseases have been compensated as injuries, including lead poisoning,[112] tularemia[113] and lung diseases.[114]

The Iowa General Assembly, by passing the Occupational Disease Law, intended that diseases and injuries be compensated in different ways.[115] Both injuries and diseases are compensated in a like manner in this draft if they result in total disability or death. Partial disability is treated differently, because a person with a disease is more likely to continue to work than one with an injury.

Damage to an artificial member is considered an injury, as it is in the

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111. *See* Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974); Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934).

112. Black v. Creston Auto Co., 225 Iowa 671, 281 N.W. 189 (1938).

113. Ford v. Goode, 240 Iowa 1219, 38 N.W.2d 158 (1949).

114. Jacques v. Farmers Lumber & Supply Co., 242 Iowa 548, 47 N.W.2d 236 (1961); Burt v. John Deere, 247 Iowa 691, 73 N.W.2d 732 (1955); Reddick v. Grand Union Tea Co., 230 Iowa 108, 296 N.W. 800 (1941). *See* Dahl, *Survey of Iowa Law, Iowa Workmen's Compensation*, 19 DRAKE L. REV. 393 (1970).

115. *See* IOWA CODE § 85A.5 (1981) "If . . . an employee incurs an occupational disease . . . but is able to continue in employment . . . he shall receive reasonable medical services therefore." *Id.* Permanent partial disabilities entitle the injured worker to weekly benefits even if he is fully employed. *See* IOWA CODE § 85.34(2) (1979).

existing statute.[116]

Subsection (i) The definition of "disability" reproduces the existing rule in Iowa. In two recent decisions, the Iowa Supreme Court has given great weight to the fact that a claimant is not employed in calculating industrial disability.

In the first case,[117] the claimant suffered a leg injury. The schedule applied if there were permanent disability. There was no finding that the injury was permanent, but, because the claimant had to take employment at a reduced wage because of the danger of later injury, he was entitled to a determination of reduction of earning capacity, either permanent partial or temporary partial. The court said:

> This is the case of an employee who has no apparent physical impairment and who wants to work at the job he had before but is precluded from doing so because his employer believes the past injury disqualifies him, resulting in a comparable reduction in his earning capacity. The extent of Blacksmith's industrial disability is an issue of fact for the commissioner to resolve.[118]

In the second case,[119] the employee suffered from a lung condition (which might be either an injury or a disease) and was unable to secure employment. The court remanded the case to the Iowa Industrial Commissioner for more evidence on the question of how his inability to secure employment fit into his disability picture. The claimant was sixty-seven years old when he quit working in the coal mine because of lung trouble. The expert physician said that his condition was no worse than any other sixty-seven-year-old man, but the court concluded that the claimant's inability to obtain work would indicate that relief should be granted.

This draft creates a rebuttable presumption that wage-earning capacity after the injury can be measured by actual earnings after the injury, but provides that the presumption may be overcome by showing that these earnings do not fairly and reasonably represent wage-earning capacity. The draft applies objective standards to encourage workers to return to work, even though only part-time. Admittedly, it is embarrassing for a truck driver earning thirty thousand dollars a year to take a job after suffering injury in a position that may pay only a fraction of that wage. However, an injured employee should not voluntarily limit his earning capacity.

The Iowa Supreme Court has stated that the workers' compensation agency may consider age in determining loss of earning capacity.[120] How-

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116. Iowa Code § 85.27 (1981).

117. Blacksmith v. All-American, Inc., 290 N.W. 2d 348 (Iowa 1980).

118. *Id.* at 354.

119. McSpadden v. Big Ben Coal Co., 288 N.W. 2d 181 (Iowa 1980).

120. Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Martin v. Skelly Oil Co., 252 Iowa 128, 106 N.W.2d 95 (1960); Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W. 899 (1935).

ever, neither the court nor the agency has provided guidelines, and it is unclear whether the older worker or the younger worker is to be considered more disabled. This has led to unnecessary litigation.[121]

Furthermore, the Iowa Civil Rights Act forbids discrimination on account of age, sex, national origin or disability.[122] For that reason, these matters are specifically excluded from consideration in determining disability.

Subsection (o) This definition is similar to that already contained in the Iowa act defining wages.[123]

Subsection (p) The problem of defining "agriculture" is a difficult one which has caused much trouble and litigation. The definition here adopted is an attempt to profit by the experience of other statutes, and to make the definition as specific and simple as possible, while recognizing that inevitably there will be borderline cases for which no statutory definition could provide an automatic solution. The principal problem is where to draw a line between farming and the various processing activities that may or may not begin on the farm premises. The amount of such processing on the farm premises increases by almost imperceptible degrees between various kinds of farming operations, particularly in the realm of fruits and vegetables. The suggested definition will immediately categorize the vast majority of operations which are either obviously "agriculture," or obviously "processing." These definitions follow decisions by the Iowa Supreme Court as to what is an agriculture pursuit, and what is not.[124]

Subsection (r) In light of the recent kidnappings and other confrontations between Americans and foreigners, one may anticipate that there will be serious restrictions on workers' compensation payments to Americans residing and injured in foreign countries. Therefore, it is desireable to have different payment methods, proof requirements and procedures for treating non-resident aliens.[125] As a practical matter, these differences do not apply to Canadians.

Subsection (t) The term "actually dependent" is defined in order to identify certain persons not within the basic category of spouse or child. The test of actual dependency is a forthright one: the receipt of more than half of a person's support from the employee. The definition has a proviso which is familiar in unemployment insurance statutes, but which is not generally found in workers' compensation acts. It provides that a person will not be

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121. *See* Becke v. Turner-Busch, No. CE10-5792 (Polk Co. Dist. Ct., filed Jan. 10, 1980). The agency does not have to give details about how it arrived at disability. *See* Farmers Elevator Co. v. Manning, 286 N.W.2d 174 (Iowa 1979).

122. IOWA CODE § 601A.6(1)(1981).

123. *Id.* § 85.61(12).

124. *See* Snook v. Herrman Gardens, 161 N.W.2d 185 (Iowa 1968)(tree trimming); Sheahan v. Plagge, 255 Iowa 182, 121 N.W.2d 120 (1963)(moving equipment); Criger v. Mustaba Inv. Co., 224 Iowa 1111, 276 N.W. 788 (1937)(repair of farm building); Slycord v. Horn, 179 Iowa 936, 162 N.W. 249 (1917) (operating corn sheller).

125. *See* IOWA CODE §§ 85.31(5), .51, .52(1981); and Draft § 44 *infra*.

deemed actually dependent if his dependency is the result of a failure to make reasonable efforts to secure suitable employment.[126] This matter has been dealt with in litigated cases before the Iowa state agency, but not in any statute or Iowa Supreme Court decision.

Persons other than a surviving spouse or child may be considered dependent, but the spouse and child are granted priority in the distribution scheme.

Subsection (u) The definitions of "surviving spouse" and "child" are adopted from the existing Iowa statute.[127]

The Iowa statute has always required that questions of relationship and dependency be determined at the time of the occurrence of the injury or disease, rather than at death.[128] Accordingly, if an employee is injured, then marries and subsequently dies from the injury, the spouse is not considered a surviving spouse for the purposes of the Iowa Workers' Compensation act. This rule is specifically codified in this subsection.

Subsection (v) The definitions here duplicate those in the present Iowa statute so far as defining "pay period," payroll taxes," "spendable weekly earnings," and "gross earnings" for determining disability or death benefits.[129]

Subsection (w) This subsection adopts existing Iowa law.

Subsection (x) The term "personal injury arising out of and in the course of employment" has been defined for many years in the Iowa act.[130] The definition is a sound one and is recaptured here.

Section 3 Coverage of Employers.

The following shall constitute employers subject to the provisions of this act:

(a) Every person that has in the State one or more employees subject to this act.

(b) The State, any agency thereof, and each county, municipal corporation, school corporation, area education agency, township as an employer of volunteer firemen only, and a benefited fire district that has one or more employees subject to this act.

Section 3 commentary

The draft adopts universal coverage, with a few exceptions. For employers generally, there is no numerical minimum on the number of employees. It is enough that the employer has one employee in the state subject to the act. Iowa has never had a numerical exception.[131] The section also explicitly

126. Iowa Code §§ 96.4(3), .5(3)(1981).
127. *Id.* § 85.42(1)-(2) (1981).
128. *Id.* §§ 85.31(1)(c), .42(1)(b), .44.
129. *Id.* § 85.61(9)-(12).
130. *Id.* § 85.61(6). *See* Frost v. S.S. Kresge Co., 299 N.W.2d 646 (Iowa 1980)(sidewalk is employer's premises).
131. Iowa Code §§ 85.3, .20 (1981).

covers every kind of public body and political subdivision having one or more employees.[132]

> **Section 4 Coverage of Employees.**
>
> The following shall constitute employees subject to the provision of this act, except as exempted under Section 5:
>
> (a) Every person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied.
>
> (b) Every executive officer of a corporation.
>
> (c) Every person in the service of the State or of any political subdivision or agency thereof, under any contract of hire, express or implied, and every official or officer thereof, whether elected or appointed, while performing his duties. Every person who is a member of a volunteer fire department shall be deemed, for the purpose of this act, to be in the employment of the municipality, township or benefited fire district having authority to demand his service as a volunteer fireman. Every person who is a reserve peace officer as defined by Section 80D.1 shall be deemed, for the purposes of this act, to be in the employment of the State.
>
> (d) Every person performing service in the course of the trade, business, profession or occupation of an employer at the time of the injury provided such person in relation to this service does not maintain a separate business, does not hold himself out to and render service to the public, and is not himself an employer subject to this act.

Section 4 commentary

Subsection (a) This subsection creates basic universal coverage for employees. It expressly includes persons in service under an apprenticeship, and minors, even when they are unlawfully employed.[133]

Subsections (b) and (c) These sections explicitly cover executive officers of a corporation[134] and employees of governmental and political bodies.[135] The innovation here is the provision that reserve peace officers shall be deemed to be in the employment of the state.[136]

Subsection (d) This provision attempts to deal with an in-between category of workers whose status has caused much litigation. This sort of person typically is a window washer or boiler repairman who performs work by the job, not by the hour, and who is at a level of skill and independence in the performance of his work which makes the test of independent contractorship meaningless. This is the type of person who provides only his skills, no

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132. *Id.* §§ 85.2, 86.61(1).

133. *Id.* §§ 85.61(2), (4). *See* Bolinger v. Kiburz, 270 N.W.2d 603 (Iowa 1978).

134. IOWA CODE § 85.61(2) (1981).

135. *Id.* § 85.61(2).

136. A reserve police officer is a person defined as such by section 80D.1 who is not a full-time member of a paid law enforcement agency. IOWA CODE § 85.61(13) (1981). "Volunteer firemen" is defined in § 85.61(8).

equipment, and who cannot be said to be an entrepeneur. The Industrial Commissioner has decided cases holding that the persons defined here are employees, rather than independent contractors, and the definitions in this subsection attempt to lay the issue to rest.

Section 5 Exemptions.

The following employees are exempt from the coverage of this act:

(a) Any person employed in agriculture by an employer who has an annual payroll that in total is less than $1,000.00.

(b) Any person employed as a household worker in any type of service in or about a private home or household who earned less than $200.00 in cash from the person by whom employed during the thirteen weeks prior to the occurrence of the injury, disease or death.

(c) Any person whose employment is purely casual and not for the purpose of the employer's trade or business who earned less than $200.00 in cash from the person by whom employed during the thirteen weeks prior to the occurrence of the injury, disease or death.

(d) An independent contractor.

(e) Persons entitled to benefits pursuant to chapters 410 and 411 of the Code.

(f) Partners.

(g) Directors of any corporation who are not at the same time employees of the corporation.

(h) Directors, trustees, officers or other managing officials of any nonprofit corporation or association who are not at the same time full-time employees of the nonprofit corporation or association.

Section 5 commentary

Subsection (a) The term "agriculture" has been defined elsewhere.[137] The Iowa Workers' Compensation act treats employees and employers in every line of business except agriculture identically. Employees of agricultural employers with an annual payroll of less than one thousand dollars are excluded,[138] as are all family members.[139] Agricultural employers may elect to cover excluded workers.[140] Excluded workers do not have a commensurate right to elect coverage, and, if the employer does not elect coverage, the employee in case of injury is not entitled to workers' compensation, and he must pursue other remedies.

The present section excluding family members employed by an agricultural employer discriminates against them in at least five ways:

(1) The type of farm employment is not criteria. That is, whether the activity is of an agricultural nature such as cultivating, baling or hoeing, or of a non-agricultural nature such as driving a vehicle, should not be determinative.

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137. *See* Draft § 2(p) *infra.*
138. IOWA CODE § 85.1(3)(a)(1981).
139. *Id.* § 85.1(3)(b).
140. *Id.* § 85.1(5).

(2) The age of the child is no criteria. It may be understandable that a farmer with young children living at home would not consider them to be employees while they are doing chores or working around the household. However, the present statute also excludes children who may be of an advanced age and not living on the employer's premises.

(3) Residence of the employer is no criteria. For example, an employee may live twenty miles away from the employer-parent in a home of his own with children and family, but he or she is still tied to the apron strings of the parent-employer in a damaging way.

(4) Dependency of the employee on the farm-employer is no criteria. The exclusions apply, for example, even if the injured family worker has his own farm business which constitutes the greater portion of his income.

(5) The marriage and maintenance of a separate household of the child is no criteria.

Any differences in hazard and situation that existed between those within the coverage of workers' compensation in business or industry and those in agriculture have blurred and disappeared today in light of the mechanization of farming.

Farm organizations have objected to complete coverage of farm workers on the following grounds:

(1) Farm workers, and especially family members, may be "on the job" longer than employees in business because they may reside on the farm premises, and, accordingly, there is greater exposure to injury.

(2) They could fabricate claims. That is, they are prone to acting fraudulently.

(3) Premiums are too high because farming is dangerous.

The first reason is the best argument for not excluding family members. The second is not supported by fact, and is a poor characterization of Iowa farmers. The third reason may be true. However, farmers may deduct workers' compensation insurance premiums from their income taxes, and thereby pass on the loss to all the taxpayers in the country, as other businessmen generally do.

One of the strongest arguments against excluding farm workers, and especially family members, from workers' compensation coverage is that it denies equal protection of the Iowa Workers' Compensation act to the excluded persons. A case dealing with this issue is presently before the Iowa Supreme Court.[141]

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141. Ross v. Ross, No. 13107 (Emmet Co. Dist. Ct., filed 8-12-80). *See* Roe v. Roe, 259 Iowa 1229, 146 N.W.2d 236 (1966) (1965 IOWA ACTS ch. 104 made it inapplicable). A person may be an employee of another family member. Reid v. Reid, 216 Iowa 882, 249 N.W. 387 (1933). As a rule, cash wages are necessary for the employer-employee relationship to exist. Henderson v. Jennie Edmundson Hospital, 178 N.W.2d 429 (Iowa 1970); Uhe v. Central States Theater Co., 258 Iowa 580, 139 N.W.2d 538 (1966); Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963). *But see* Usgaard v. Silver Crest Golf Club, 256 Iowa 453, 127 N.W.2d 636 (1964). In

The subsection excludes exchange workers by requiring that, to be covered, the worker must receive cash payments.[142]

Subsections (b) and (c) Household workers[143] and casual workers[144] are excluded if the employer has a payroll of less than two hundred dollars for a quarter year. The present statute contains an identical provision.

Subsections (d)-(h) Excluded are independent contractors, policemen or firemen entitled to benefits from their own pension fund, partners, directors of a corporation who are not also employees of the corporation, and directors, trustees, officers or other managing officials of a nonprofit corporation or association who are not at the same time full-time employees of the employer. These individuals are also excluded under the present statute. The exclusions are brought together here for easier reference.[145]

Section 6 Voluntary Coverage.

(a) An employer who has in his employment any employee exempted under Section 5 may elect to be subject to this act. Such election on the part of the employer shall be made by the employer's securing the payment of compensation to such exempted employees in accordance with Section 44. Any employee, otherwise exempted under Section 5, of such employer shall be deemed to have elected to come under this act if, at the time of the injury for which liability is claimed, such employer has in force an election to be subject to this act with respect to the employment in which such employee was injured and such employee has not, either upon entering into the employment or within five days after the filing of an election by the employer, given to such employer.

(b) Such employer, within five days after securing the payment of compensation in accordance with Section 44, shall post and keep posted on the premises, where any employee or employees otherwise exempted under Section 5 works, printed notices approved by the Director stating his acceptance of this act. Failure to give the notices required by this

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cases other than workers' compensation, exchanging farm labor has been held to create an employee-employer relationship. Erickson v. Erickson, 250 Iowa 491, 94 N.W.2d 728 (1959); Ganzhorn v. Reep, 234 Iowa 495, 12 N.W.2d 154 (1943). For tests of the employer-employee relationship *see generally*, McClure v. Union County, 188 N.W.2d 283 (Iowa 1971); Hjerleid v. State, 229 Iowa 818, 295 N.W. 139 (1940). Several courts have recently reviewed farm exclusions for constitutionality. *See* Fitzpatrick v. Crestfield Farm, 582 S.W.2d 2044 (Ky. 1978); Gutierrez v. Glaser Crandell Co., 388 Mich. 654, 202 N.W.2d 786 (1972); State ex rel. Hammond v. Hager, 160 Mont. 391, 503 P.2d 52 (1972), *appeal dismissed*, 411 U.S. 912 (1973); Cueto v. Stakmann Farms, Inc., 98 N.M. 223, 608 P.2d 535 (1980); Benson v. North Dakota Workmen's Compensation Bureau, 250 N.W.2d 249 (N.D. 1977), *rehearing denied*, 283 N.W.2d 96 (N.D. 1979).

