PROBLEMS OF WORKERS' COMPENSATION FEDERALIZATION

Keith C. Miller†

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Reading mandates into political elections is, of course, a risky venture. When so few people vote and their reasons for voting a particular way are so varied, it is difficult to determine exactly what an official was elected to do. One oft-expressed view of the results of the November 1980 elections, however, was that they represented a feeling that Americans wanted a diminished or less visible role for the federal government in their lives. This mindset is sometimes expressed by the saying that people want "to get government off their backs." Such antipathy toward the federal government could be expected to be most severe when it concerns an expanded federal presence in an area of law historically administered by the states. Such an area is workers' compensation. Workers' compensation has been primarily a state responsibility since its adoption in the United States in the early twentieth century. Federal government involvement in state workers' compensation has been almost non-existent, though the federal government does have responsibility for administering certain types of federal compensation programs.[1]

Despite this history of non-involvement many persons consider federal intrusion upon or involvement with state compensation plans not as an alarming prospect but a desirable one. State workers' compensation programs are not adequately vindicating the interests of injured workers and it

† B.A. 1973, J.D. 1976, University of Missouri—Kansas City; LL.M. 1979, University of Michigan. Associate Professor of Law, Drake University Law School.

1. *See, e.g.*, Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8193 (1976); Black Lung Benefits Act, 30 U.S.C. §§ 901-962 (1976); Longshoremens' and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1976).

is often argued that the disparity among the states in compensation coverage is unjust. Proponents of such an expanded federal presence have presented several bills in Congress, the most recent effort being the proposed National Workers' Compensation Standards Act of 1979 (hereinafter cited as H.R. 5482 or "the proposed Act").[2] This proposal was designed "to strengthen State workers' compensation programs."[3] The bill, however, has met with the same fate as its predecessors—non-enactment by Congress.

Certainly, the inability of supporters of such legislation to secure passage will but momentarily dampen their ardor and additional bills are sure to follow.[4] Questions are raised by these continuing failures however. Why have the bills been unsuccessful? Is it due to intransigence on the part of industry and the states? A perception that the specific bills offered have not been designed to strengthen but to *displace* state systems? More importantly, are state programs in need of invigoration supplied by the federal government? How does one go about discerning whether this need is extant?

This article will consider these and other problems in the context of a representative effort to gain workers' compensation reform, the ill-fated, H.R. 5482. As the author believes the discussion will demonstrate, a need for "strengthening" state workers' compensation systems is arguably present, especially in the area of occupational disease. However, H.R. 5482 was seriously flawed by a ponderous and unwieldy attempt to address the occupational disease issue. The unmanageability of the proposed procedure conjures up many of the visions of bureaucratic convolution which animate the call to get Uncle Sam "off the backs of the people."

I. Framework of H.R. 5482

A. *H.R. 5482 and the National Commission Report*

In the last eight years, there have been at least four bills proposed in Congress, other than H.R. 5482, which were intended to affect state compensation programs.[5] H.R. 5482 is representative of these efforts.

The findings and statement of purpose of H.R. 5482, contained in section 2, are revealing. In declaring that the "many existing State workers' compensation laws do not provide an adequate, prompt, and equitable sys-

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2. *National Workers' Compensation Standards Act of 1979: Hearings on H.R. 5482 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor,* 96th Cong., 2d Sess. 3-47 (1980) [hereinafter cited as *Hearings on H.R. 5482*].

3. Such purpose is indicated in the preamble to the bill.

4. No bill seeking to achieve the same objectives as H.R. 5482 has as yet been introduced in the 97th Congress.

5. S. 420, 96th Cong., 1st Sess., 125 Cong. Rec. 51454 (1979) (*National Workers' Compensation Standards Act of 1979*); S. 3060, 95th Cong., 2d Sess., 124 Cong. Rec. 57324 (1978) (*National Workers' Compensation Act of 1978*); H.R. 9431, 94th Cong., 1st Sess., ___ Cong. Rec. ___ (1975) (*National Workers' Compensation Act of 1975*); S. 2008, 93d Cong., 1st Sess., 119 Cong. Rec. 19947 (1973) (*National Workers' Compensation Act of 1973*).

tem of compensation"[6] for work-related injuries, diseases, and deaths, section 2 concludes that "there is a need for the Federal Government to encourage and assist the States," as well as a need for federal minimum standards for state programs.[7] This is to be done "while at the same time maintaining the primary responsibility and authority for workers' compensation in the States."[8]

Another issue addressed by section 2 is one which pervades the legislative subcommittee hearings on H.R. 5482.[9] In 1972, the National Commission on State Workmen's Compensation Laws issued its report.[10] In its descriptive review of state workers' compensation programs, the Commission issued the following judgment: "Our intensive evaluation of the evidence compels us to conclude that State workmen's compensation laws are in general neither adequate nor equitable. While several States have good programs, and while medical care and some other aspects of workmen's compensation are commendable, strong points too often are matched by weak."[11] There was little serious questioning of this conclusion at the time because in 1972 workers' compensation in many states still stood in the "dark ages." The query which remains is more critical and is the one constituting the cutting edge of much of the present dispute: what has happened since 1972? Spurred by the recommendations of the National Commission Report, have states vigorously overhauled their workers' compensation systems to bring them into compliance with the prescriptive elements of the Report and with the demands of an equitable workers' compensation system? Or have the states with "inadequate" workers' compensation systems proceeded torpidly, instituting only minor and piecemeal changes? Meaningful criteria with which to gauge state progress are few. The nineteen recommendations which are listed by the Commission's Report as *essential* are often a reference point. As will become apparent, judgments differ as to the sufficiency of the progress by the states toward adoption of these nineteen recommendations. However, section 2 of H.R. 5482 contains the Commission's conclusion that "existing State workers' laws still fail to meet the minimum standards recommended by the National Commission on Workmen's Compensation Laws. . . ."[12] Due to these perceived shortcomings, H.R.

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6. *Hearings on H.R. 5482, supra* note 2, H.R. 5482 § 2(a)(6).

7. *Id.* § 2(a)(10).

8. *Id.*

9. When introduced, H.R. 5482 was referred to the House Committee on Education and Labor, which in turn referred the bill to the Subcommittee on Labor Standards which held hearings on it. Hearings were conducted on March 25 and 26; April 1, 17 and 23; and May 1 and 15, 1980. Testimony from the hearings before the Subcommittee will be cited hereinafter as "Hearings," with the corresponding date of the statement.

10. NATIONAL COMM. ON STATE WORKMENS' COMPENSATION LAWS, REPORT (1972) [hereinafter cited as NATIONAL COMMISSION REPORT].

11. *Id.* at 24-25.

12. *Hearings on H.R. 5482, supra* note 2, H.R. 5482 § 2.

5482 sought to "establish minimum standards for workers' compensation programs,"[13] establish procedures for obtaining benefits in accordance with those standards in states not in compliance with them and provide assistance to aid states in upgrading their workers' compensation operations.[14] These ambitious proposals are then followed by a statement which rings of wishful thinking. The bill's authors state that they hoped to "accomplish the foregoing objectives in such a way as to maintain the primary authority and responsibility for workers' compensation in the States."[15] When one reviews the provisions of the bill, it strains credulity to believe the authors thought this objective was actually attainable.

B. *Benefit Levels and Standards*

Section 4 of H.R. 5482 is the provision which engendered the most ardent opposition. Entitled "Standards for Workers' Compensation Benefits," it specified what terms should be considered "minimum" ones for states. The bulk of these standards pertain to how a worker can qualify for benefits and at what minimum level these benefits must be maintained. At this point, the "essential" recommendations of the National Commission Report also come into focus more clearly.