142. The present statute also requires that the act applies to an employer whose total "cash annual payroll" is $1000. Iowa Code § 85.1(3)(a) (1981).

143. *Id.* § 85.1(1).

144. *Id.* § 85.1(2).

145. Persons entitled to benefits pursuant to chapters 410 and 411, policemen and firemen, are excluded by Iowa Code section 85.1(4); independent contractors are excluded by section 85.61(3)(b); and other persons are excluded by section 85.61(3)(c).

paragraph shall not void or impair the employer's election to be subject to or relieve him of any liability under this act.

(c) Any employer who has complied with subsection (b) of this section may withdraw his acceptance of this act by posting written notice of the withdrawal of his acceptance where the affected employee or employees work or shall otherwise notify such employees of such withdrawal.

Section 6 commentary

This section permits election on the part of the employer to bring within the act employees who would otherwise be exempted, as does the present act.[146] Although it is unlikely that employees would reject coverage voluntarily secured for them by employers, it is desireable as a matter of principle to reserve the privilege of election to the employee so that he may, in the event of injury, maintain a lawsuit against the employer.

Section 7 Extraterritorial Coverage.

(a) If an employee, while working outside the territorial limits of this State, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this act had such injury occurred within this State, such employee, or in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this act, provided that at the time of such injury

(1) his employment is principally localized in this State, or

(2) he is working under a contract of hire made in this State in employment not principally localized in any State, or

(3) he is working under a contract of hire made in this State in employment principally localized in another State whose workers' compensation law is not applicable to his employer, or

(4) he is working under a contract of hire made in this State for employment outside the United States and Canada.

(b) The payment or award of benefits under the workers' compensation law of another State, territory, province, or foreign nation to an employee or his dependents otherwise entitled on account of such injury or death to the benefits of this act shall not be a bar to a claim for benefits under this act; provided that a claim under this act is filed within the time limits set forth in Section 26. If compensation is paid or awarded under this act:

(1) The medical and related benefits furnished or paid for by the employer under such other workers' compensation law on account of such injury or death shall be credited against the medical and related benefits to which the employee would have been entitled under this act had claim been made solely under this act;

(2) The total amount of all income benefits paid or awarded the employee under such other workers' compensation law shall be credited against the total amount of income benefits which would have been due the employee under this act, had claim been made solely under this act;

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146. IOWA CODE § 85.1(5) (1981).

(3) The total amount of death benefits paid or awarded under such other workers' compensation law shall be credited against the total amount of death benefits due under this act.

(c) If an employee is entitled to the benefits of this act by reason of an injury sustained in this State in employment by an employer who is domiciled in another State and who has not secured the payment of compensation as required by this act, the employer or his carrier may file with the Director a certificate, issued by the commission or agency of such other State having jurisdiction over workers' compensation claims, certifying that such employer has secured the payment of compensation under the workers' compensation law of such other State and that with respect to said injury such employee is entitled to the benefits provided under such law. In such event:

(1) The filing of such certificate shall constitute an appointment by such employer or his carrier of the Director as his agent for acceptance of the service of process in any proceeding brought by such employee or his dependents to enforce his or their rights under this act on account of such injury;

(2) The Director shall send to such employer or carrier, by registered or certified mail to the address shown on such certificate, a true copy of any notice of claim or other process served on the Director by the employee or his dependents in any proceedings brought to enforce his or their rights under this act;

(3) (i) If such employer is a qualified self-insurer under the workers' compensation law of such other State, such employer shall, upon submission of evidence, satisfactory to the Insurance Commissioner, of his ability to meet his liability to such employee under this act, be deemed to be a qualified self-insurer under this act;

(ii) If such employer's liability under the workers' compensation law of such other State is insured, such employer's carrier, as to such employee or his dependents only, shall be deemed to be an insurer authorized to write insurance under and be subject to this act; *provided,* however, that unless its contract with said employer requires it to pay an amount equivalent to the compensation benefits provided by this act, its liability for income benefits or medical and related benefits shall not exceed the amounts of such benefits for which such insurer would have been liable under the workers' compensation law of such other State;

(4) If the total amount for which such employer's insurance is liable under (3) above is less than the total of the compensation benefits to which such employee is entitled under this act, the Director may, if he deems it necessary, require the employer to file security, satisfactory to the Director, to secure the payment of benefits due such employee or his dependents under this act; and

(5) Upon compliance with the preceding requirements of this subsection (c) such employer, as to such employee only, shall be deemed to have secured the payment of compensation under this act.

(d) As used in this section:

(1) "United States" includes only the States of the United States and the District of Columbia;

(2) "State" includes only the States of the United States, the District of Columbia, or any Province of Canada;

(3) "Carrier" includes any insurance company licensed to write workers' compensation insurance in any State of the United States or any State or provincial fund which insures employers against their liabilities under a workers' compensation law;

(4) A person's employment is principally localized in this or another State when (1) his employer has a place of business in this or such other State and he regularly works at or from such place of business, or (2) if clause (1) foregoing is not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other State;

(5) An employee whose duties require him to travel regularly in the service of his employer in this and one or more other States may, by written agreement with his employer, provide that his employment is principally localized in this or another such State, and unless such other State refuses jurisdiction, such agreement shall be given effect under this act;

(6) "Workers' compensation law" includes "occupational disease law."

Section 7 commentary

In 1975 the Iowa General Assembly provided a new section to the act to specifically extend its protection to workers who were injured outside of the borders of Iowa, but who had sufficient contacts with the state to invoke the protection of the Iowa Workers' Compensation act.[147] Prior to 1975, the act did not contain specific provisions purporting to state what domestic contacts were necessary for the Iowa act to apply.[148]

Through case law, the courts had laid down clear rules that the Iowa Workers' Compensation act would apply to a worker who was injured while driving through the state[149] or flying over it,[150] or who was injured outside of Iowa but had been hired in Iowa,[151] or whose employer's business was local-

147. *Id.* § 85.71.

148. A statute provides coverage under the Iowa Workers' Compensation act for employees engaged in interstate or foreign commerce working in Iowa. IOWA CODE § 85.56 (1981). States may not apply their own compensation acts to railroad employees covered by the Federal Employers' Liability Act. 35 Stat. 65 (1908), 45 U.S.C. §§ 51-59; 36 Stat. 291 (1910), 45 U.S.C. §§ 56, 59; 53 Stat. 1404 (1939); 45 U.S.C. §§ 51, 54, 56, 60 (1952). However, the federal commerce power has not precluded state compensation to other employees engaged in interstate commerce. *See* Davis, *The Iowa Law of Workmen's Compensation* 162 (Univ. of Iowa 1967). Section 85.56 is redundant, and has been dropped from the draft.

149. Towers v. Watson Bros. Transp. Co., 229 Iowa 387, 294 N.W. 594 (1940).

150. Schmidt v. Pittsburgh Plate Glass Co., 243 Iowa 1307, 55 N.W.2d 227 (1952).

151. Haverly v. Union Constr. Co., 236 Iowa 278, 18 N.W.2d 629 (1945); Elk River Coal & Lumber Co. v. Funk, 222 Iowa 1222, 271 N.W. 204 (1937); Cullamore v. Groneweg & Schoentgen Co., 219 Iowa 200, 257 N.W. 561 (1934); Pierce v. Bekins Van & Storage Co., 185 Iowa 1346, 172 N.W. 191 (1919).

ized in Iowa.[152]

In an effort to codify this existing Iowa law on extraterritorial coverage and to comply with the recommendations of the National Commission on State Workmen's Compensation Laws, the legislature amended the Iowa act using some, but not all, of the language recommended by a draft prepared by the Council of State Governments.[153] The draft codified all of the recommendations made by the National Commission for adoption by the states. Because the Iowa legislation did not use all of the language of the Council of State Governments draft, there arose an aberration which resulted in a rule that domicile of the employee in Iowa was alone sufficient to entitle him to benefits under the Iowa Workers' Compensation Act. The purpose of the amendment was to avoid any employee "falling between the cracks" by not being covered under the law of any state. However, the Iowa amendment went further than that, and now is used as a supplemental source of workers' compensation benefits because Iowa benefits are greater than those in neighboring states.

The decisions of deputy industrial commissioners have liberalized the word "domicile" to mean merely "residence."[154] Furthermore, even though an insurance policy specifically provides coverage only for one state, and that state is not Iowa, and there is no all-states endorsement, the state agency will require the employer or carrier to pay Iowa benefits when the injury occurs in Iowa. Other states have reached a contrary result and have denied coverage.[155]

Neither the National Commission nor the Council of State Governments contended that domicile in a state alone was sufficient to give jurisdiction; there had to be domicile plus a substantial part of working time in the state. The Iowa General Assembly left out that part of the Council of State Governments draft which defines "principally localized" in the alternative as domicile plus a substantial part of working time in the State of Iowa. This may mean that "domicile" (or residence) is what the legislature intended.

It is not clear whether the present statute on extraterritorial coverage means that the employer or employee must be domiciled in Iowa for the workers' compensation act to apply. A constitutional question may arise as

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152. Severson v. Hanford Tri-State Airlines, 105 F.2d 622 (8th Cir. 1939), *cert. denied*, 209 U.S. 660 (1940); Chicago, R.I. & Pac. Ry. v. Lundquist, 206 Iowa 499, 221 N.W. 228 (1928), *cert. denied*, 278 U.S. 658 (1929).

153. National Commission Recommendation R2.11 (1974).

154. Kline v. Weaver Potato Chip Co., No. 14162, slip op. at 2 (Iowa Indus. Comm'r Nov. 5, 1976).

155. Thornton v. Wolfson, No. 13511, slip op. at 2 (Iowa Indus. Comm'r Sept. 30, 1976). *See* Kacur v. Employers Mut. Cas. Co., 253 Md. 500, 254 A.2d 156 (1969); Woody v. American Tank Co., 49 Mich. App. 217, 211 N.W.2d 666 (1973); Toebe v. Employers Mut. of Wausau, 114 N.J. Super. 39, 274 A.2d 820 (1971); Weinberg v. State Workmen's Ins. Fund, 368 Pa. 76, 81 A.2d 906 (1951).

to whether the domicile of the employee in Iowa alone gives jurisdiction to the Iowa workers' compensation agency, especially where another state has jurisdiction, so that there is no question of the worker falling between the cracks in both. This section sets out the entire draft language for extraterritorial coverage and thereby avoids any misunderstandings.

Section 8 Inmates of Public Institutions.

(a)(1) If an inmate confined in a penal institution sustains an injury or disease resulting in total permanent bodily loss or losses scheduled in Section 16(c) as a result of performing his work in connection with the maintenance of the institution or in an industry maintained therein or while on detail to perform services on a public work project, he shall be paid benefits as are provided in Section 16(c) and medical services. The weekly rate shall be equal to 66⅔ percent of the state average weekly wage as determined under Section 17(b) of this act and in effect at the time of the occurrence of the injury or disease.

(2) Weekly compensation benefits under this section may be determined prior to the inmate's release from the institution, but payment of benefits to an inmate shall commence as of the time of the inmate's release from the institution either upon parole or final discharge.

(3) If an inmate is receiving benefits under the provisions of this section and is recommitted to a penal institution the benefits shall immediately cease. If benefits cease because of the inmate's recommitment, the benefits shall resume upon subsequent release from the institution.

(4) If death results from injury or disease, income benefits for death shall be paid to the dependents of the inmate as in other workers' compensation cases except that the weekly rate shall be determined as provided in Section 8(a)(1).

(5) Payment under this section shall be made promptly out of apropriations which have been made for that purpose, if any. An amount or part thereof which cannot be paid promptly from the appropriation shall be paid promptly out of money in the state treasury not otherwise appropriated.

(6) The time limit for commencing an original proceeding to determine entitlement to benefits under this section shall be the same as set forth in Section 47.

(b) The Department of Social Services may elect to include as an employee for purposes of this act any person confined as an inmate at the Riverview release center and who is participating in the inmate employment program. If an inmate in the performance of work sustains an injury or disease arising out of and in the course of the work, the inmate shall be paid compensation as provided in subsection (a) of this section. If death results from such injury or disease, death benefits shall be paid to the dependents of the inmate, as provided in subsection (a) of this section.

(c) The county board of supervisors of any county may elect to include as an employee for purposes of this act any person confined as an inmate in the county jail or confined in any other facility in lieu of confinement in the county jail. If an inmate in the performance of his work

in connection with the maintenance of a county jail or other local facility, or in connection with any industry maintained therein, or with any highway or public works activity outside a county jail or other facility sustains an injury or disease arising out of and in the course of the work, he shall be paid compensation at the minimum rate provided by this act. If death results from such injury or disease, death benefits shall be paid to the dependents of the inmate at the minimum rate allowed by this act.

(d) Disability benefits paid under subsections (a), (b) and (c) of this section shall be held in trust and paid to the inmate, or in the event of his death, his dependents, after the inmate's release from the institution either upon full or final discharge.

(e) For purposes of this section the term "penal institution" means any reformatory, state penitentiary, release center, or other state penal or correctional institution.

Section 8 commentary

The Iowa act extends limited workers' compensation coverage to inmates of a reformatory and penitentiary,[156] to Riverview release center occupants participating in an inmate employment program,[157] and inmates of county jails.[158] Coverage is compulsory for the first group. Coverage may be elected by the State Department of Social Services for the second group, and by the county boards of supervisors for the third.

Inmates of a penitentiary or reformatory may receive benefits for medical care and permanent disabilities; inmates of the Riverview release center and inmates of county jails may receive benefits for temporary disability, healing period and some permanent disabilities. In death cases, their dependents may receive benefits, but at different rates. The time when benefits begin and when they must be sought are not consistent. To think about reconciling these three sections is to descend into madness. This draft brings consistency to the coverage of inmates, and there does not appear to be any sound reason for changing it.

Section 9 Disease.

(a) Brucellosis.

When any employee is clinically diagnosed as having brucellosis (undulant fever), it shall not be considered that the employee has the disease unless the clinical diagnosis is confirmed by:

(1) A positive blood culture for brucella organisms, or

(2) A positive agglutination test which must be verified by not less than two successive positive agglutination tests, each of which tests shall be positive in a titer of one to one hundred sixty or higher. Said subsequent agglutination test must be made of specimens taken not less

156. IOWA CODE § 85.59 (1981). Before passage of this section, the court concluded that convicts were not employees because there was no contract of hire. Frederick v. Men's Reformatory, 203 N.W.2d 797 (Iowa 1973).

157. IOWA CODE § 85.60 (1981).

158. *Id.* § 85.62.

than seven nor more than ten days after each preceding test. The specimens for the test required herein must be taken by a licensed practicing physician or osteopathic physician, and immediately delivered to the state hygienic laboratory of the state department of health at Iowa City, and each such specimen shall be in a container upon which is plainly printed the name and address of the subject, the date when the specimen was taken, the name and address of the subject's employer and a certificate by the physician or osteopathic physician that he took the specimen from the named subject on the date stated over his signature and his address.

The state hygienic laboratory shall immediately make the test and upon completion thereof it shall send a report of the result of such test to the physician or osteopathic physician from whom the specimen was received and also to the employer.

In the event of a dispute as to whether the employee has brucellosis, the matter shall be determined as any other disputed case.

(b) Pneumoconiosis.

(1) Defined. "Pneumoconiosis" shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of dust particles.

(2) Presumptions. In the absence of conclusive evidence in favor of the claim, disability or death from pneumoconiosis shall be presumed not to be due to the nature of any occupation within the provisions of this chapter unless during the ten years immediately preceding the disablement of the employee who has been exposed to the inhalation of dust particles over a period of not less than five years, two years of which shall have been in employment in this state.

(3) Compensation payable. Except as in this chapter otherwise provided, compensation for disability from uncomplicated pneumoconiosis shall be payable in accordance with the provisions hereof; provided, however, that no compensation shall be payable for disability from pneumoconiosis of less than thirty-three and one-third percent of total, and provided further that, during the transitory period, the aggregate compensation payable to employees and their dependents for disability and death for uncomplicated pneumoconiosis shall be limited as follows: If disablement occurs or in case of no claim for prior disablement, if death occurs in the third calendar month after October 1, 1947, the total compensation and death benefits payable shall not exceed the sum of five hundred dollars. If disablement occurs or in case of no claim for prior disablement, if death occurs during the next calendar month, the total compensation and death benefits payable shall not exceed five hundred fifty dollars. Thereafter, the total amount or limit of the compensation and death benefits payable for disability and death shall be increased at the rate of fifty dollars per month, the aggregate payable in each case to be limited according to the foregoing formula for the month in which disability occurs, or, in case of no claim for prior disablement, in which death occurs. Such progressive increase in the limits of the aggregate compensation and benefits for disability and death shall continue until the limit upon such benefits fixed in the workers' compensation law is reached, and thereafter the total aggregate of such compensation and

benefits shall be the total compensation and benefits otherwise provided in the workers' compensation law.

(4) Pneumoconiosis complicated with other diseases. In case of disability or death from pneumoconoiosis complicated with tuberculosis of the lungs, compensation shall be payable as for uncomplicated pneumoconoiosis, provided, however, that the pneumoconiosis was an essential factor in causing such disability or death. In case of disability or death from pneumoconiosis complicated with any other disease, or from any other disease complicated with pneumoconiosis, the compensation shall be reduced as herein provided.

(5) Last employer liable. In case of pneumoconiosis, the only employer liable shall be the last employer in whose employment the employee was last injuriously exposed to the hazards of the disease during a period of not less than sixty days.

(c) Disability.

(1) An employer shall not be liable for any compensation for a disease unless total disability or death of the employee results within three years in case of pneumoconiosis, or within one year in case of any other disease, after the last injurious exposure to such disease in such employment, or in case of death, unless death follows continuous disability from such disease commencing within the period above limited for which compensation has been paid or awarded or timely claim made as provided by this chapter and results within seven years after such exposure.

(2) If an employee incurs a disease but is not totally disabled he shall receive medical benefits only.

(d) Apportionment.

Where a disease is aggravated by any other disease or infirmity not of itself compensable, or where disability or death results from any other cause not of itself compensable but is aggravated, prolonged or accelerated by such an occupational disease, and disability results such as to be compensable under the provision of this act, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the disease was the sole cause of the disability or death, as such disease bears to all the causes of such disability or death. Such reduction or limitation in compensation shall be effected by reducing either the number of weekly payments or the amount of such payments as the Director may determine is for the best interests of the claimant or claimants.

(e) Defenses.

No compensation shall be allowed or payable for any disease or death intentionally self-inflicted by the employee or due to his intoxication, or due to his being a narcotic drug addict, his commission of a misdemeanor or felony, his refusal to use a safety appliance or health protective, his refusal to obey a reasonable written or printed rule of the employer which has been posted in a conspicuous position in the place of work, or his failure or refusal to perform or obey any statutory duty. The burden of establishing any such ground shall rest upon the employer.

Section 9 commentary

The present separate occupational disease act necessarily duplicates many parts of the Iowa Workers' Compensation act, and is repealed by the draft. Separate tests for brucellosis,[159] pneumoconiosis[160] and pneumoconiosis complicated with tuberculosis[161] are combined in subsections (a) and (b); the tests for the time in which disability and death arise from the last injurious exposure and requirements for disability in subsection (c) are combined;[162] the provisions for apportioning disability or death between work and non-work causes are relocated to subsection (d);[163] and defenses are outlined in subsection (e).[164]

Sections in the occupational disease law permitting the agency to order examination and submit controversial questions to a medical board are repealed as unnecessary and outmoded.[165] In this draft, the agency has authority under another section to order examinations and reports in all cases.[166]

Section 10 Exclusiveness of Liability.

(a) If an employer secures payment of compensation as required by this act, the liability of such employer under this act shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. The liability of an employer to another person who may be liable for or who has paid damages on account of injury or death of an employee of such employer arising out of and in the course of employment and caused by a breach of any duty or obligation owed by such employer to such other shall be limited to the amount of compensation and other benefits for which such employer is liable under this act on account of such injury or death, unless such other and the employer by written contract have agreed to share liability in a different manner. The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers or directors of such employer or carrier, provided the exemption from liability given an employee, officer or director of an employer or carrier shall not apply in any case where the injury, disease or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director.

(b) If an employer fails to secure payment of compensation as required by this act, an injured employee, or his legal representative in

159. *Id.* § 85A.11.
160. *Id.* § 85A.13.
161. *Id.* § 85A.13(4).
162. *Id.* §§ 85A.4-.5, .12.
163. *Id.* § 85A.7(4). There is no similar provision for apportionment with injuries.
164. *Id.* § 85A.7(5).
165. *Id.* § 85A.19-.24.
166. *See* draft § 12(h) *supra*.

> case death results from the injury, may claim compensation under this act and in addition may maintain an action at law or in admiralty for damages on account of such injury or death, provided that the amount of compensation shall be credited against the amount received in such action, and provided that, if the amount of compensation is larger than the amount of damages received, the amount of damages less the employee's legal fees and expenses shall be credited against the amount of compensation. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risks of his employment, or that the injury was due to the contributory negligence of the employee.

Section 10 commentary

Subsection (a) Isolated sections of the present act make the injured employee's remedy against the employer exclusive if the employer is a non-government entity and insures its liability.[167] The present act makes the law compulsory and the exclusive remedy for an employee of the governmental employer, even if the employer does not insure.[168]

Subsection (b) If a non-government employer fails to insure, the injured worker may either collect workers' compensation or sue the employer with the attending presumptions that the injury was the result of employer's negligence, and that the employer's negligence was the proximate cause of the injury. The three common law defenses of contributory negligence, assumption of the risk and the fellow servant rule may not be pleaded or relied upon.[169]

The draft gives the employee the opportunity to both file suit and claim compensation. As a practical matter, if the employer cannot afford to buy workers' compensation coverage he probably is judgment-proof anyway.

The present Iowa act also permits an injured worker receiving workers' compensation to sue a fellow employee if the injury was caused by the other employee's gross negligence amounting to such a lack of care as to constitute wanton neglect for the safety of another.[170] This is confusing because various levels of tortious conduct—"gross" negligence and "wanton neglect"—are combined, and the terms have no precedent in Iowa law. The court has written an exhaustive opinion on the meaning of the exclusion, and has concluded that such conduct does not defeat the injured worker's lawsuit against a fellow servant.[171]

This draft clarifies the restriction by permitting a lawsuit against a fellow servant, officer or director if the injury, disease or death is proximately

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167. Iowa Code §§ 85.3, .20 (1981).

168. *Id.* § 85.2. But see section 87.21 which purports to allow an injured employee to sue for damages "any employer, except an employer exempt as provided in § 85.1, who has failed to insure the employer's liability . . . ." *Id.* § 87.21.

169. *Id.* § 87.21.

170. *Id.* § 85.20.

171. Brigdon v. Brandrup, 267 N.W.2d 396 (Iowa 1978).

caused by such parties' willful and unprovoked physical aggression.

Section 11 Third Party Liability.

(a) The right to income and other benefits under this act, whether for disability or death, shall not be affected by the fact that the injury or death is caused under circumstances creating a legal liability in some person (other than the employer or another person exempt from liability under Section 10 of this act) to pay damages therefor, such person so liable being hereinafter referred to as the third party. The respective rights and interests of the injured employee, or, in case of his death, his dependents and [any person entitled to sue therefor], and of the employer or person, association, corporation or carrier liable for the payment of compensation benefits under this act, hereinafter called "the carrier," in respect to the cause of action and the damages recovered shall be as provided by this section.

(b) The injured employee, or, in event of his death, his dependents, shall be entitled to receive the income and other benefits provided by this act and to enforce by appropriate proceedings his or their rights against the third party, provided that action against the third party must be commenced not later than six months after the carrier accepts liability for the payment of compensation or makes such payment pursuant to an award under this act, except as hereinfater provided. In such case the carrier shall have a lien on the proceeds of any recovery from the third party whether by judgment, settlement or otherwise, after the deduction of attorneys' fees, as approved by the district court incurred in effecting such recovery, to the extent of the total amount of compensation paid, and to such extent such recovery shall be deemed to be for the benefit of the carrier. Any balance remaining after payment of attorney fees and satisfaction of the carrier's lien shall be applied as a credit against future compensation benefits for the same injury or death and shall be distributed as provided in subsection (g) of this section. Notice of the commencement of such action shall be given within 30 days thereafter to the employer and carrier.

(c) If, prior to the expiration of the six months period referred to in subsection (b) or within 90 days prior to the expiration of the time in which such action may be brought, whichever occurs first, the injured employee, or, in event of his death, [the person entitled to sue therefor] shall not have commenced action against or settled with the third party, the right of action of the injured employee, or, in event of his death, [the person entitled to sue therefor] in writing, by personal service or by registered or certified mail that failure to commence such action will operate as an assignment of the cause of action to the carrier. Prior to the expiration of 90 days after such assignment, the carrier shall give the injured employee, or, in event of his death, his dependents and [the person entitled to sue therefor] notice, upon a form prescribed by the Director, that action has been or will be commenced against the third party. Failure to give such notice, or to commence such action at least 30 days prior to the expiration of the time within which such action may be brought, as fixed by [state statute of limitation], shall operate as a reassignment of such

right of action to the injured employee or, in event of his death, [to the person entitled to sue therefor], and the rights and obligations of the parties shall be as provided by subsection (b) of this section.

If the carrier as such assignee recovers in an action (1) for injury, an amount in excess of the sum of the total of compensation paid or provided the injured employee and the attorneys' fees, incurred in making such recovery, or (2) for death, an amount on behalf of the dependents of the employee in excess of the sum of the income benefits paid such dependents, and the attorneys' fees, incurred in making such recovery, such excess shall be applied as a credit against future compensation benefits for the same injury or death and shall be distributed in accordance with subsection (g) of this section.

(d) If the persons entitled to share in the proceeds of an action brought under subsection (b) or (c) for death of the employee include any person who was not a dependent of the deceased employee, such person's share of any recovery made in such action, less a rateable share of the reasonable attorneys' fees incurred in making such recovery, shall be paid to such person or to the personal representative of the deceased.

(e) The injured employee, or, in event of his death, his dependents, and the carrier may, by agreement provide for a distribution of the proceeds of any recovery in such action different from that prescribed by subsection (b) or (c) of this section.

(f) If the third party, with notice or knowledge of the carrier's lien, and the employee, or, in the event of his death, [the person entitled to sue therefor], make a compromise settlement without the written consent of the carrier for an amount less than the total of the compensation to which he or they are entitled under this act because of such injury or death, such settlement shall be invalid as against the carrier, which shall be entitled to maintain an action against the third party to recover the amount of compensation for which the carrier is liable under this act, less the amount actually inuring to the benefit of the carrier from the proceeds of such settlement.

At the trial of such action the fact of such settlement shall be prima facie evidence that the injury was proximately caused by a breach of duty owed to the employee or a warranty given by the third party.

The carrier shall not unreasonably refuse to approve a proposed compromise settlement with the third party. The injured employee or his dependents may make written application to the Director for a finding that a proposed compromise settlement with the third party is reasonable and fair to all parties. If the Director, after such inquiry as he deems necessary, and after hearing if demanded by either the carrier, the injured employee or his dependents, finds the proposed settlement reasonable and fair, it shall be deemed to have been approved by the carrier.

(g) When there remains a balance or more of the amount recovered from a third party by the beneficiary or carrier after payment of attorney fees and satisfaction of the carrier's lien, the entire balance shall be paid to the beneficiary by the third party. The present value of all amounts estimated by the Director to be thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by

the Director, shall be paid forthwith to the beneficiary, but shall continue to constitute a credit against future compensation benefits for the same injury or death as to any compensation liability that may exist after such fund has been exhausted.

(h) If death results from the injury and if the employee leaves no dependents entitled to benefits under this act, the carrier shall have a right of action against the third party for any amounts paid into the Special Fund established by Section 55, for reasonable funeral expenses and medical benefits actually paid by the carrier, and such cause of action shall be in addition to any cause of action of the legal representative of the deceased. Such right may be enforced in action at law brought against the third party within two years after the occurrence of the injury or disease causing the death of the employee.

Section 11 commentary

This section is a detailed effort to balance as equitably as possible the rights of the injured employee and the employer and carrier in the complex field of third party actions. It ensures that both employee and the insurance carrier have a fair opportunity to press the damage suit, in case the other neglects to do so. It is impossible to protect the rights of the employee adequately in these circumstances without spelling out a fairly detailed series of requirements. It would be simple merely to say that the employee shall have the first opportunity to sue, and that if he does not, the right then passes to the carrier. Or, the order could be reversed. However, in order to ensure the maximum protection and opportunity, the draft contains three stages. In the first stage, the employee who was injured has the right to bring the third party suit. If he does not, the right passes to the carrier. However, if the carrier in turn fails to bring suit, there is a final thirty-day period before the right completely expires at which time the right to sue reverts back to the employee.

Detailed provisions are also inserted to make sure that the injured employee will not lose his rights out of ignorance or inadvertance. It is assumed that the carrier is keeping track of the case. Accordingly, the assignment from the employee to the carrier in the first instance will not occur unless the carrier notifies the injured employee in writing. The second protective device requires the carrier to notify the injured employee prior to the period of ninety days alotted to the carrier for bringing suit after receiving the assignment of the cause of action from the employee now that such suit has been or will be commenced. If this notice is not given, the reassignment takes place at that time, and continues for whatever period of time remains of the statute of limitations. In any event, no matter how little is left of the statute of limitations, the remaining period within which the employee resumes the right to sue may not be less than thirty days.

As with the existing statute, before the sharing process of the recovery

from the third party begins, attorney fees are deducted.[172]

PART II

Medical, Rehabilitation and Burial Services

Section 12 Medical Services, Appliances and Supplies.

(a) The employer, for all injuries compensable under this act, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefore and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one set of permanent prosthetic devices.

(b) Any employee, employer or insurance carrier making or defending a claim for benefits agrees to the release of all information to which they have access concerning the employee's physical or mental condition relative to the claim and further waives any privilege for the release of such information. Such information shall be made available to any party or their attorney upon request. Any institution or person releasing such information to a party or their attorney shall not be liable criminally or for civil damages by reason of the release of such information. If release of information is refused the party requesting such information may apply to the Director for relief. The information requested shall be submitted to the Director who shall determine the relevance and materiality of the information to the claim and enter an order accordingly.

(c) Charges for medical services believed to be excessive or unnecessary may be referred to the Director for determination, and the Director may conduct such inquiry as he shall deem necessary. Any institution or person rendering treatment to an employee whose injury is compensable under this section agrees to be bound by such charges as allowed by the Director and shall not recover in law or equity any amount in excess of that set by the Director.

(d) For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, he should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the Director may, upon application and reasonable proofs of the necessity therefor, allow and order other care. In an emergency, the em-

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172. IOWA CODE § 85.22 (1981). A third party tortfeasor may not set up workers' compensation settlement in mitigation of damages. Rigby v. Eastman, 217 N.W.2d 604, 609 (Iowa 1974).

ployee may choose his care at the employer's expense, provided the employer or his agent cannot be reached immediately.

(e) When an artificial member or orthopedic appliance, whether or not previously furnished by the employer, is damaged or made unusable by circumstances arising out of and in the course of employment other than through ordinary wear and tear, the employer shall repair or replace it. When any crutch, artificial member or appliance, whether or not previously furnished by the employer, either is damaged or made unusable in conjunction with a personal injury entitling the employee to disability benefits, or services as provided by this section or is damaged in connection with employee actions taken which avoid such personal injury, the employer shall repair or replace it.

(f) After an injury, the employee, if so requested by his employer, shall submit himself for examination at some reasonable time and place within the state and as often as may be reasonably requested, to a physician or physicians authorized to practice under the laws of this state, without cost to the employee; but if the employee requests, he shall, at his own cost, be entitled to have a physician or physicians of his own selection present to participate in such examination. Whenever an employee is required to leave his work for which he is being paid wages to attend upon such requested examination, he shall be compensated at his regular rate for the time he shall have lost by reason thereof, and he shall be furnished transportation to and from the place of examination, or the employer may elect to pay him the reasonable cost of such transportation. The refusal of the employee to submit to such examination shall deprive him of the right to any compensation for the period of such refusal. When a right of compensation is thus suspended, no compensation shall be payable for the period of suspension.

(g) Whenever an evaluation of permanent disability has been made by a physician retained by the employer, and the employee believes this evaluation to be too low, he shall, upon application to the Director and at the same time delivery of a copy to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of his own choice, and reasonably necessary transportation expenses incurred for such examination. The physician chosen by the employee shall have the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

(h) Whenever the Director deems it necessary, in order to assist him in resolving any issue of medical fact or opinion, he shall cause such employee to be examined by a physician or physicians selected by the Director and obtain from such physician or physicians a report upon the condition or matter which is the subject of inquiry. The Director shall pay the cost of such examination. The cost of such examination shall include the payment to the employee of all necessary and reasonable expenses incident to such examination, such as transportation and loss of wages.

(i) All fees and other charges for such medical services shall not be higher than such charges as prevail in the same community for similar

services to injured persons.

Section 12 commentary

The draft does not change the medical and related benefits available to an injured worker or the procedures for his securing them. It brings together the present section which sets out the type of medical benefits available, the provision that physicians or hospitals must release information to either the employee, employer or insurance carrier, protects the employee, employer and insurance carrier from excessive charges by permitting bills to be submitted to the agency for determination and denies an action for any deficiency against the practitioner or institution, maintains the privilege of employer to choose the original medical care, and requires the employer to replace artificial appliances.[173]

The draft replants to this section the provisions authorizing the employer to have an examination of the employee and the right of the employee, in cases of permanent disability, to have an independent examination at the employer's expense.[174]

Section 13 Rehabilitation.

An employee who has sustained an injury resulting in permanent partial or permanent total disability, for which compensation is payable under this chapter, and who cannot return to gainful employment because of such disability, shall upon application to and approval by the Director be entitled to a twenty-dollar weekly payment from the employer in addition to any other benefit payments, during each full week in which he is actively participating in a vocational rehabilitation program recognized by the state board for vocational education. The Director's approval of such application for payment may be given only after a careful evaluation of available facts, and after consultation with the employer or the employer's representative. Judicial review of the decision of the Director may be obtained in accordance with terms of the Iowa Administrative Procedure Act and section. Such additional benefit payment shall be paid for a period not to exceed twenty-six consecutive weeks.

Section 13 commentary

The draft adopts the existing statute on rehabilitation.[175] To encourage a worker to enter a vocational rehabilitation program if he has difficulty returning to employment for which he was fit before the injury, the section grants an additional benefit of twenty dollars a week for a maximum of twenty-six weeks. The draft amends the present section by allowing as much as the entire twenty-six weeks in one application, rather than requiring that the first application be for only thirteen weeks with thirteen additional weeks payable if the need persists. The purpose of this provision is to cut down on paper work and delays in getting benefits to the worker.