An important facet of establishing benefit levels in workers' compensation is the determination of the *maximum* benefit amount obtainable by an employee or his dependents in a death case. An obvious goal of workers' compensation is income maintenance, that is, to provide a certain modicum of protection to a worker whose income has been disrupted or perhaps permanently impaired.[15.1] This income maintenance objective is premised both on a perceived societal and humanitarian obligation to aid injured workers and the pragmatic concern that if a worker is injured, unable to work and without compensation, he and his dependents may become a burden on society generally by going on the relief rolls. The counterweight to this concern is illustrated by the image some have of income assistance. Namely, that the so-called rehabilitation incentive is dampened if benefit levels rise too high. In other words, critics ask, why should one work if one can obtain benefits comparable to one's salary? Though this rather cynical view of human nature commands some authority,[16] and the problem was recognized by the National Commission,[17] the Report also concluded that many states had in-

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13. *Id.*§ 2(b) (1).

14. *Id.* §§ 2(b)(2), (3).

15. *Id.* § 2(b)(4).

15.1 *See* NATIONAL COMMISSION REPORT, *supra* note 10, at 35 *(Five Objectives For a Modern Workmen's Compensation Program).*

16. *See, e.g., Hearings on H.R. 5482, supra* note 2, at 241 (statement of Thomas Nyhan on behalf of the Chamber of Commerce of the United States).

17. NATIONAL COMMISSION REPORT, *supra* note 10, at 53.

adequate benefit structures.[18] Nevertheless, there is little controversy as to whether the employee is to receive 66⅔% of his *gross* weekly wage, or 80% of workers' *spendable* earnings as the National Commission suggests.[19] Most states follow one or the other formula. The problem is setting the state's *maximum* weekly benefit.

For temporary total, permanent total and death benefits, the National Commission adopted uniform standards and considered these recommendations essential. Benefit levels for all three were to be "at least 66⅔% of [the workers] gross weekly wage," subject to the state's maximum weekly benefit.[20] The maximum weekly benefit for the three types of benefits was to be at least 66⅔% of the state's average weekly wage,[21] with this being raised two years later to at least 100% of the state's average weekly wage.[22] In recommendations considered *non*-essential by the Commission, it was proposed that the maximum be raised to 133⅓% of the state's average weekly wage as of July 1, 1977, 166⅔% of that figure as of July 1, 1979 and 200% of the same as of July 1, 1981.[23]

The standards of H.R. 5482 are to a great extent more generous than the "essential" recommendations of the National Commission Report. The maximum benefit levels of H.R. 5482 are, however, identical to the National Commission recommendations. Maximums are set at 100% of the state average weekly wage beginning January 1, 1982, with increases to 150% on January 1, 1983, and 200% in 1984.[24] At the other end of the spectrum, *minimum* benefit levels were also addressed by the bill.[25] While the National Commission Report has set this standard of maximum benefit levels, it is fair to say that the states have not rushed to comply with these recommendations. In reviewing benefit levels as of January 1, 1980, the following observations can be made regarding temporary total disability benefits:

1) approximately 25 jurisdictions set their maximum benefit level at 100% of the state average weekly wage; this is the treatment used by the most states;[26]

2) only one jurisdiction has a maximum level set at 133⅓% of the state

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18. *Id.* at 53-54.

19. *Id.* at 56 (recommendation 3.2).

20. *Id.* at 57 (recommendation 3.1). The use of the 66⅔% formula geared to *gross* wages is regarded by the Commission as "generally inferior" to the 80% of spendable weekly earnings formula. *Id.* (emphasis added).

21. *Id.* (recommendation 3.2).

22. *See id.* at 62 (recommendation 3.8), *id.* at 64 (recommendation 3.15), *id.* at 71 (recommendation 3.23).

23. *See id.* at 62 (recommendation 3.9), *id.* at 64-65 (recommendation 3.16), *id.* at 72 (recommendation 3.24).

24. *Hearings on H.R. 5482, supra* note 2, H.R. 5482 § 4(b)(1)(A)-(C).

25. *See id.* § 4(b)(1)(D).

26. *See id.* at 307 (American Insurance Association Maximum Workers' Compensation Benefits for Temporary Total Disability as of January 1, 1980).

average weekly wage,[27] three set it at 166⅔%,[28] and two compensation systems are set at 200%;[29]

3) the remainder of the jurisdictions have maximum levels set at various amounts not geared to the state average weekly wage. These amounts range from a low of $98 (Mississippi) to a high of $215 (New York).[30]

In considering the significance of these figures, it is appropriate to note the criticism most frequently levelled at the benefit proposals of H.R. 5482, namely, that it would be overly costly to both business and the consumer, thereby fueling inflation.[31] Additionally, industry spokesmen claim that as maximum benefit levels are set higher, there is a corresponding pattern of increased utilization of the workers' compensation system.[32] Though industry can be expected to voice such concerns in the face of proposals to increase benefits, these fears of substantial cost hikes cannot be cavalierly dismissed.

As part of its project, the National Commission Report calculated the estimated cost increase (or decrease) of incorporating the recommendations of the Commission. Computations were separated between the essential recommendations and all recommendations and were expressed as a percentage of actual costs.[33] *Actual* cost increase figures from the period 1972-1980 often bear little resemblance to the Commission projections. An examination of the figures from several states portrays an extreme underestimation of the cost of adopting the Commission recommendations and the cost of workers' compensation programs generally. Three states which are industrialized to varying degrees offer enlightening illustrations.

The National Commission estimated that the cost increase in Illinois of incorporating the essential recommendations would be 17.3% measured at 1975 maximum weekly benefit levels.[34] According to one source, the actual rate level change between 1972-1980 has been 134.7%.[35] Michigan's projec-

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27. *Id.* (Illinois).

28. *Id.* (Alaska $650.00, Iowa $352.00 and Maine $306.23). Iowa as of July 1, 1981 sets its rate at 200%. IOWA CODE § 85.37 (1981).

29. *Hearings on H.R. 5482, supra* note 2, at 314 (Longshoreman's Act), *id.* at 307 (District of Columbia).

30. *Id.* at 307.

31. *See id.* at 50 (testimony of Donald C. Brian, President, Independent Insurance Agents of America).

32. *See id.* at 356 (testimony of Andre Maisonpierre, Vice-President, Alliance of American Insurers).

33. NATIONAL COMMISSION REPORT, *supra* note 10, at 143.

34. *Id.*

35. This figure is one developed by the Alliance of American Insurers and offered as testimony before the Subcommittee on Labor Standards. Hearings, *supra* note 9, April 23, 1980, p. 389. Some may make the charge that these figures are not reliable due to the bias of the insurance industry in attempting to demonstrate the costliness of modernizing workers' compensation laws. No direct impeachment of the industry figures was presented at the hearings, and it is suggested that the insurance industry has a stake as well in developing reliable figures.

tion reveals a similar story. The projected cost increase for adoption of the essential recommendations at 1975 maximum weekly benefit levels was 25.1%;[36] the actual increase has been 139.5%.[37] Finally, in New York, where the projection was an 18.6% increase,[38] the hike has amounted to 146.6%.[39] While some states did reflect cost changes below the Commission projections, such examples were few in number.[40]

It is worth bearing in mind that the above-referenced statistics related to cost projections and actual changes for adoption of the essential recommendations only. None of these states has adopted all the essential recommendations. As of January 1, 1980, Illinois had adopted fourteen of the essential recommendations, and New York and Michigan ten.[41] Thus, cost increases for implementing all nineteen essential recommendations would be greater than those just stated.

The above-cited statistics certainly possess at least a superficial shock value. This is especially so when considered in light of terms in legislative proposals such as H.R. 5482, which, as will be demonstrated, actually go beyond the National Commission's essential recommendations. Yet a sense of perspective needs to be maintained. It is news only to those from another planet that our economy has suffered an inflationary climb over the last decade the likes of which have never been experienced in the United States. This reality has resulted in projections of cost hikes made years ago being vastly underestimated, a phenomenon certainly not restricted to the costs of workers' compensation programs. If this inflationary explosion could have been anticipated by the Commission no doubt their projections would have been considerably higher. Though the studies of cost increases calculated in terms of constant dollars also establish in some instances a substantial underestimation by the Commission,[42] infallibility in economic projection is reserved for only the most omniscient of forecasters.