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173. Iowa Code § 85.27 (1981).
174. *Id.* § 85.39.
175. *Id.* § 85.70.

As a practical matter, the application used by the agency requires the party providing the vocational rehabilitation to describe its length, which should be sufficient.

Medical rehabilitation is covered by another section.[176]

> **Section 14 Burial Expense.**
>
> If death results from the injury, the employer shall pay the cost of burying in an amount not to exceed one thousand dollars to any person who performed such service or incurred the liability for the service, whether or not the employee leaves dependents within the meaning of this act.

PART III

Income Benefits

> **Section 15 Waiting Period.**
>
> No income benefits shall be allowed for the first three days of the disability; *provided,* however, that in case the injury or disease results in permanent disability or disability of fourteen or more days, income benefits shall be allowed from the date of the disability. The day on which the injury occurred shall be included in computing this waiting period unless the employee has been paid full wages for that day.

Section 15 commentary

This section consolidates the provisions of several present sections with regard to when income benefits begin. It allows a three-day waiting period for total or partial disability as defined in Section 16,[177] but none for permanent losses.[178]

> **Section 16 Income Benefits for Disability.**
>
> Income benefits for disability shall be paid to the employee as follows, subject to the maximum and minimum limits specified in Section 17.
>
> (a) *Total Disability*: For total disability eighty percent of his weekly spendable earnings.
>
> (b) *Partial Disability*: For partial disability, and not subject to the *minimum* weekly benefit set forth in Section 17(a), [sixty percent] of his decrease in wage-earning capacity during the continuance thereof.
>
> (c) *Scheduled Income Benefits*: For total permanent bodily loss or losses herein scheduled, after and in addition to income benefits payable before he reaches the maximum of healing and restoration of function, scheduled income benefits on the basis of eighty percent of his average weekly spendable earnings as follows:

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176. *Id.* § 85.27.
177. *Id.* §§ 85.30, .32, .33.
178. *Id.* § 85.34(1)-(3).

BODILY LOSS	WEEKS OF DISABILITY
(1) Arm	Two Hundred Fifty
(2) Leg	Two Hundred Fifty
(3) Hand	One Hundred Ninety
(4) Foot	One Hundred Fifty
(5) Thumb	Sixty
(6) Index Finger	Thirty-Five
(7) Middle Finger	Thirty
(8) Ring Finger	Twenty-Five
(9) Little Finger	Twenty
(10) Great Toe	Forty
(11) Other Toe	Fifteen
(12) Total Loss of Vision of One Eye	One Hundred Forty
(13) Total Loss of Vision of One Eye, the Other Eye Having Been Lost Prior to the Injury	Two Hundred
(14) Loss of Hearing in One Ear	Fifty
(15) Loss of Hearing in Both Ears	One Hundred Seventy-Five
(16) Total Loss of Bilateral Vision	Five Hundred
(17) Total Loss, or Loss of Use, of Both Hands, Both Arms, Both Feet or Both Legs	Five Hundred

(18) Phalanges: For loss of distal phalange, one half of the income benefits for loss of the entire digit. For loss of more than the distal phalange of a digit, the same as loss of the entire digit.

(19) Arm or Leg: For an arm or leg amputated to a point two-thirds the distance from the elbow joint to the shoulder joint or from the knee joint to the hip joint scheduled income benefits shall be the same as those for the loss of the arm and leg respectively. Losses of the ankle and wrist shall be the same as those for the loss of the foot and hand respectively.

(20) Total loss of use: Scheduled income benefits for permanent total loss of use of a member shall be the same as for loss of the member.

(21) Partial loss or partial loss of use: Scheduled income benefits for permanent partial loss of use of a member shall be for a period proportionate to the period benefits are payable for total loss of use of the member as such partial loss bears to total loss.

(22) Loss of hearing or partial loss of bilateral vision: Scheduled income benefits for partial loss of vision in one or both eyes, or total loss of hearing in one ear, or partial loss of hearing in one or both ears shall be for a period proportionate to the period benefits are payable for total bilateral loss of vision or total binaural loss of hearing as such partial loss

bears to total loss. The provisions of subsection (f) of this section shall apply to occupational loss of hearing.

(23) In any case in which there shall be a loss or loss of use of more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subsection, scheduled income benefits shall be for the loss or loss of use of each such member or part thereof, with the periods of benefits to run consecutively.

(24) Disfigurement: For disfigurement of the face or head which shall impair the future earnings of the employee in his occupation at the time of receiving the injury, for such period as may be determined by the Director, not to exceed one hundred fifty weeks.

(25) In any case of total or partial loss of use of a member or organ, of hearing or vision, or in any case of disfigurement, determination of the period for which scheduled income benefits are payable shall not be made until the maximum of healing and of restoration of function has been attained.

(d) Scheduled Income Benefits: Scheduled income benefits for bodily loss or losses, or loss of use, partial or total, shall be exclusive and in lieu of all income benefits payable after and in addition to the income benefits payable during the period of recovery until the maximum of healing and restoration of function has been attained, except as otherwise provided in subsection (e) of this section. To reduce litigation and establish more certainty and uniformity in the rating of disability in Section 16(c)(1)-(21) the Agency shall adopt and use as standards for determining disability and impairment the Guides to the Evaluation of Permanent Impairment, copyright 1977, 1971 by the American Medical Association.

(e) Major Member Losses: For total loss, or total and permanent loss of the use of both arms, hands, feet, eyes, or any two thereof, caused by a single injury, whether or not the injury also involves other impairments of the body, income benefits for such major member losses shall be for the period specified for such loss or loss of use in subsection (c), and with respect to any subsequent period of actual disability, income benefits shall be payable as provided in subsection (a) or (b) of this section, as long as the major member loss continues as a total loss and as long as actual disability as defined in Section 2(i) continues.

(f) Occupational Hearing Loss:

(1) Definitions.

(a) "Occupational hearing loss" means a permanent sensorineural loss of hearing in one or both ears in excess of twenty-five decibels if measured from international standards organization or American national standards institute zero reference level, which arises out of and in the course of employment caused by prolonged exposure to excessive noise levels.

In the evaluation of occupational hearing loss, only the hearing levels at the frequencies of five hundred, one thousand, two thousand, and three thousand Hertz shall be considered.

(b) "Excessive noise level" means sound capable of producing occupational hearing loss.

(2) Excessive noise level. An excessive noise level is sound which exceeds the times and intensities listed in the following table:

Duration per day hours	*Sound level, dBA slow response*	*Duration per day minutes*	*Sound level, dBA slow response*
8	90	52	106
7	91	45	107
6	92	37	108
5	93	33	109
4½	94	30	110
4	95	26	111
3½	96	22	112
3	97	18	113
2½	98	16	114
2¼	99	15	115
2	100	No exposure permitted	Greater than 115
1¾	101		
1½	102		
1¼	103		
1⅛	104		
1	105		

The Industrial Commissioner may promulgate rules pursuant to chapter 17A to amend this table based upon charges recommended in nationally recognized consensus standards.

An employer shall immediately inform an employee if the employer learns that the employee is being subjected to sound levels and duration in excess of those indicated in the above table. In instances of occupational hearing loss alleged to have occured, either in whole or in part prior to January 1, 1981 an employer shall provide upon request by an affected employee whatever evidence is available to the employer of the date, duration, and intensities of noise to which the employee was subjected in employment.

(3) Maximum compensation. Compensation is payable for a maximum of one hundred seventy-five weeks for total occupational hearing loss. For partial occupational hearing loss compensation is payable for a period proportionate to the relation which the calculated binaural, both ears, hearing loss bears to one hundred percent, or total loss of hearing.

(4) Periodic examination. Compensation is not payable to an employee who willfully fails to submit for reasonable periodic physical and audiometric examinations. Reasonable written notice of the dates and times of examinations required by the employer shall be given the employee. Examinations shall be scheduled during times the employee, examining personnel, and examination facilities are reasonably available. Physical and audiometric examinations shall be at the expense of the

employer. The employee shall be compensated for any time lost from work occasioned by employer examinations. Compensation is not payable to any employee if the employee fails or refuses to use employer-provided hearing protective devices required by the employer and communicated in writing to the employee at the time the employee is employed or at the time the protective devices are provided by the employer.

(5) Date of occurence. A claim for occupational hearing loss due to excessive noise levels may be filed six months after separation from the employment in which the employee was exposed to excessive noise levels. The date of the injury shall be the date of occurrence of any one of the following events:

(a) Transfer from excessive noise level employment by an employer.

(b) Retirement.

(c) Termination of the employer-employee relationship.

The date of injury for a layoff which continues for a period longer than one year shall be six months after the date of the layoff. However, the date of the injury for any loss of hearing incurred prior to the effective date of this Act shall not be earlier than the occurrence of any one of the above events.

(6) Measuring hearing loss. Pure tone air conduction audiometric instruments, properly calibrated according to accepted national standards used to define occupational hearing loss shall be used for measuring hearing loss, and the audiograms shall be taken and the tests given in an environment such as is prescribed by accepted national standards. If more than one audiogram is taken following notice of an occupational hearing loss claim, the audiogram having the lowest threshold will be used to calculate occupational hearing loss. If the losses of hearing average less than those levels that constitue an occupational hearing loss, the losses of hearing are not a compensable hearing disability. If the losses of hearing average ninety-two decibels American National Standards Institute (ANSI) or International Standards Organization (ISO), or more in the four frequencies, then the losses are total, or one hundred percent, compensable hearing loss. In measuring hearing impairment the lowest measured losses in each of the four frequencies shall be added together and divided by four to determine the average decibel loss. For each resulting decibel of loss exceeding twenty-five decibels ANSI and ISO, an allowance of one and one-half percent shall be made up to the maximum of one hundred percent, which is reached at ninety-two decibels ANSI or ISO. In determining the binaural percentage of loss, the percentage of impairment in the better ear shall be multiplied by five. The resulting figue shall be added to the percentage of impairment in the poorer ear, and the sum of the two divided by six. The final percentage shall represent the binaural hearing impairment. Audiometric examinations shall be made by persons trained by formal course work in air conduction audiometry at an accredited educational institution or licensed as audiologists under chapter 147, as physicians under chapter 148, as osteopathic physicians under chapter 150, or as osteopathic physicians and surgeons under chapter 150A if such licensed persons are trained in air

conduction audiometry. The interpretation of the audiometric examination shall be by the employer's regular or consulting physician who is trained and has had experience with such interpretation, or by a licensed audiologist. If the employee disputes the interpretation, the employee may select a physician similarly trained and experienced or a licensed audiologist to give an interpretation of the audiometric examination. This section is applicable in the event of partial permanent or total permanent occupational hearing loss in one or both ears.

(7) Employers notice of results of test. The employer shall communicate to the employee, in writing, the results of an audiometric examination or physical examination of an employee which reflects an average hearing loss of the employee in one or both ears in excess of twenty-five decibels ANSI or ISO for the test frequencies of five hundred, one thousand, two thousand, and three thousand Hertz, as soon as practicable after the examination. The communication shall include the name and address of the person conducting the audiometric examination or physical examination, the kind or type of test or examinations given, the results of each, the average decibel loss, in the four frequencies, in each ear, if any, and, if known to the employer, whether the loss is sensorineural hearing loss and, if the hearing loss resulted from another cause, the name of the cause.

(8) Previous hearing loss excluded. An employer is liable, as provided in this Act and subject to the provisions of chapter 85, for an occupational hearing loss to which the employment has contributed, but if previous hearing loss, whether occupational or not, is established by an audiometric examination or other competent evidence, whether or not the employee was exposed to excessive noise level within six months preceding the test, the employer is not liable for the previous loss, nor is the employer liable for a loss for which compensation has previously been paid or awarded. The employer is liable only for the difference between the percent of occupational hearing loss determined as of the date of the audiometric examination used to determine occupational hearing loss and the percentage of loss established by the preemployment audiometric examination. An amount paid to an employee for occupational hearing loss by any other employer shall be credited against compensation payable by an employer for the hearing loss. An employee shall not receive in the aggregate greater compensation from all employers for occupational hearing loss than that provided in this section for total occupational hearing loss. A payment shall not be made to an employee unless the employee has worked in excessive noise level employment for a total period of at least ninety days for the employer from whom compensation is claimed.

(9) Hearing aid provided. A reduction of the compensation payable to an employee for occupational hearing loss shall not be made because the employee's ability to communicate may be improved by the use of a hearing aid. An employer who is liable for occupational hearing loss of an employee is required to provide the employee with a hearing aid unless it will not materially improve the employee's ability to communicate.

> (10) Payments of compensation discharges employer. Payments of compensation and compliance with other provisions of this chapter by the employer or the employer's insurance carrier in accordance with the findings and order of the industrial commissioner or a court making a final adjudication in appealed cases, discharges the employer from further obligation.
>
> (g) In computing the compensation to be paid to any employee who, before the injury or disease for which he claims compensation, was disabled and drawing compensation under the provisions of this act, the compensation for each subsequent injury shall be apportioned according to the proportion of disability caused by the respective injuries or diseases which he shall have suffered.
>
> This subsection shall not apply to compensable injuries arising under Section 20.
>
> (h) Where an employee is entitled to compensation under this act and death ensues from a cause not resulting from the injury or disease for which he was entitled to the compensation, payments of the unpaid balance of compensation owing for such injury or disease shall cease and all liability therefor cease.

Section 16 commentary

The draft, in the interest of simplicity, addresses only total disability and partial disability, and abandons the more complicated terminology of temporary total, permanent total and permanent partial. This is in line with recent decisions of the Iowa Supreme Court.[179] Instead of the concept of "temporary" disability[180] and "healing period," the draft in subsection (d) refers to the "period of recovery until the maximum of healing and restoration of function has been attained." This is more clear than the existing definition of "healing period," which is, "beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first."[181]

The unclear portion of this section is the use of the word "recuperation" in a way not generally accepted by dictionary writers. Recuperation is defined by rule as follows: "Recuperation occurs when it is medically indicated that either no further improvement is anticipated from the injury or that the employee is capable of returning to employment substantially similar to that in which the employee was engaged at the time of the injury, whichever occurs first."[182] There is no maximum limit on the benefits during the period of recovery.[183]

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179. *See* text accompanying notes 15-16 *supra*. *See also* Dahl, *Proposals for Uniform Disability Evaluation in Workmen's Compensation Cases*, THE FORUM, Jan., 1970 at 156-159.

180. IOWA CODE § 85.33 (1981).

181. *Id.* § 85.34(1).

182. IOWA AD. CODE 500-8.3(85).

183. IOWA CODE § 85.34(1) (1981).

If the employee continues to be totally disabled, benefits for total disability are paid as long as the disability continues, which may be for life if the disability persists for life. This is a recapitulation of existing Iowa law.[184]

As to cases of partial disability, the benefit pattern would normally fall into two, or possibly three phases. The first phase would be the period of recovery, during which total or partial benefits would be paid as the case warranted.

At the completion of the period of recovery, the calculation of subsequent benefits depends on whether the remaining disability, if any, falls within the losses listed in the schedule. If the loss were scheduled, a specific number of weeks of disability would be payable.[185] If it were not a scheduled loss, and if actual partial disability continued, benefits would be continued under subsection (b).

Finally, if the loss falls within two or more schedules, there may be a third phase which takes over after the number of weeks specified in the schedule has expired. This is provided for in subsections (d) and (e). It is an improvement over the present statute because it permits the employee, employer or carrier to more easily determine the benefits owing when two or more major members or organs are involved.[186] For example, if an employee had an injury to both arms resulting in permanent disability he would receive the amount provided by the schedule, but thereafter he would be entitled to whatever benefits he could prove under subsection (a) or (b) and section 2(i).

The matter of occupational hearing loss was recently codified in a separate chapter of the Code.[187] It is brought to this section as subsection (s) without change.

Two subsections (g) and (h) dealing respectively with prorating disability between an earlier compensable injury and a later one,[188] and termination of disability benefits when a claimant dies from unrelated causes,[189] are transferred here from other parts of the present act.

Section 17 Weekly Maximum and Minimum Income Benefits for Disability.

(a) The minimum weekly benefit for total disability and scheduled

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184. *Id.* § 85.34(3).

185. Kellogg v. Shute & Lewis Coal Co., 256 Iowa 1257, 1262, 130 N.W.2d 667, 669 (1964); Schell v. Central Eng. Co., 232 Iowa 421, 424-25, 4 N.W.2d 399, 401 (1942); Soukup v. Shores, 222 Iowa 272, 277, 268 N.W. 598, 601 (1936).

186. The test now is industrial disability, rather than functional disability, based on 500 weeks for the body as a whole. *See* Davis, *The Iowa Law of Workmen's Compensation* 87 (Univ. of Iowa 1967). Thereafter, subsection (2)(s) of section 85.34 was amended to provide that loss of two major members shall equal 500 weeks.

187. IOWA CODE ch. 85B (1981). The subsection now is not clear ("loss equals weeks!") so an argument may be made that the test is functional disability only.

188. IOWA CODE § 85.36(10)(c) (1981).

189. *Id.* § 85.32(4).

income benefits shall not be less than thirty-six dollars per week, except if at the time of the occurrence of his injury or disease the earnings of the employee are less than thirty-six dollars per week, then his weekly income benefits shall be a sum equal to the full amount of his weekly earnings.

(b) The maximum weekly benefit for total and partial disability, rounded to the nearest dollar, shall be two hundred percent of the state average weekly wage paid employees as determined by the Iowa Department of Job Service under the provisions of Section 96.3 and in effect at the time of the occurrence of the injury or disease.

(c) The maximum weekly benefit for scheduled losses listed in Section 16(c), rounded to the nearest dollar, shall be one hundred eighty four percent of the state average weekly wage paid employees as determined by the Iowa Department of Job Service under the provisions of Section 96.3 and in effect at the time of the occurrence of the injury or disease.

(d) The minimum and maximum income benefits as so determined in Section 17(a) that are in effect on the date of the occurrence of the injury or disease shall be applicable for the full period during which income benefits for disability are payable.

Section 17 commentary

For convenience, this section brings together scattered provisions for maximum and minimum benefits for permanent partial disability,[190] permanent total disability,[191] temporary disability and healing period.[192]

This provision does not change the methods of calculating maximum and minimum benefits for disability. The minimum benefit is thirty-six dollars per week or the injured employee's actual earnings, if less;[193] the maximum weekly benefit for total and partial disability is two hundred percent of the state average weekly wage;[194] and the maximum weekly benefit for scheduled losses is one hundred eighty-four percent of the state average weekly wage.[195]

Section 18 Income Benefits for Death.

(a) If an injury or disease causes death, income benefits shall be payable in the amount and to or for the benefit of the persons following, subject to the maximum limits specified in Section 18(c):

(1) To the surviving spouse for life or until remarriage eighty percent per week of the average spendable weekly earnings of the deceased.

(2) Two years' benefits in a lump sum shall be payable to the surviving spouse upon remarriage if there is no child.

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190. *Id.* § 85.34(2).
191. *Id.* § 85.34(3).
192. *Id.* § 85.37.
193. *Id.*
194. *Id.* §§ 85.34(3), .37.
195. *Id.* § 85.34(2).

(3) To the child or children, if there is no surviving spouse, eighty percent per week of the average spendable weekly earnings of the deceased divided among such children share and share alike.

(4) The income benefits payable on account of any child under this section shall cease when he dies, marries, or reaches the age of 18, or when a child over such age ceases to be physically or mentally incapable of self-support, or if actually dependent ceases to be actually dependent, or, if enrolled as a full-time student in any accredited educational institution, ceases to be so enrolled or reaches the age of 25. A child who originally qualified as dependent by virtue of being less than 18 years of age may, upon reaching age 18, continue to qualify if he satisfies the tests of being physically or mentally incapable of self-support, actual dependency, or enrollment in an educational institution.

(5) Where a deceased employee leaves a surviving spouse and a dependent child or children the Director may make an order of record for an equitable apportionment of the compensation payments.

(6) To anyone actually dependent, if they are not a surviving spouse or child. If there should be more than one of such dependents, the total income benefits payable on account of such dependents shall be divided share and share alike.

(7) A person ceases to be actually dependent when his income from all sources exclusive of workers' compensation income benefits is such that, if it had existed at the time as of which the original determination of actual dependency was made, it would not have supported a finding of dependency. In any event, if the present annual income of an actual dependent person including workers' compensation income benefits at any time exceeds the total annual support received by the person from the deceased employee, the workers' compensation benefits shall be reduced so that the total annual income is no greater than such amount of annual support received from the deceased employee. In all cases, a person found to be actually dependent shall be presumed to be no longer actually dependent three years after such time as of which the person was found to be actually dependent. This presumption may be overcome by proof of continued actual dependency as defined in this subsection and Section 2(t).

(b) *Change in Dependents.* Upon the cessation of income benefits under this section to or on account of any person, the income benefits of the remaining persons entitled to income benefits for the unexpired part of the period during which their income benefits are payable shall be that which such persons would have received if they had been the only persons entitled to income benefits at the time of the decedent's death.

(c) The maximum weekly income benefits payable for all beneficiaries in case of death shall not exceed eighty percent of the average spendable weekly earnings of the deceased as calculated under Section 19, subject to the maximum limits in Section 17, with a minimum of thirty-six dollars per week or the actual weekly earnings of the deceased, whichever is the lesser. The classes of beneficiaries specified in paragraphs (1) and (3) of this section shall have priority over all other beneficiaries.

(d) The minimum and maximum income benefits as so determined in Section 18(c) that are in effect on the date of the occurrence of the injury or disease shall be applicable for the full period during which income benefits for death are payable.

Section 18 commentary

Subsection (a) This subsection restates the existing provisions in which benefits for the death of a worker are payable to the surviving spouse (either husband or wife) for life or until remarriage.[196] Thereafter, benefits may be payable to a dependent child or to dependent children until age eighteen,[197] or until age twenty-five if the child is actually dependent, or during mental or physical disability.[198]

The present provision is retained and the director may apportion the benefits between a surviving spouse and dependent children of a prior marriage of the deceased.[199] The draft makes it clear that actual dependents may receive death benefits, but the surviving spouse and children have priority.[200]

To clarify the issue of partial dependency and to avoid frivolous claims for nominal sums, the draft provides a threshold requirement. A person is considered to be "actually dependent" only if he receives more than half of his support from the employee and only if his earnings are not equal to the support received from the decedent.[201]

As noted many times elsewhere, provisions relating to death became scattered throughout the existing chapters on workers' compensation and occupational disease compensation.[202] The draft brings these various sections together. This section defines its own maximum and minimum benefits.[203]

Section 19 Determination for Average Weekly Wage.

Except as otherwise provided in this act, the average weekly wage of the injured employee at the time of the occurrence of the injury or disease, rounded to the nearest dollar, shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) In the case of an employee who is paid on a weekly pay period basis, the weekly gross earnings.

(b) In the case of an employee who is paid on a biweekly pay period basis, one-half of the bi-weekly gross earnings.

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196. *Id.* § 85.31(1)(a).

197. *Id.* § 85.31(1)(b) (if the child is a full-time student, that fact is prima facie evidence of actual dependency).

198. *Id.* § 85.1(3) (this is determined at the time of the injury causing death, and the determination continues for the duration of incapacity from earning).

199. *Id.* § 85.43.

200. *But cf.* IOWA CODE § 85.44 (1981) (defines dependent as "one actually dependent").

201. *See* draft § 2(t) *supra.*

202. IOWA CODE §§ 85.31, .42-.44 (1981).

203. *Id.* § 85.31(1)(d).

(c) In the case of an employee who is paid on a semimonthly pay period basis, the semimonthly gross earnings multiplied by twenty-four and subsequently divided by fifty-two.

(d) In the case of an employee who is paid on a monthly pay period basis, the monthly gross earnings multiplied by twelve and subsequently divided by fifty-two.

(e) In the case of an employee who is paid on a yearly pay period basis, the weekly earnings shall be the yearly earnings divided by fifty-two.

(f) In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the occurence of the injury or disease.

(g) In the case of an employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the occurence of the injury or disease, his weekly earnings shall be computed under subsection (f), taking the earnings, not including overtime or premium pay, for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen calendar weeks immediately preceding the occurrence of the injury or disease and had worked, when work was available to other employees in a similar occupation.

(h) If at the time of the occurrence of the injury or disease the hourly earnings have not been fixed or cannot be ascertained, the earnings for the purpose of calculating compensation shall be taken to be the usual earnings for similar services where such services are rendered by paid employees.

(i) In occupations which are exclusively seasonal and therefore cannot be carried on throughout the year, the weekly earnings shall be taken to be one-fiftieth of the total earnings which the employee has earned from all occupations during the twelve calendar months immediately preceding the occurrence of the injury or disease.

(j) In computing the compensation to be allowed a volunteer fireman or reserve peace officer his earnings as a fireman or reserve peace officer shall be disregarded and he shall be paid the maximum compensation allowable under this act.

(k) If the employee was an apprentice or trainee when injured, and it is established under normal conditions his earnings should be expected to increase during the period of disability, that fact may be considered in computing his weekly earnings.

Section 19 commentary

This section adopts the present Iowa statute which contains formulas for arriving at an average weekly wage,[204] except that it drops the present provision for determining statutory wages of "an employee who earns either no wages or less than the usual weekly earnings of a regular full-time adult laborer in the line of industry in which [he] is injured in that locality . . . ."[205] Since the calculation is difficult to make, it is dropped in favor of subsection (h) which provides that if at the time of injury the hourly earnings have not been fixed or cannot be ascertained, the earnings, for purposes of calculating compensation, shall be the usual earnings for similar paid services.[206] An example where this section is unnecessary is when an unpaid religious worker performs skilled services such as nursing.

Naturally, in other cases the minimum benefits, as set out in section 18, would apply. The draft adopts the existing sections for calculating weekly benefits for volunteer firemen and reserve peace officers and trainees.[207]

> **Section 20 Payment for Second Injuries from Special Fund.**
>
> (a) If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury or disease, which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury or disease if there had been no pre-existing disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Special Fund" created by this act the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.
>
> (b) Any benefits received by any such employee, or to which he may be entitled, by reason of such increased disability from any state or federal fund or agency, to which said employee has not directly contributed, shall be regarded as a credit to any award made against said second injury fund as aforesaid.

Section 20 commentary

The original conception of the Second Injury Fund is illustrated by the following example. If a one-eyed man applies for a job, the prospective employer might reason that if he hired him and he loses his one remaining eye he will be required to pay permanent total disability benefits.[208] The solu-

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204. *Id.* § 85.36.

205. *Id.* § 85.36(10).

206. *See* draft § 19(h) *supra.*

207. IOWA CODE § 85.36(10(a)-(b) (1981).

208. *See* Jennings v. Mason City Sewer Pipe Co., 187 Iowa 967, 174 N.W. 785 (1919)(the statute was later amended to prevent the employer from having to pay permanent total disability benefits in this situation).

tion of the Second Injury Fund is to provide a separate fund which pays some of the difference between the scheduled loss of the second eye and permanent total disability.

The Iowa Second Injury Fund is a so-called "narrow" one in that it covers only first or second injuries involving total or partial loss or loss of use of the hands, arms, eyes, feet or legs.[209] This is retained in the draft.

In another section, however, the draft places the provisions of the second injury law dealing with the financing of the fund, its management and protection.[210] The purpose for this separation is that by-and-by the General Assembly must consider financing for long-term disability cases and other programs. In that case, the fund is already set up and available for use.

Section 21 Benefit Adjustment Study.

The Director shall study the feasibility of providing additional protection from inflation for workers entitled to total disability benefits and dependents entitled to death benefits and the method or methods of adjusting benefits therefor and report his findings and recommendations to the General Aseembly not later than March 1, 1983.

PART IV

Procedures

Section 22 Record of Injury or Death.

Every employer shall keep a record of each injury to any of his employees as reported to him or of which he otherwise has knowledge. Such record shall include a description of the injury, a statement of any time during which the injured person was unable to work because of the injury, a description of the manner in which the injury occurred. These records shall be available to the Director at reasonable times and under reasonable conditions. Upon refusal of an employer to make the records of injury available to the Director, the Director may enter an order requiring the employer to do so.

Section 22 commentary

This section requires the employer to keep a record of all work injuries of which he has knowledge. This is not required by any provision of the present act.[211] The section permits the workers' compensation agency to inspect wage records, but this probably is a relic from a 1912 study commission draft which recommended a state insurance association instead of pri-

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209. IOWA CODE § 85.64 (1981). *See* Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1979); Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); Irish v. McCreary Saw Mill, 175 N.W.2d 364 (Iowa 1970). *See also*, Dahl, *The Second Injury Fund, Proceedings of the 18th Annual Workers' Compensation Symposium* (1980); Jackwig, *The Second Injury Fund*, 28 DRAKE L. REV. 889 (1980).

210. *See* draft § 48 *infra*.

211. An employer must keep a record of injuries, alleged by an employee, resulting in incapacity for a period longer than one day. *See* IOWA CODE § 86.11 (1981).

vate insurance. Such wage records would be of concern to it.[212]

Most employers keep records of injuries in the event a later claim arises; consequently, this requirement is not burdensome.

> **Section 23 Report of Injury or Death.**
>
> (a) Within fifteen days after the employer has notice or knowledge of the occurrence of a death or any injury or disease which constitutes a permanent impairment, or which renders the injured person unable to perform a regularly established job at his place of employment during any portion of his regular shift for more than three days subsequent to the day of the occurrence of the injury or disease, a report thereof shall be made in writing by the employer to the Director, upon a form approved by the Director for that purpose, setting forth (1) the name, address, and business of the employer; (2) the name, address and occupation of the employee; (3) the nature of the injury or disease and a description of the manner in which it occurred; (4) the year, month, day and hour when, and the particular locality where injury or death occurred; and (5) such other information as the Director may prescribe by regulation. In addition, within the same period, except where claim has been filed under Section 26(e), if the case involved death or more than three days' disability, the employer shall notify the Director in writing whether payment shall be made without an award or controverted. If the right to compensation is controverted, the grounds shall be stated, but the stating of such grounds shall not prevent the later assertion of other defenses.
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> (b) The mailing to the Director of any such written report as required in subsection (a) of this section within the time prescribed, shall be a compliance with this section.
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> (c) Whenever an employer willfully fails to file or refuses to file a report required by Section 23(a) within twenty days after the Director demands he do so, the Director may order the employer to appear and show cause why he should not be subject to civil penalty of one hundred dollars for each occurrence. After hearing, the Director shall enter a finding of fact and may enter an order requiring such penalty to be paid into the special injury fund created by Section 48. In the event the civil penalty assessed is not voluntarily paid the Director may file a certified copy of such finding and order with the clerk of the court for the district in which the employer maintains a place of business. If the employer maintains no place of business in this state, service shall be made as provided in this act for nonresident employers. In such case the finding and order may be filed in any court of competent jurisdiction within this state.
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> The Director may thereafter petition the court for entry of judgment upon such order, serving notice of such petition on the employer and any other person in default. If the court finds the order valid, the court shall enter judgment against the person or persons in default for the amount due under the order. No fees shall be required for the filing of the order

212. IOWA CODE § 86.10 (1981).

or for the petition for judgment, or for the entry of judgment or for any enforcement procedure thereupon. No supersedeas shall be granted by any court to a judgment entered under this section.

When a report is required under Section 23(a) and that report has been filed with the Director the insurance carrier shall be responsible for filing the report.

(d) The report to the Director shall be without prejudice to the employer or insurance carrier and shall not be evidence of any matter or admissible in any administrative or judicial proceeding except as to notice or knowledge of injury, disease or death.

Section 23 commentary

The primary purposes of this draft are to simplify procedures, reduce unnecessary paper work and avoid interference by the agency. Some government activity in workers' compensation is necessary, but in a time of tight government budgets and public antipathy towards government interference, unnecessary reports must be avoided.

The reporting procedure in this section is the first step in the "direct payment" method of compensation administration which has been adopted by the proposed draft to replace the present "agreement" plan. The "direct payment" procedure suggested here is simple, efficient and requires less government participation than the present "agreement" scheme which requires a review by the agency.[213] The process begins with the report of injury, disease or death. This report must be made only when, as now, there has been a death, permanent disability, or loss of time more than three days subsequent to the day of injury.[214]

This section assembles the various sections of the present act which deal with agency enforcement of reporting requirements and adopts the provision of the present act which provides that the reports are without prejudice to the employer or carrier.[215]

Section 24 Method and Time of Payment of Compensation.

(a) Compensation under this act shall be paid promptly, and directly to the person entitled thereto, without an award, except where the right to compensation is controverted by the employer.

(b) The first installment of income benefits shall become due on the fifteenth day after the employer has notice or knowledge of the employee's disability or death due to injury or disease, on which date all income benefits then due shall be paid. Thereafter, income benefits shall be paid in weekly installments, except where the parties agree that payment in installments should be made at some other period.

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213. *Id.* § 86.13. *See* Davis, *The Iowa Law of Workmen's Compensation*, 107-10 (1967). Claims analysts on the agency staff who review agreements would be redundant and funds freed by their termination would be available for the new appeals board, director and worker's compensaton judges.

214. IOWA CODE § 86.11 (1981).

215. *Id.* §§ 86.11-.12.

(c) Upon making the first payment of income benefits, and upon stopping or changing of such benefits for any cause other than final payment under Section 27(c), the employer shall immediately notify the Director, in accordance with a form prescribed by the Director, that the payment of income benefits has begun or has been stopped or changed.

(d) If payments have been made without an award, and the employer then elects to controvert, the notice of controversy shall be mailed to the beneficiary and a copy filed with the Director no less than thirty days before the due date of the first omitted payment under this election; except that the employer may stop income benefits for disability immediately when an employee returns to work.

(e) If, after the payment of compensation without an award, the employer elects to controvert the right to compensation, the payment of compensation shall not be considered a binding determination of the obligations of the employer as to future compensation payments but shall be a credit against benefits awarded in a compensation order. The acceptance of compensation by the employee or his dependents shall not be considered a binding determination of their rights under this act.

(f) The person entitled to compensation may direct the employer in writing to pay his compensation to his attorney on his behalf.

Section 24 commentary

This section establishes the basic direct payment procedure. It begins with the forthright statement that compensation shall be paid promptly and directly to the person entitled thereto without an award, except where the right to compensation is controverted.

Thus, in a great majority of cases, there will be no need for administrative involvement. In the ordinary case, payments will continue in this manner until the employer terminates or changes the process of payment. For example, if the employee is disabled for six weeks, and resumes his regular employment at the beginning of the seventh week, the employer will simply stop payments at the beginning of the seventh week, and will notify the Director of this fact.