Other questions remain. For instance, is it all that significant that these cost projections have been low? Part of the theory of workers' compensation is that the cost of compensation insurance premiums can be passed along to

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36. NATIONAL COMMISSION REPORT, *supra* note 10, at 143.

37. *Hearings on H.R. 5482*, *supra* note 2, at 389 (figure offered by Alliance of American Insurers).

38. NATIONAL COMMISSION REPORT, *supra* note 10, at 143.

39. *Hearings on H.R. 5482*, *supra* note 2, at 389 (figure offered by Alliance of American Insurers). Pennsylvania's figures present the widest disparity, with the projection by the National Commission 37.8% and the actual change of 402.7%

40. Mississippi, Missouri and Montana reflected such decreases. *See id.* at 389 (testimony of Alliance of American Insurers).

41. *See id.* at 217 (statement by AFL-CIO Executive Council with attachments).

42. *See id.* at 359. For example, while the Commission cost projection in Iowa for the adoption of the nineteen essential recommendations was 28%, the actual cost increase from 1972-1976 in constant dollars was 73%.

the consumer of the goods in question.[43] If that is the case, the higher product prices due to more generous benefit scales are merely the result of the workers' compensation system operating as it is designed to operate. Nevertheless, if benefit levels are hiked too substantially, the point of "economic impracticality" will be reached. That is, the cost of administering and paying for a workers' compensation system will become so high that the system will collapse. These are problems not possessed of easy solutions, but it is suggested that accurate prediction of the "cost" of benefit increases will be an increasingly tenuous task. Moreover, the benefit levels established by H.R. 5482 are *maximum* levels. For the vast majority of workers, this maximum will be irrelevant and the workers will continue to collect either 66⅔% of their gross weekly wage or 80% of their spendable earnings.[44]

The other death and medical benefit provisions embodied in the minimum standards of section 4 of H.R. 5482 were generally unremarkable. Subsection (c)(1) provided that death benefits be paid to a surviving spouse at the levels provided by subsection (b), the levels which have been noted above.[45] Those benefits are to be paid for life, or until remarriage in which case two years' benefits are payable.[46] If there are surviving children, at least 50% of the benefits payable are to be paid to the children up to the age of eighteen, or age twenty-five if the child is a full-time student in an accredited educational institution.[47] There is also a provision for limited offset against benefits payable under the Social Security Act.[48] For death, total disability and medical benefits, there are provisions that no maximum time or dollar limitations be imposed.[49]

The *non*-benefit portions of section 4 addressed a number of matters, though few present issues of substantial controversy. There were provisions for rehabilitation services[50] and for the employment of the injured employee in the position or occupation such employee held prior to the disability.[51] Also, section 4 contained unspectacular terms concerning the eligible employee's right to select the treating physician,[52] conflicts of law problems,[53]

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43. *See* 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 2.20 (1980) [hereinafter cited as LARSON].

44. *E.g.*, IOWA CODE § 85.37 (1981). This section makes the weekly benefit amount 80% of the employee's "spendable" earnings. "Spendable earnings is that amount remaining after payroll taxes are deducted from gross weekly earnings." *Id.* § 85.61.

45. *Hearings on H.R. 5482, supra* note 2, at 11, H.R. 5482 § 4(c)(1).

46. *Id.*

47. *Id.*

48. *Hearings on H.R. 5482, supra* note 2, at 13-14, H.R. 5482 § 4(c)(2).

49. *Id.* § 4(d), (e).

50. *Id.* § 4(h).

51. *Id.* at 16, § 4(i). This provision required the employer to take reasonable steps to accomplish this reemployment, or place the qualified employee in another available position. If the employer could establish that to do this would constitute an "undue hardship," he is relieved of this obligation.

52. *Id.* § 4(j). This subsection provided that the employee, subject to the control of the

statute of limitations,[54] waiting period for benefits[55] and restrictions on the compromise, waiver or release of a claim.[56]

There is another part of section 4 which does require attention however. Subsection (g) addressed the problem of occupational disease. It stated, inter alia, that the "peculiar risk" doctrine is not to be used to exclude any disease from workers' compensation coverage or be used to deny compensation.[57] Also, diseases were not to be considered non-compensable because they are not the result of an "accident"[58] or are not on a schedule of diseases where non-inclusion on the schedule renders a disease non-compensable and the disease might sometimes be employment-related.[59] Additionally, it pronounced that an "added risk" analysis was to be applied to "ordinary diseases of life" or communicable diseases.[60] That is, where the nature of the employment increases the risk of contracting a disease, it would still be compensable though the disease may be one that persons not so employed may likewise contract. Finally, a state would have been permitted to establish "rebuttable presumptions" concerning the circumstances under which particular diseases may be found to have arisen or not to have arisen out of and in the course of the employment.[61] However, this could only be done when such a presumption did not conflict with a "standard issued pursuant to section 5."[62]

It is section 5 which presents the most troubling aspect of H.R. 5482. As will be demonstrated, despite the seriousness of the occupational disease problem, H.R. 5482 treated the issue with a heavyhandedness and clumsiness sure to delight those who view an increased federal presence as a prelude to ineptitude. The advocates of reform are well advised to learn from the shortcomings of section 5.

II. Occupational Disease

A. *The Scope of the Occupational Disease Problem*

The historical development of occupational disease legislation has been

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state compensation board, had the right to select the treating physician for his injury from among either all licensed physicians in the state or a board-designated panel of physicians.

53. *Id.* at 17, § 4(1).

54. *Id.* at 17-18, § 4(n). This subsection provided basically a two year statute of limitation.

55. *Id.* § 4(m). This provision stated that any waiting period should not exceed three days and that benefits are to be paid retroactively for the waiting period once the disability has lasted 14 days.

56. *Id.* at 18, § 4(o).

57. *Id.* at 14, § 4(g)(1).

58. *Id.* at 14-15, § 4(g)(2).

59. *Id.* at 15, § 4(g)(3).

60. *Id.* § 4(g)(4).

61. *Id.*

62. *Id.*

chronicled elsewhere.[63] For present purposes, it is sufficient to note that workers' compensation coverage for occupational disease has not been as extensive as the coverage afforded accidental injury. Many reasons have been advanced for this disparity, with the conventional wisdom stating that such diseases were matters better handled by a system of general health insurance.[64] However, the absence of such a comprehensive system of insurance in the United States has meant that occupational disease has often gone uncompensated. Now all fifty states and the District of Columbia provide for some coverage of occupational disease.[65] Such *general* coverage has not eliminated the controversy surrounding occupational disease compensation, however. Numerous problems with the systems of compensating workers for occupational diseases have led to federal entry into the field, most notably by enactment of the Federal Coal Mine Health and Safety Act of 1969,[66] a statute designed to compensate sufferers of "black lung" disease (pneumoconiosis). H.R. 5482 reflected a judgment that greater federal intervention in the occupational disease field is needed.

As will be discussed, the need for some reform seems clear. However, if one is looking to find a justification for the aversion many have to a federalization of, or at least a substantial federal presence in state workers' compensation systems, it is certainly supplied by the ponderous standard setting procedure prescribed by H.R. 5482. One is not denigrating the seriousness of the occupational disease problem by suggesting any future proposal seeking to redress the occupational disease dilemma should possess a procedure which is considerably more streamlined than that of H.R. 5482. A detailed inquiry into the nature of the occupational disease problem itself is called for, however, before an examination of H.R. 5482's occupational disease provisions.

A valuable source of information for the evaluation of occupational diseases is a study submitted to Congress in June 1980 by the Department of Labor entitled "An Interim Report to Congress on Occupational Diseases." The Interim Report was prepared as part of a statutory direction contained in the Black Lung Benefits Reform Act of 1977.[67] The Secretary of Labor's letter of transmission to Congress sets out the four major issues considered in the report:

> 1) the magnitude and severity of occupationally related diseases with

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63. 1B LARSON, *supra* note 43, § 41.20.