This informality does not prejudice the rights of any party, since the employer may change his mind at any point and decide to controvert the right to compensation within thirty days before the first omitted payment.[216] The employee, in turn, can accept direct payment of compensation

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216. This is the procedure mandated under the present "agreement" scheme. *See* Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (Iowa 1978). The court concluded that due process of law, as guaranteed by both the U.S. Constitution and the Iowa Constitution (Art. I § 9), requires that prior to termination of workers' compensation benefits, except where a worker has demonstrated recovery by returning to work, a recipient is entitled to at least thirty days notice and an opportunity to be heard. The notice, at a minimum, must contain the following information: that termination is contemplated; the date the termination is to occur; the reason or reasons for the termination; that the claimant can submit any documents or other evidence to contradict these reasons; that the claimant is to submit such documents and must be advised thereafter if the termination is still contemplated and that the claimant has a right

without being bound to a determination that this is the full extent of compensation.

If the claimant is still entitled to benefits but moves away or is unavailable, he may, according to the draft, direct the employer, in writing, to pay the compensation to his attorney on his behalf. The attorney, in turn, will transmit the compensation to the plaintiff wherever he is.

Section 25 Notice of Injury, Disease or Death.

(a) Notice of injury, disease or death shall be given to the employer within ninety days after the date of the occurrence of the injury, disease or death, or within ninety days after the employee or his dependents know of the injury or disease and their relationship to the employment.

(b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or, in case of death by any person claiming to be entitled to compensation for such death, or by a person on his behalf.

(c) Notice shall be given to the employer by delivering it to him or his representative or by sending it by mail addressed to him or such agent at the last known place of business of either. Such notice may be given to the employer, partner, superior, foreman, agent, or officer of the employer.

(d) Failure to give such notice shall not bar any claim under this act (1) if the employer (or his representative as identified in subsection (c) above) or the carrier had knowledge of the injury, disease or death, or (2) unless objection to such failure is raised in the answer as filed with the Director in accordance with Section 26(d).

Section 25 commentary

This notice is important because it is the beginning point of the employer's obligation to pay compensation, whether under the direct payment procedure, or under the claims procedure in controverted cases. It adopts the existing Iowa law, which bars the claim unless the employer is notified or has obtained knowledge of the occurrence of the injury or disease within ninety days.[217]

Section 26 Time Limitation for Filing of Claims.

(a) The right to compensation shall be barred unless a claim therefor is filed within two years after the occurrence of the injury or disease or

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to petition for a review-reopening under section 86.34 of the Code. The court has yet to address a case regarding the issue of whether the *Auxier* termination procedures are necessary where a private, rather than public, person is the employer. The termination procedures are probably necessary because the court decided the case on due process grounds and not on the basis that a governmental function was involved. Five years elapsed between the time a deputy industrial commissioner, acting as claims adjuster for state government, cut off compensation and the time claimant won her case and received compensation. *But see* 27 DRAKE L. REV. 736 (1977-78) wherein a student-writer concludes the *Auxier* procedures are unfair to *insurers*.

217. IOWA CODE § 85.23 (1981).

within three years after last payment of income benefits. The right to income benefits for death shall be barred unless a claim therefor is filed within two years after the death or within two years after the dependents know or by exercise or reasonable diligence should know the possible relationship of the death to the employment. However, in cases in which the nature of the injury or disease or its relationship to the employment is not known to the employee the time for filing claim shall not begin to run until the employee knows or by exercise of reasonable diligence should know of the existence of the injury and its possible relationship to his employment or disease.

(b) No claim or proceedings for benefits shall be maintained by any person other than the injured employee; his or her dependent or his or her legal representative if entitled to benefits.

(c) If a person who is entitled to compensation under this act is incompetent or a minor, the time for filing claim under subsection (a) shall begin to run even though such person has no guardian or other authorized representative.

(d) Notwithstanding the terms of chapter 17A, the filing with the Director of an original notice and petition as provided in Section 33(a) shall be the only act constituting the filing of a claim under this section. The other party or parties in a contested case proceeding shall respond by answer or other pleading or motion within the time set by rule after service of the original notice and petition. If an answer is not filed, the Director or his workers' compensation judge shall proceed to determine the rights of the parties.

(e) Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this act, the limitation of time prescribed in subsection (a) of this section shall not begin to run earlier than from the date of final termination of such action.

Section 26 commentary

The statute of limitations for claims for original proceedings remains at two years.[218] The claim may be brought within three years after the last payment of weekly compensation. The same provision is contained in the present act.[219]

A change in subsection (e) permits an employee who is defeated in a civil action to file his workers' compensation claim after the denial. The purpose of this change is to avoid the common problem of the employee maintaining both a civil case and a workers' compensation case at the same time, thereby cluttering the courts and agency.

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218. *Id.* § 85.26(1). Subsection (b) adopts an existing provision. *See id.* § 85.26(4). Subsection (c) adopts the doctrine in Otis v. Parrott, 233 Iowa 1039, 8 N.W.2d 708 (1943). Subsection (a) extends the time for insidious ailments. *See* Orr v. Lewis Central School District, 298 N.W.2d 256 (Iowa 1980).

219. IOWA CODE § 85.26(2) (1981).

Section 27 Payment of Compensation.

(a) If the right to compensation has not been controverted and any amount of compensation payable to the beneficiary without an award is not paid within 14 days after it becomes due, as provided in Section 24(b), there shall be added to such unpaid compensation an amount equal to ten percent thereof, which shall be paid to the beneficiary at the same time as, but in addition to, such amount due, and without regard to any limitation otherwise applicable upon the amount of the compensation.

(b) If review is had, interest at the rate of five percent shall be added to the award from the date of the original award of the Director or hearing officer.

(c) Within 16 days after the final payment of income benefits has been made, the employer shall send to the Director a notice, in accordance with a form prescribed by the Director, stating that such final payment has been made, the total amount of income benefits paid, the name of the employee, and of any other person to whom income benefits have been paid, the date of the injury or death, the dates on which income benefits have been paid, and the period covered by the payment. If the employer fails to notify the Director within such time, the Director may enforce compliance as provided in Section 23(c).

(d) Whenever the Director deems it advisable or necessary to protect a beneficiary, he may require an employer who has not secured the payment of compensation to his employees as required by this act to make a deposit of money with the Treasurer of State to secure the prompt and convenient payment of compensation payable under an award or modified award. Payments therefrom upon any such award shall be made upon order of the Director.

(e) The employer's liability for compensation under this act, or any part hereof, may be discharged by the payment of a lump sum equal to the present day value of future income benefits commuted, computed at five percent true discount computed annually. The Director shall adopt tables based on reliable data for determination of (1) the probability of the beneficiaries death before the expiration of the period to which he is entitled to income benefits and (2) the probability of the remarriage of a surviving spouse. The probability of the happening of any other contingency affecting the duration of the income benefits shall be disregarded.

(f) Unless otherwise intended or agreed upon when the employer pays wages in whole or part during an injured employee's disability, he shall be entitled to a credit not to exceed the amount of income benefits due for the same period when such wages are paid except for scheduled benefits paid under Section 16(c) to which this subsection shall not apply.

(g) When the employer pays insurance premiums in whole or part for, or contributes to, a nonoccupational group plan for income benefits or medical and related benefits and thereafter such plan pays benefits to or on behalf of an employee for injury or disease payable under this act, the employer shall be entitled to a credit for an amount equal to the payments made but not to exceed the amount of income benefits or med-

ical and related benefits due for the same period when such income benefits and medical and related benefits are paid. Such amounts so credited shall be deducted from the payments made under these chapters. Any nonoccupational group plan shall be reimbursed in the amount so deducted. This section shall not apply to payments made under any group plan which would have been payable even though there was an injury or disease payable under this chapter. Any employer receiving such credit shall keep such employee safe and harmless from any and all claims or liabilities that may be made against them by reason of having received such payments only to the extent of such credit.

(h) A person against whom claim is made under this act and the person making the claim as an alleged beneficiary, either in or prior to the filing of a contested case proceding, where a right to compensation is in controversy may make a compromise settlement. The settlement shall be in writing, signed by the parties and filed with the Director.

(i) If the person making claim under subsection (e) or (h) is represented by a lawyer licensed to practice law in this state, the settlement shall be final and a bar to further rights under the act according to its terms when filed. If the person making claim is not represented by a lawyer licensed to practice law in this state, or if the Director does not approve the settlement in writing the settlement shall be subject to modification under Section 35.

Section 27 commentary

Subsection (a) This subsection provides a reasonable time for the payment of compensation and a penalty for unpaid compensation. The penalty is easier to determine than the present provision setting interest.[220]

Subsection (b) When an award has been made, failure to pay results in an additional penalty to the delinquent employer.

Subsection (c) At the present time, the agency has the authority to direct employers or carriers to report upon benefits paid.[221] This subsection does the same thing and also provides for a penalty.

Subsection (d) This subsection is new but necessary. At least one large transit firm is deliberately going uninsured and a large local cement plant did the same, went bankrupt and caused great hardship to employees who were entitled to workers' compensation benefits. If the Director is aware of such a situation he may require the employer to make a deposit with the treasurer of state. There is no such authority at the present time.

Subsection (e) This subsection permits commutation of benefits to which an employee is definitely entitled.[222]

Subsections (f) and (g) These provisions give credit to an employer for payments made to an employee as wages[223] or as company-financed group

220. *Id.* § 85.30.
221. IOWA AD. CODE 500-3.1(2) and 3.1(3).
222. IOWA CODE §§ 85.45-.48 (1981).
223. IOWA AD. CODE 500-8.4 (credit each week only to the amount of compensation

benefits.[224] This is identical to the present law.

Subsection (h) This section authorizes the compromise of special case settlements. The same provision currently exists.[225]

Subsection (i) If the claimant is represented by a lawyer then the parties may enter into commutation agreements and special case settlements without approval of the workers' compensation agency. If the claimant is not represented by a lawyer then the settlements will become final at the time they are approved by the agency. If the claimant is not represented by a lawyer, and the agency does not approve, then either a commutation or a compromise special case settlement is subject to reconsideration by the agency within three years after the payment. This changes the existing law by giving the parties the right to enter into settlements without the approval of the agency.[226] However, to prevent unscrupulous employers or carriers from settling cases for less than their full value, the claimants may reopen the case if they do not have a lawyer and if the agency does not specifically review and approve them.

Section 28 Minors or Incompetents.

(a) If a guardian or legal representative has been appointed for a person who is incompetent or a minor, payment of income benefits under this act shall be made to the guardian or legal representative.

(b) If no guardian or legal representative has been appointed, and notwithstanding any provision of law to the contrary, the income benefits payable to a minor or incompetent person may, upon approval of the Director, after hearing, be paid by the employer in whole or in such part as the Director may determine for and on behalf of such minor or incompetent directly to the person caring for, supporting, or having custody of such minor or incompetent without requiring the appointment of a guardian or other legal representative. The Director may petition a court of competent jurisdiction for appointment of a guardian or other representative to receive income benefits payable to, or to represent in compensation proceedings, any person who is incompetent or a minor under this act.

(c) The Director may require of any guardian or other legal representative or of any person to whom income benefits may be paid under this provision, an accounting of the disposition of the funds received by the person under this act for and on behalf of such minor or incompetent.

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224. Iowa Code § 85.38(2)(1981). *See* Heck v. Geo. A. Hormel Co., 260 N.W.2d 421 (Iowa 1977).

225. Iowa Code § 85.35 (1981). Rich v. Dyna Technology, Inc., 204 N.W.2d 867 (Iowa 1973) (compromise settlement does not constitute payment of compensation for set-off under non-occupational plan).

226. Iowa Code § 17A.10 (1981). The Iowa Administrative Procedure Act encourages informal settlement of controversies. *But see* § 86.27 which requires approval by the Industrial Commissioner. The procedures are infinitely complex. Iowa Ad. Code 500-6.1-6.5.

(d) Nothing in this act shall be deemed to preclude the payment of income benefits directly to a minor or incompetent with the approval of the Director.

(e) The payment of income benefits by the employer in accordance with the order of the Director shall discharge the employer from all further obligations as to such income benefits.

Section 28 commentary

Under existing Iowa law, the district court shall act as trustee for minors or incompetents who are entitled to benefits.[227] The draft changes and improves this by permitting the Director to order compensation payments to some other person on behalf of the minor or incompetent. The Director, however, has the authority to seek the appointment of a guardian or other representative if he believes it necessary.

Section 29 Recording and Reporting of Payments.

(a) Every carrier shall keep a record of all payments of compensation made under the provisions of this act, and of the time and manner of making such payments.

(b) The employer shall furnish, upon request of an injured employee or dependent or any legal representative acting for such person, a statement of the wages, and other matters relating thereto during the year or part of the year that such employee was in the employment of such employer for the year preceding the injury, but not more than one report shall be required on account of any one injury. On failure of the employer to furnish such statement of earnings for thirty days after receiving written request therefor from an injured employee, the employee's agent, attorney, dependent, or legal representative, such employer shall be guilty of a simple misdemeanor.

Section 29 commentary

This is a routine provision followed by all carriers.

Section 30 Invalid Agreements.

(a) No agreement by an employee to pay any portion of premium paid by his employer or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation as required by this act shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this act shall be guilty of [misdemeanor] and upon conviction thereof shall be punished by a fine of not more than one thousand dollars.

(b) No agreement by an employee to waive his right to compensation under this act shall be valid. However, any person who has some physical defect which increases the risk of injury, may, subject to the approval of the industrial commissioner, enter into a written agreement with his employer waiving compensation for injuries which may occur directly or in-

227. Iowa Code §§ 85.40-.50 (1981).

directly because of such physical defect, provided, however, that such waiver shall not affect the employee's benefits to be paid from the Special Fund established under Section 48.

Section 30 commentary

Workers' compensation in the United States has traditionally been noncontributory. Both the present law and subsection (a) prohibit the circumvention of this intention by any device designed to attain an indirect contribution by the employee to the cost of compensation insurance.[228] Subsection (b) is a familiar provision and, as in Iowa, an employee may not waive compensation except in cases of a physical defect.[229]

Section 31 Assignment and Exemption from Claims of Creditors.

No assignment, release or commutation of income benefits due or payable under this act, except as provided by this act, shall be valid, and such income benefits shall be exempt from all claims of creditors, or other debts and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

Section 31 commentary

This provision, removes compensation payments from the reach of assignments, attachments and the like, and is a normal adjunct of a compensation act. The reason for this provision is that the protective purpose of the legislation would be defeated if the income payments, upon which the injured worker and his family depend, could be taken, on account of various debts or perhaps improvident commitments made by the beneficiary. It adopts the existing Iowa law.[230]

Section 32 Compensation Lien Against Assets.

In case of insolvency or bankruptcy, every liability for compensation under this act shall constitute a first lien upon all the property of the employer liable therefor, paramount to all other claims or liens except for wages and taxes, and such liens shall be enforced by order of the court.

Section 32 commentary

This also is a familiar provision; the substance of which is in the existing Iowa law.[231]

Section 33 Hearing Procedure.

(a) Upon petition of an employee, beneficiary or employer, and when issues in a contested case cannot be resolved by pre-hearing conferences or otherwise, the Director shall order that a hearing be held to determine the questions at issue. Evidence, procedure and process in such a contested case proceeding shall be governed by chapter 17A except as specif-

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228. *Id.* § 85.54.
229. *Id.* § 85.55.
230. *Id.* § 627.13.
231. *Id.* § 87.9.

ically provided in this act. Filing the petition and an original notice with the Director shall constitute the commencement of the contested case proceeding.

(b) The petitioning party in a contested case proceeding under this act shall deliver a copy of the original notice and petition to the other parties in the manner required by Section 17A.12(1). Such petitioning party may serve a nonresident employer in the following manner:

(1)(a) By filing a copy of said notice with the Secretary of State.

(b) By mailing to such employer within ten days after said filing with the Secretary of State, by certified mail with return receipt requested addressed to the nonresident employer at his last known residence or place of abode, a copy of said notice on which shall be noted the date of filing of the copy with the Secretary of State.

(2) In lieu of mailing said copy of notice to the nonresident employer in a foreign state, the petitioning party may cause the same to be personally served or delivered in the foreign state on such employer by any adult person not a party to the proceedings, by delivering said copy of notice to the nonresident employer or by offering to make such delivery in case delivery is refused.

(3) Proof of the filing of a copy of said notice with the Secretary of State and proof of the mailing or personal delivery of the copy to said nonresident employer shall be made by affidavit of the party doing said acts. All affidavits of service or delivery shall be endorsed upon or attached to the original of the papers to which they relate and all such proofs of service or delivery, including the certified mail return receipt shall be forthwith filed with the original of the papers.

(4) The Secretary of State shall keep a record of all notice filed with him pursuant to Section 85.3 and this section and shall not permit said filed notices to be taken from his office except on an order of court but shall, on request and without fee, furnish any nonresident employer or his insurer with a certified copy of any notice in which he is named.

(5) The term nonresident employer as used in Section 85.3 and this section shall not be construed to mean foreign corporations lawfully qualified to transact business within the State of Iowa under chapter 494 or chapter 496A.

(c) Following the presentation of evidence at hearing, the Director or workers' compensation judge who was the presiding officer shall determine the questions at issue and file a decision thereon in the office of the Director within thirty days after submission of the case to the presiding officer.

(d) The Director must adopt rules and regulations of practice and procedure consistent with this act for the hearing, disposition and adjudication of cases, the text of which shall be published and readily available. Such rules shall include provision for procedures in the nature of conferences in order to dispose of cases informally, or to expedite claim adjudication, narrow issues, and simplify the methods of proof at hearings.