64. *See, e.g.*, W. MALONE, M. PLANT, & J. LITTLE, WORKERS' COMPENSATION AND EMPLOYMENT RIGHTS, CASES AND MATERIALS 231 (2d ed. 1980) [hereinafter cited as MALONE].

65. *See Hearings on H.R. 5482*, *supra* note 2, at 249 (testimony of United States Chamber of Commerce).

66. 30 U.S.C. § 901-962 (1976).

67. *See United States Department of Labor, An Interim Report to Congress on Occupational Diseases* (1980) [hereinafter cited as the *Interim Report*] (letter of transmission by Secretary of Labor).

> special reference to pulmonary and respiratory diseases; 2) the status and adequacy of current disability programs for victims of occupational diseases; 3) alternatives for improving disability compensation for victims of occupational diseases; and 4) the status and adequacy of preventive programs.[68]

The Interim Report offers some alarming statistics on the magnitude and extent of the occupational disease problem. For example, according to the Interim Report, only 5% of those severely disabled from an occupational disease receive workers' compensation benefits as a result.[69] In identifying the difficulties with establishing the requisite connection between disease and employment, this Report indicated a few of the more formidable impediments: "(a) the length of time which has elapsed between the hazardous exposure and the onset of disability and/or death, (b) the multiple causes of diseases, and (c) associating occupational diseases with employment experience at specific firms".[70] The "multiple causes" rationale is referred to frequently in the Report;[71] the Interim Report placed considerable emphasis on the fact that the interaction of smoking with workplace agents produced a *multiplicative* and not merely additive effect in the causation of cancer.[72]

Other factors and statistics underscore the disparate treatment accorded workers who suffer work injuries and those who are afflicted with an occupational disease. While work injury cases are resolved in an average period of two months, a worker with an occupational disease waits an average of a year before receiving compensation benefits.[73] This certainly runs counter to one of the primary objectives of workers' compensation: to expeditiously get money to the worker so as to maintain the injured eligible employee at least at a minimal income level.[74] The occupational disease claim was denied initially in 60% of the cases as compared to only 10% of the injury cases.[75] Moreover, the prevalence of compromise settlements is much greater in occupational disease cases.[76] Such settlements are widely regarded as being inappropriate for workers' compensation cases. They place a lump-sum amount in the worker's hands rather than a weekly payment which can be regarded as a continuing substitute for wages lost due to disability.

The most poignant demonstration of the unfavorable treatment accorded occupational disease is supplied by noting the average benefits received by a worker who is totally disabled by an occupational disease *and*

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68. *Id.*
69. *Id.* at 3.
70. *Id.*
71. *See, e.g., id.* at 11, 15.
72. *Id.* at 11. *See also Hearings on H.R. 5482, supra* note 2, at 474-83 (testimony of Dr. James A. Merchant).
73. *See Interim Report, supra* note 67, at 3.
74. *See* MALONE, *supra* note 59, at 40.
75. *Id.*
76. *Id.*

has satisfactorily established a work-connection for his disability. Total compensation benefits in such cases amounted to $9700, while the average expected future earnings amounted to $77,000.[77] This disparity is in striking contrast to the goal of workers' compensation statutes to replace at least ⅔ of lost wages.[78]

Finally, there are other factors which substantially disadvantage occupational disease claimants.

> Many occupational diseases, particularly respiratory illnesses, exhibit clinical symptoms indistinguishable from "ordinary diseases of life" and other confounding factors such as the aging process. Other chronic diseases, such as lead intoxication, have varied medical manifestations. Many are manifested long after the first exposure and sometimes where there has been no recent connection, occupational or otherwise, with the hazard in question. Still other issues such as, multiple causality, and synergistic effects undermine the establishment of simple cause/effect relationships.[79]