(e) In making an inquiry or conducting a hearing the Director or his hearing officer shall not be bound by common law or statutory rules of

evidence or by technical or formal rules of procedures, except as provided by this act, but may make such inquiry or conduct such hearing in such manner as best to ascertain the rights of the parties.

(f)(1) The Director or a workers' compensation judge may appoint or may direct a party to furnish at the party's initial expense a certified shorthand reporter to be present and report, or to furnish mechanical means to record, and if necessary, transcribe proceedings of any contested case under this act and fix the reasonable amount of compensation for such service. The charges shall be taxed as costs and the party initially paying the expense of the presence or transcription shall be reimbursed. The reporter shall faithfully and accurately report the proceedings.

(2) Notwithstanding the requirements of Section 17A.12 subsection 7, a certified shorthand reporter appointed may maintain and thus have the responsibility for the recording or stenographic notes for the period required by Section 17A.12 subsection 7.

(g) All powers, authority, and duties of the Director in respect to adjudications and hearings shall apply to a workers' compensation judge.

Section 33 commentary

The Iowa Administrative Procedure Act controls hearings before the workers' compensation agency.[232] However, there are peculiar requirements in the Workers' Compensation Act and these are set out in this section.

It is expected that the parties will resort to formal hearings only after every other kind of informal procedure has failed.[233]

The draft repeats the provisions which concern service of notice to the employer when a case has been contested.[234] It requires a prompt decision by the agency of contested case proceedings.[235] It also authorizes the Direc-

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232. *Id.* ch. 17A; § 86.14; IOWA AD. CODE 500-4.1-.38. IOWA CODE § 17A.9 (1981) authorizes declaratory rulings by an agency and the Industrial Commissioner has adopted rules for them. *See* IOWA AD. CODE 500-5.1.

233. IOWA AD. CODE 500-4.19-4.22.

234. IOWA CODE §§ 17A.12(1), 85.3(2), 86.36 (1981).

235. The author reviewed cases he tried before the agency and found that the average length of time between submission of the case and decision was more than six months. The agency maintains records for the hearing officers on lag, but does not release them. Inasmuch as all proposed decisions by hearing officers may be appealed to the agency, both now and under the provisions of the Draft, until the General Assembly adopts the Draft, the agency should consider speeding up the decision-making process by having the hearing officers prepare a proposed decision by using a check-list. Proposed decisions dispose of most contested case proceedings and requirements for the form of decisions, dictated by the Iowa Supreme Court, could more easily be followed by both the hearing officers and the agency appellate body. *See* Hawk v. Jim Hawk Chevrolet-Buick, Inc., 282 N.W.2d 84 (Iowa 1979); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1979); Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974)(decisions should be reasoned and show how the hearing officer arrived at the decision); Catalfo v. Firestone Tire & Rubber Co., 213 N.W.2d 506 (Iowa 1973). Ch. 414, Lab. § 2339 (1980) amends the CAL. LAB. CODE § 123.5 (Deering 1971) to prohibit payment of referees' salary if any case remains pending and undetermined 90 days after submission.

tor to adopt rules and regulations of practice and procedure[236] and does not bind him to technical or formal rules.[237] Finally, it authorizes a hearing officer to appoint a shorthand reporter.[238] Consequently, it is clear that the workers' compensation judges, in appropriate cases, have all the powers, authorities and duties of the Director.[239]

> **Section 34 Appeals to the Board.**
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> (a) A party aggrieved by a decision, order, ruling, finding or other act of the Director or a workers' compensation judge in a contested case proceeding under this act may appeal to the Workers' Compensation Appeals Board in the time and manner the Board prescribes by rule. The hearing on appeal shall be in Polk County unless the Board shall order it held elsewhere.
>
> (b) In addition to the provisions of Section 17A.15, the Board may affirm, modify or reverse the decision, order, ruling, finding or other act of the Director or workers' compensation judge or remand the case to the Director for further proceedings and action.
>
> (c) In addition to the provisions of Section 17A.15, the Board by rule may limit the presentation of evidence on appeal to it.
>
> (d) The appealing party, or first party to file appeal if more than one party appeals, shall file a transcript of the evidence in the contested case proceeding held pursuant to Section 33 with the Board within thirty days after filing the appeal. If the appeal to the Board is limited to certain issues the appealing party may file a transcript of only the relevant evidence. The Board may order additional parts of the transcript if it finds that more than a limited transcript is necessary for it to act.
>
> (e) The Board shall make a decision disposing of the issues presented by the appeal and file a decision within sixty days of completion of submission of the case to the Board.

Section 34 commentary

An appeal, from the order of the workers' compensation judge or Director, is made to the new Workers' Compensation Appeals Board, which has power to review both findings of fact and conclusions of law.[240] It may take additional evidence if it chooses. It would hold hearings in Polk County or elsewhere and, after reviewing the evidence, file a decision within sixty days of completion of the submission of the case. The increased number of cases requires that a multi-member board replace the single Industrial Commissioner as an appeal body.

The setting of a time limit for the decisions of the judges, Director and Board is consistent with the purpose of workers' compensation, which is to provide rough and speedy justice.

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236. IOWA CODE § 86.8(1) (1981).
237. *Id.* § 86.18(1).
238. *Id.* § 86.19.
239. *Id.* §§ 86.3, .17.
240. *Id.* § 86.24.

Section 35 Application for Modification.

The Director may review any compensation case and make a determination upon application of any party in interest in accordance with the procedure in respect of hearings, which may terminate, continue, reinstate, increase, decrease, or otherwise properly affect the compensation benefits provided by this act, or in any other respect consistent with this act, modify any previous decision, award, or action including the making of an award of compensation if the claim had been rejected in whole or in part. A review may be had upon application of a party in interest filed with the Director at any time but not later than within three years after the date of the last payment of income benefits upon the following grounds:

(1) Change in the nature or extent of the employee's injury, wage-earning capacity, or status of the claimant; (2) fraud; or (3) clerical error or mistake in mathematical calculations.

Section 35 commentary

Unless specific grounds for review and modification of awards are provided in the act, unappealed compensation awards are final. However, there are legitimate reasons for modifying awards.[241] Accordingly, a party may reopen a case within three years after the date of the last payment of income benefits if there has been:

(1) A change in the nature or extent of the employee's injury, wage-earning capacity, or status of the claimant;

(2) Fraud; or

(3) Clerical error or mistake in mathematical calculations.

At the present time the district court, not the workers' compensation agency, is the only tribunal having jurisdiction to modify a case because of fraud.[242] The law is changed by this section.

Section 36 Authority of the Director and Board of Conducting Hearings.

(a) The hearings by the Director or a workers' compensation judge shall be held in the judicial district where the injury occurred. By written stipulation of the parties or by the order of the Director or a workers' compensation judge, a hearing may be held elsewhere. If the injury occurred outside this state, or if the proceeding is not one for benefits resulting from an injury or disease, the Director or a workers' compensation judge shall hold a hearing in Polk County or as otherwise stipulated by the parties or ordered by the Director.

(b) In a contested case proceeding the Director, a workers' compensation judge and the Board shall have the powers conferred upon them by Section 17A.13(1).

(c) In their decisions, the Board, the Director and workers' compensation judge presiding at a contested case proceeding shall state in the

241. *Id.* §§ 85.26(2), 86.14(2).

242. Whitters & Sons, Inc. v. Karr, 180 N.W.2d 444, 447 (Iowa 1970).

decision whether or not any other person assisted in preparation of the record or making the decision and, if so, the names of the other members of the Agency or other persons aside from the parties who communicated with them or gave aid and advice about the contested case proceeding, the substance of the communication, aid and advice, the educational and occupational qualifications of the persons communicating or giving aid and advice, and the amount of time the other members or persons spent working on the decision.

Section 36 commentary

This section gives the Director, workers' compensation judges and the Board the powers necessary to effectively conduct hearings and obtain evidence.[243] It adopts the procedures of the Iowa Administrative Procedure Act.[244]

Subsection (c) requires the hearing authority to state what persons may have assisted in writing the decision. In the past the Iowa agency has used law clerks to write decisions. It was particularly disconcerting for the author to have students in his workers' compensation law class at Drake University tell him they were writing a decision in cases in which he was involved. Persons conducting agency hearings must be lawyers and should write their own decisions without help.

Section 37 Judicial Review of Decision by Board.

(a) A party to a contested case proceeding under the act may seek judicial review under chapter 17A. Notwithstanding the terms of chapter 17A, a party may file a petition for judicial review in the district court of the county in which the hearing under Section 36(a) was held. Such a review proceeding shall be accorded priority over other matters pending in the district court.

(b) Notwithstanding the terms of chapter 17A, the names of other respondents shall precede that of the Board as respondent and the individual members of the Board shall not be named as respondents.

Section 37 commentary

Again, this provision for judicial review substantially adopts the procedures of the Iowa Administrative Procedure Act (IAPA).[245] The purpose of this section is to authorize the use of the IAPA.[246]

Section 38 Enforcement of Payment in Default and Penalties.

(a) In the event of default in the payment of compensation due under a compensation order or decision the person to whom such compensation is payable may, on or after the thirtieth day from the date upon which the compensation became due, and before the lapse of two

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243. IOWA CODE § 86.17(1) (1981).

244. *Id.*

245. *Id.*

246. *Id.* §§ 86.26, .29. *See* Polson v. Meredith Publishing Co., 213 N.W.2d 520, 524-25 (Iowa 1973)(an appeal to the court deprives the agency of jurisdiction).

years from such due date, make application for a supplementary compensation order declaring the amount of compensation in default. Such application shall be filed with the Director who shall forthwith notify the employer and the carrier of the filing of such application with opportunity to be heard in respect thereto. In the absence of an allegation and proof of fraud in the procurement of the compensation order or decision and if the Director determines that payment of compensation is in default, the Director shall make and file a supplementary compensation order declaring the amount of the compensation in default. In case the payment in default is an installment of an award of determinable amount, the Director may, in his discretion, declare the entire balance of the award as the amount in default. The applicant or Director may file a certified copy of the supplementary compensation order with the district court where judicial review of the agency action may be commenced.

(b) The applicant or Director may thereafter petition the court for entry of judgment upon the supplementary compensation order, serving notice of such petition on the employer and any other person in default. If the court finds the supplementary compensation order valid, the court shall enter judgment against the person or persons in default for the amount due under the order. No fees shall be required for the filing of the supplementary compensation order, or for the petition for judgment, or for the entry of judgment or for any enforcement procedure thereupon. No supersedeas shall be granted by any court with respect to a judgment entered under this section.

(c) Proceedings to enforce a compensation order or decision shall not be instituted otherwise than as provided by this act.

Section 39 Witnesses and Their Fees.

Witness fees and mileage allowance in contested case proceedings under this act shall be the same as in the Iowa district court.

The testimony of any witness may be taken by deposition or interrogatories according to the rules of civil practice and may be taken before any hearing officer under this act or before any person authorized to take testimony.

Section 39 commentary

Witness fees and mileage allowance, in workers' compensation cases, will be the same as in the courts.[247] The parties may present evidence by deposition.[248]

Both of these provisions adopt present Iowa law.

Section 40 Costs on Judicial Review.

In proceedings for judicial review of compensation cases the clerk shall charge no fee for any service rendered except the filing fee and transcript fees when the transcript of a judgment is required. The taxation of costs on judicial review shall be in the discretion of the court.

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247. Iowa Code § 86.41 (1981).
248. *Id.* § 86.18(2).

Section 40 commentary

The court, on appeal, may charge only a filing fee and transcript fees and tax those costs as it chooses. This is the same as the present law.[249]

Section 41 Costs in Contested Case Proceedings.

The Director, a workers' compensation judge, or the Board in cases before them shall assess the costs in their sound discretion.

Section 41 commentary

Costs may be assessed in contested case proceedings before the administrative agency or Appeals Board.[250]

Section 42 Enforcement of Penalties, Deposits and Assessments.

Proceedings to enforce civil penalties and to require deposits as authorized by this act may be instituted by the Director and brought in any court of competent jurisdiction having jurisdiction over the defendant.

Section 42 commentary

This section authorizes the Director to enforce civil penalties, require deposits and resort to the district court if necessary.[251]

Section 43 Aliens.

(a) Except as otherwise provided by treaty, whenever, under the provisions of this and chapters 86 and 87, compensation is payable to a dependent who is an alien not residing in the United States at the time of the injury, the employer shall pay fifty percent of the compensation herein otherwise provided to such dependent, and the other fifty percent shall be paid into the Special Fund in the custody of the Treasurer of State. But if the nonresident alien dependent is a citizen of a government having a compensation law which excludes citizens of the United States, either resident or nonresident, from partaking of the benefits of such law in as favorable degree as herein extended to the nonresident alien, then said compensation which would otherwise be payable to such dependent shall be paid into the second injury fund in the custody of the Treasurer of State.

(b) Unless and until an alien entitled to benefits under this act shall otherwise notify the Director in writing, a duly accredited consular officer of the country in which the alien resides, or the duly authorized representative of such officer, may upon filing notice with the Director (who shall transmit a copy thereof to the employer) act in all respects under this act as the agent of the alien.

(c) The Director may require such consular officer or representative to secure an order from the Polk County district court appointing him as trustee for the alien on such conditions as the court orders, including the giving of a bond.

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249. *Id.* § 86.32.
250. *Id.* § 86.40.
251. *Id.* §§ 86.10, .12.

(d) If such consular officer, or his duly appointed representative, shall file with the Director evidence of his authority, the Director shall notify such consular officer or his representative of the death of all employees leaving alien dependent, or dependents, residing in the country of said consular officer so far as same shall come to his knowledge.

Section 43 commentary

Several sections scattered throughout the present act are consolidated here.[252] Dependents of an alien, not residing in the United States, receive half the benefits of a resident unless a treaty provides otherwise. The Director may act in all matters as the agent of the alien or, if he chooses, require a consular officer or representative to secure a trustee through the court. All of this is an effort to simplify the Workers' Compensation Act.

Part V

Insurance

Section 44 Security for Payment of Compensation.

(a) Every employer shall secure the payment of compensation under this act:

(1) By insuring and keeping insured the payment of such benefits with a corporation, association or organization authorized to insure workers' compensation in this state.

(2) By furnishing satisfactory proof to the insurance commissioner of his financial and administrative ability to meet his obligations under this act and by receiving an authorization from the insurance commissioner to pay such compensation directly.

(a) An employer may comply with Section 44(a)(2):

(1) As an individual person securing authorization from the insurance commissioner to pay compensation directly.

(2) By becoming a member, and paying premiums due, in an insurance association composed of a group of employers by themselves or in association with any or all of their employees.

(3) By individually or as a member of a group of employers entering into or continuing an agreement with his or their employees to provide a scheme of compensation, benefit or insurance in lieu of compensation and insurance. Such scheme shall not provide less than the compensation provided by this act. If the scheme provides for contributions by the employees, the insurance commissioner shall approve it only if the contributions by employees provides benefits commensurate with such contributions in addition to compensation under this act.

(b) The insurance commissioner by use of chapter 17A may terminate a plan previously approved under Section 44(a)(2)(a) if he finds that it no longer qualifies thereunder.

(c) All valid claims now due or which may hereafter become due employees of the state under the provisions of this act shall be paid out of

252. *Id.* §§ 85.31(5), .51-.53.

any funds in the state treasury not otherwise appropriated. The state comptroller is hereby authorized and directed to draw warrants on the state treasury for any and all amounts due state employees under the act.

Section 44 commentary

This section adopts the existing Iowa methods by which an employer may secure its compensation liability. These are:

(1) Insurance.[253]
(2) Group self insurance.[254]
(3) Benefit insurance.[255]
(4) Individual self insurance.[256]

The government of the State of Iowa has never been insured. There are sections in the present act regarding the procedures it must follow in processing claims and these are repeated in subsection (c).[257]

The present act deals with the situation where an employer has more than five persons engaged in hazardous employment and fails to insure.[258] The employer may file a bond with the Industrial Commissioner. This section probably dates back to the time when coal mining was considered to be hazardous employment. It is not relevant in light of the other methods of an employer securing compensation and is covered in another section anyway.[259]

Section 45 Posting of Notices.

(a) Any employer who fails to secure the payment of compensation as required by Section 44 shall post and keep posted in a conspicuous place or places in and about his place or places of business, a sign of sufficient size that it can be seen by his employees. The sign shall read as follows:

NOTICE TO EMPLOYEES

You are hereby notified that the undersigned employer has failed to insure his liability to pay compensation as required by law, and that because of such failure he is liable to his employees in damages for personal injuries sustained by his employees as provided in Section 10(b) of the workers' compensation act.

(Signed)_____

Any employer coming under the provisions of this act who fails to comply with this section or to post and keep the above notice in the manner and form herein required, shall be guilty of a simple misdemeanor.

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253. *Id.* § 87.1.
254. *Id.* § 87.4.
255. *Id.* §§ 87.5-.7.
256. *Id.* § 87.11.
257. *Id.* §§ 85.57-.58.
258. *Id.* §§ 87.16-.17.
259. Draft § 27(d) *infra.*

(b) Every employer who has secured the payment of compensation as required by Section 44(a)(1) shall post a sign in the same manner as Section 45(a) containing the name and address of the corporation, association or organization with whom the employer has secured payment of compensation.

Section 45 commentary

This section requires an employer, who fails to secure the payment of compensation, to post a sign, to that effect, where employees may see it.[260] If the employer has secured the payment of compensation he also must post a sign containing the name and address of the insurer.

Section 46 Insurance Policies.

(a) Every policy or contract for the insurance of compensation herein provided for shall be deemed to be made subject to the provisions of this act and provision thereof inconsistent with the act shall be deemed to be reformed to conform with the provisions of this act.

(b) An insurer insuring the liability of an employer under this act shall be deemed to be the insurer for all employees of the employer within the protection of this act. However, a separate insurance policy may be issued for a specified plant or work location if the liability of such employer under this act to all his other employees is otherwise secured.

(c) If the insurer or employer intends to cancel a contract or policy of insurance issued by the insurer under this act within the policy period, he shall give notice to such effect in writing to the other party fixing the date on which it is proposed that such cancellation be effective. Such notices shall be served personally on or sent by certified mail to the other party. No such cancellation shall be effective until [10] days after the mailing of such notice, unless the employer has secured insurance with another carrier which would cause double coverage. In such event the cancellation shall be made effective as of the effective date of such other insurance.

(d) For the purposes of this act, as between the employee and the insurer, notice or knowledge of the occurrence of injury or disease or death on the part of the employer shall be notice or knowledge, as the case may be, of the insurer, jurisdiction of the employer shall be jurisdiction of the insurer, and the insurer shall be bound by and subject to the findings, judgments, awards, decrees, orders and decisions rendered against the employer in the same manner and to the same extent as the employer.

(e) Every policy or contract of insurance issued under authority of this act shall be deemed to contain a provision to carry out the provisions of subsection (d) of this section and a provision that insolvency or bankruptcy of the employer or his estate or discharge therein or both or any default of the employer shall not relieve the carrier from payment of compensation for injury sustained by an employee during the policy

260. IOWA CODE §§ 87.2, .16 (1981).

period.

(f) The insurer shall be directly and primarily liable to any person entitled to the benefits of this act. The obligations of the insurer may be enforced by such person, or for his benefit by any agency authorized by law, whether against the insurer alone or jointly with the employer.

Section 46 commentary

The "full coverage" rule is adopted by this provision. Regardless of the attempt to limit an insurance policy's coverage to certain names, locations, classes of employees or operations, the policy will be deemed to cover all employees of the employer within this act. Deputy commissioners have already issued decisions concluding that even though an employer has a policy purporting to cover only another state, it nonetheless will apply to operations in Iowa.[261]

Subsection (c). The cancellation of an insurance policy must be handled with care to avoid any risk of a gap in coverage and also to preserve, as far as possible, the contractual freedom of the insurer and the employer. No cancellation is effective unless it is made within ten days after the mailing of the cancellation notice to the other party.

Subsections (d), (e) and (f). These provisions provide that for the purposes of the act, notice to and knowledge of the occurrence of injury on the part of the employer are also considered as notice or knowledge on the part of the insurer.[262] The insolvency or bankruptcy of the employer shall not relieve the carrier from payment[263] and the insurer will be primarily liable.[264] Currently, these are all provisions of the Iowa law.

Section 47 Penalty for Failure to Secure Compensation.

(a) Any employer required to secure the payment of compensation under this act who willfully fails to secure the payment of such compensation shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than [one year], or by both such fine and imprisonment; and in any case where the employer is a corporation any officer or employee of the corporation who had authority to secure payment of compensation on behalf of the corporation and willfully failed to do so shall be individually liable to a similar fine and imprisonment; and such officer or employee shall be personally liable jointly and severally with such corporation for any compensation which may accrue under this act in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure the payment of compensation as required by Section 46 of this act.

(b) Any employer who knowingly transfers, sells, encumbers, assigns,

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261. The standard workers' compensation and employers' liability contains this provision but the statute does not.

262. IOWA CODE § 87.10 (1981).

263. *Id.* § 87.8.

264. *Id.* § 87.9.

or in any manner disposes of, conceals, secretes, or destroys any property or records belonging to such employer, after one of his employees has been injured within the purview of this act, and with intent to avoid the payment of compensation under this act to such employee or his dependents, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or by both such fine and imprisonment; and in any case where such employer is a corporation, any officer or employee thereof, if knowingly participating or acquiescing in the act, shall be also individually liable to such penalty of imprisonment as well as joint and severally liable with such corporation for such fine.

(c) This section shall not affect any other liability of the employer under this act.

Section 47 commentary

The securing of liability is at the heart of the compensation process and the failure to secure compensation is an offense of extreme gravity. Criminal penalties for willful failure to secure the payment of compensation are imposed, but it should be emphasized that they are for "willful" failure, rather than negligence or inadvertence. Under the present statute, failure to secure compensation is a criminal offense for mine operators[265] and for employers who have more than five persons engaged in hazardous employment.[266]

The employer also would be subject to an action for compensation or damages as elsewhere provided.[267]

Section 48 Special Fund.

(a) There is hereby established in the state treasury a Special Fund for the sole purpose of making payments in accordance with the provisions of Section 20 and this section. The Fund shall be administered by the Director. The Treasurer of State shall be the custodian of the Fund and all moneys and securities in the Fund shall be held in trust by the state treasurer and shall not be money or property of the state.

(b) The Treasurer of State is authorized to disburse moneys from the Fund only upon written order of the Director.

(c) The employer, or if insured, his insurance carrier in each case of compensable injury or disease causing death shall pay to the Treasurer of State for the Special Fund the sum of one thousand dollars, said payment to be made at the time compensation payments are begun, or at the time the burial expenses are paid in a case where there are no dependents. These payments shall be in addition to any payments of compensation to injured employees or their dependents, or of burial expenses as provided in this chapter.

(d) The Treasurer of State shall invest any surplus moneys thereof in securities which constitute legal investments for state funds under the

265. *Id.* § 87.14.
266. *Id.* § 87.19.
267. *See* draft § 10 *supra.*

laws of this state, and may sell any of the securities in which said fund is invested, if necessary, for the proper administration or in the best interests of said fund. When the total amount of such payments provided for in the preceding section, together with accumulated interest thereon and earnings, equals or exceeds one hundred thousand dollars no further contributions to said fund shall be required; but whenever, thereafter, the amount of such sum shall be reduced below fifty thousand dollars by reason of payments made to employees pursuant to the provisions of this division, the said contributions shall be resumed forthwith and shall continue until such sum, together with accumulated interest and earnings, shall again amount to one hundred thousand dollars. The Treasurer of State as custodian of such fund shall quarterly furnish to the Director a statement of the fund, setting forth the balance of moneys in said fund, the income of the fund, specifying the source of all income, the payments out of the fund, specifying the various items of such payments, and setting forth the balance of the fund remaining to its credit. Such statement shall be open to public inspection in the office of the Director.

(e) The Director shall be charged with the conservation of the assets of the Fund. In furtherance of this purpose, the Attorney General shall appoint a member of his staff to represent the Fund in all proceedings brought to enforce claims against the Fund.

(f) The Director, on behalf of the Special Fund created by this section, shall have a cause of action under the provisions of Section 11 to the same extent as an employer against any person not in the same employment by reason of whose negligence the subsequent injury of such previously disabled person was caused. Any such action shall be brought by the Director on behalf of said Fund, and any recovery, less the necessary and reasonable expenses incurred by the Director, shall be paid to the Treasurer of State and credited to the Special Fund.

(g) The Treasurer of State is hereby authorized to receive and credit to said fund any sum or sums that may at any time be contributed to the state by the United States or any agency thereof, under any Act of Congress or otherwise, to which the state may be or become entitled by reason of any payments made to any previously disabled person out of said fund.

Section 48 commentary

This Special Fund, for purposes of this act, is a second-injury fund as described in section 20. This section supplies the operating details of the fund itself. It incorporates existing sections establishing the fund,[268] sets the amount of assessment to finance the fund,[269] authorizes the state treasurer to invest moneys in the fund, establishes the amount to be collected[270] and places the Director in charge of conserving the assets of the fund and the

268. IOWA CODE § 85.65 (1981).
269. *Id.* § 85.66.
270. *Id.*

attorney general in charge of defending the fund.[271]

PART VI

Administration

Section 49 Agency to Administer the Act.

(a) This act shall be administered by the Director of the State Workers' Compensation Department who shall devote his entire time to the duties of the office. The Governor shall appoint the Director by and with the advice and consent of the Senate. The Director shall serve during the pleasure of the Governor. He shall maintain his office at Des Moines. An appointment to fill a vacancy in the position may be made when the Senate is not in session but the Senate shall act on it at its next session. It shall be unlawful for the Director to be financially interested in any business enterprise coming under or affected by this chapter during his term of office, and if he violates this statute, it shall be sufficient grounds for his removal from office, and in such case the Governor shall at once declare the office vacant and appoint another to fill the vacancy.

(b) The Director shall appoint such workers' compensation judges and other employees, other than employees and assistants of the Workers' Compensation Appeals Board, as he deems necessary to administer this act. All workers' compensation judges and other employees shall be employed under the State Merit Employment Act.

(c) The Director and workers' compensation judges appointed after the effective date of this act must be lawyers licensed to practice in this state. They shall devote full time to their duties and shall not engage in the private practice of law.

Section 49 commentary

The Industrial Commissioner has been both the administrator of the workers' compensation agency and the appellate person who must review all proposed decisions.[272] In the last ten years there has been an increase in the number of filings made with the Industrial Commissioner both in non-litigated and litigated cases.[273] With the increased volume of work, the time has come to divide the work load between the agency and a new appeals board. The agency would be run by a director, who would succeed to the Industrial Commissioner. It would be his responsibility to supervise the filing of reports and disposing of litigated cases. For purposes of continuity, it is assumed that the Director will be the present Industrial Commissioner who will be assured of remaining in office throughout his present term. This is provided for in section 67. Thereafter, the Director would serve an indefinite term by appointment of the Governor.

The present title of deputy industrial commissioner is changed to work-

271. *Id.* § 85.67.

272. *Id.* §§ 86.1, .8, .24.

273. *See, e.g.*, 30th-33rd Biennial Reports, Iowa Indus. Comm'r (1972-78).

ers' compensation judge and the present deputy commissioners are retained in office by section 67. They would continue to be subject to the state merit employment act. Both the Director and the workers' compensation judges would be lawyers.

In short, this section recognizes the ability of the existing officials in the agency and increases their prestige by new titles.

> **Section 50 Appeals Board.**
>
> (a) There is hereby created a Workers' Compensation Appeals Board composed of three members appointed by the Governor by and with the advice and consent of the Senate for terms of six years each, except that the terms of members first appointed shall be for two, four, and six years respectively as designated by the Governor at the time of appointments. A member of the Board must be a lawyer licensed to practice in this state. The Governor shall designate the chairman of the Board. Each member shall hold office until his successor is appointed and qualified. The members shall devote full time to their duties as members of the Board and shall not engage in the private practice of law. The Governor may at any time remove any member for cause after furnishing him with a written copy of the charges against him and giving him a public hearing if he requests it. Each member of the Board shall be paid a salary at the rate of not less than the minimum salary of a judge of the state district court.
>
> (b) The Board shall have power to decide appeals from compensation orders of the Director or workers' compensation judges and it shall have authority to consider and decide all matters of fact and questions of law properly cognizable under this act.
>
> (c) A decision concurred in by any two members shall constitute a decision of the Board.
>
> (d) A vacancy in the Board, if there remain two members of it, shall not impair the authority of two members to act.
>
> (e) The chairman of the Board shall employ such employees as may be required to carry out the Board's duties under this act, shall assign the work of the Board to the members thereof and its employees, and shall serve as administrative officer of the Board.
>
> (f) The Board shall be within the Workers' Compensation Department for budgetary and administrative purposes only.

Section 50 commentary

This section creates the new component in the administrative structure. Its function is to decide appeals from the compensation orders of the Director or the workers' compensation judges.

The appeals board is largely kept separate from the Director and the administrative apparatus. It is expected that the appeals board will maintain the posture of a quasi-judicial body, which can pass upon cases with judicial detachment since it will not have been administratively involved at earlier stages. The Director and his staff have more freedom under this arrangement to discharge the non-adjudicatory tasks involved in achieving in-

formal disposition of cases.

It is expected that the appeals board will consist of three members, although it may operate with two. There will be additional expense for the appeals board, but in light of the increasing work load on the present Industrial Commissioner hearing appeals from proposed decisions, there is little doubt that the board is necessary.[274]

Section 51 Authority to Adopt Rules and Regulations.

The Director and the Board each shall have authority to adopt reasonable rules and regulations within their respective areas of responsibility, after notice and public hearing, if requested, for effecting the purposes of this act. All rules and regulations, upon adoption, shall be published and be made available to the public, and, if not inconsistent with law, shall be binding in the administration of this act.

Section 52 Seal.

The Director and the Board shall each provide a seal for the authentication of orders, decisions and records and for such other purposes as required.

Section 53 Operating Expenses.

The Director shall make such expenditures as may be necessary for the adequate administration of this act by the agency. The chairman of the Board shall make such expenditures as may be necessary to perform the Board's function under this act. Such expenditures may include salaries, other personal service, traveling expenses, and cost of subsistence while traveling on official business, office rent, the purchase and rental of books, periodicals, office equipment and supplies, printing and binding, vehicles, cost of membership in official organizations, attendance at meetings and conventions concerned with subject matters cognizable with this act, and all other purposes. All expenditures of the agency and of the Board in the administration of this act shall be paid out of the appropriations for said Board and department made by the General Assembly.

Section 54 Reports.

(a) Each year the Director shall make a report to the Governor and through him to the General Assembly on the operation of this act, including suggestions and recommendations as to improvements in the law and administration thereof, a detailed statement of receipts and expenditures, and a statistical analysis of industrial injury experience and compensation costs.

(b) The Director shall prepare and publish such other statistical and informational reports and analyses based upon the reports and records available which, in his opinion, will be useful in increasing public understanding of the purposes, effectiveness, costs, coverage, and administrative procedures of workmen's compensation and rehabilitation in the state; and in providing basic information regarding the occurrence and

274. *See* note 213 *supra.*

sources of work injuries for the use of public and private agencies engaged in industrial injury prevention activities.

Section 55 Cooperation with Other Agencies.

In carrying out the duties and responsibilities under this act, the Director may enter into contracts with any state agency, with or without reimbursement, for the purpose of obtaining the services, facilities, and personnel of such agency and with the consent of any state agency or any political subdivision of the state, accept and use the services, facilities, and personnel of any agency of the state or political subdivision and employ experts and consultants and organizations in order to expeditiously, efficiently, and economically effectuate the purposes of this act. The provisions of this paragraph are subject to approval by the executive council where required by law.

Section 56 Severability.

If any provision of this act be declared to be unconstitutional or the applicability thereof to any person or circumstance to be held invalid, the validity of the remainder of the act and the applicability of such provision to other persons and circumstances shall not be affected thereby.

Section 57 Laws Repealed.

1. Chapters 85, 85A, 85B, 86 and 87 and Section 627.13 are hereby repealed.

2. The agency of Industrial Commissioner created and authorized by section 86.1 is hereby abolished. The Industrial Commissioner in office on the effective date of this act shall continue to serve in such office for the remainder of his term and shall be known as Director of the workers' compensation department.

3. Any deputy industrial commissioner in office on the effective date of this act shall continue to serve in such office and shall be known as a workers' compensation judge.

Section 58 Effective Date. [Insert effective date].

Sections 51-58 commentary

These sections authorize the Director and the board to adopt rules and regulations,[275] provide a seal,[276] establish a budget for operating expenses financed by appropriation of the General Assembly,[277] authorize the Director to make an annual report,[278] authorize the Director to cooperate with other agencies in carrying out functions of the agency,[279] deal with severabil-

275. IOWA CODE § 86.8(1) (1981).

276. *Id.* § 86.8(6).

277. There is no such provision now in the Iowa Workers' Compensation Law.

278. The Industrial Commissioner now makes a biennial report. Under the Model Act the General Assembly would meet annually and an annual report would assist both the agency and General Assembly keep abreast of developments.

279. IOWA CODE §§ 86.8, 85.69 (1981).

ity of the act[280] and repeal the existing workers' compensation act.[281]

Omitted Provisions

Certain sections of the Council of State Governments' draft are omitted because they are not part of the program administered by the state agency, are not presently in the statute, and are controversial and political. The sections omitted include ones on presumptions, assessment of attorney fees in cases instituted or contained without reasonable grounds, payment by the employer of fees for a claimant's legal services, penalties for misrepresentation by any party, assigned insurance risks, judgment by the Director of the performance of insurance organizations, payments of compensation pending determination of policy coverage where two or more employers or carriers are involved, and an Uninsured Employer's Fund and a "broad" Second Injury Fund.

Conclusion

There are several objectives in revising the Iowa Workers' Compensation act. The first objective is to clarify the existing statute, court and agency decisions, and agency policy. The second objective is to restate the statute in plain language so that laymen as well as lawyers may understand it and operate under it with as little agency interference as possible. A third objective is to reduce the need for agency interference by providing for a "direct payment" system, permitting settlements without the need for agency review although such review is certainly permissible, and reducing paper work by employers, carriers and the agency. The last objective is to minimize litigation by putting to rest as many known controversies as can be best handled by a deliberate choice of statutory language. Where particular words and phrases in the Iowa law have acquired an accepted interpretation, they have been disturbed as little as possible, so as to avoid the necessity of creating a fresh body of decisional law to interpret some new and unfamiliar phrase.

In short, the draft is intended to be a practical restatement of the Iowa Workers' Compensation Law which the General Assembly may adopt with the expectation that it will improve the administration without substantially increasing the cost of state government and be fair to employees, employers and insurance carriers.

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280. *See* draft § 56.

281. *See* draft § 57. Note that the Industrial Commissioner's title is changed to Director and the deputy commissioners' title is changed to workers' compensation judges and they are retained in office.