Aside from the medical complexities associated with occupational disease cases described above, there are also imposing legal barriers to establishing an entitlement to benefits. Many states provide for exclusion of "ordinary diseases of life" even where the proof suggests the worker in fact contracted the disease as part of his employment.[80] Likewise, many state statutes purport to apply a "peculiar risk" test to the disease though judicial interpretation may temper this.[81] The presence of rebuttable presumptions against compensability poses a similar problem. Such provisions typically state that there is a presumption against compensability of the worker's condition unless he has been exposed to, for example, dust particles for a minimum period of time immediately preceding his claimed disability.[82] Such provisions exist despite the widespread ignorance regarding the rela-

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77. *Id.* at 3-4. A worker injured by accident receives an average of $23,400 for total disability. *See Interim Report, supra* note 67, at 74.

78. *See Hearing on H.R. 5482, supra* note 2, H.R. 5482 § 4(b)(1).

79. *Interim Report, supra* note 67, at 68.

80. *See, e.g.,* MICH. COMP. LAWS ANN. § 418.401 (1980) which states: "Ordinary diseases of life to which the public is generally exposed outside of the employment shall not be compensable." As noted by many sources, the problem in establishing compensation usually does not lie in the definition of "ordinary diseases of life." Rather, the courts focus on whether the conditions of employment as a matter of factual causation can be tied to the contracting of the disease. *See* 1B LARSON, *supra* note 43, § 41.33.

81. The "peculiar risk" doctrine would be applied in such a way that would also exclude ordinary diseases of life. Moreover, the employee would have to establish that his condition was not only an ordinary disease of life, but was an incidental result of his *particular* employment.

82. *See, e.g.,* IOWA CODE §§ 85A.12, 13(2) (1981). The latter provision states that there is a presumption on non-compensability for pneumoconiosis "unless during the ten years immediately preceding the disablement . . . the employee . . . 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."

tionship between amount and length of exposure and occupational disease. Also, maximum amounts recoverable for certain occupational diseases are statutorily prescribed in some states. For example in Iowa, the maximum amount of compensation presently payable for pneumoconiosis is approximately $21,000.[83]

The most vexing aspect of the occupational disease problem, however, is the insufficiency of data on the prevalence of occupational disease. Predictably, industry estimates of occupational disease are much lower than labor projections.[84] Yet how are we to judge whether a federalized occupational disease statute is called for unless we can accurately gauge the scope of the problem? The Department of Labor Report paints a troubling picture. Sources of data noted by the Interim Report which are available to examine occupational disease include OSHA mandated employers' records, state workers' compensation data on occupational disease claims, physician reports of occupational disease and illnesses in California, death certificates and a Social Security Administration survey.[85] Deficiencies with these sources are obvious. OSHA statistics understate the occupational disease problem for various reasons, not the least of which is a reluctance on the part of employers to acknowledge the magnitude of the problem.[86] Efforts to collect accurate data are impeded also by the absence of a centralized data collecting system for workers' compensation.[87] Moreover, physician records suffer from incompleteness because doctors are inadequately trained to recognize work-related illnesses.[88]

The means of data-collection employed by the Social Security Administration is not free from question and is, in fact, harshly criticized by indus-

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83. *See* IOWA CODE § 85A.13(3) (1981).

84. *Compare Hearings on H.R. 5482, supra* note 2, at 331-41 (testimony of Frank Burkhardt, Research Director, International Brotherhood of Painters & Allied Trades) *with id.* at 172 (testimony of Mary Ann Stiles, President and General Counsel of the Associated Industries of Florida). The former witness spoke of the "incidence of occupational disease . . . growing at a phenomenal rate," *id.* at 338, while the latter stated that "sources from the medical, scientific, academic, governmental and international communities effectively refute," *id.* at 172, the supposition that occupationally induced cancers constitute 20 to 38 percent of all cancers.

85. *Interim Report, supra* note 67, at 39.

86. *Id.* at 40.

87. *Id.*

88. *Id.* at 40. The sponsor of H.R. 5482, Representative Edward Beard, made the following statement in the hearings:

> Well, you know, we wrote to the medical schools asking them if they could step up the programs in this whole area of identifying occupational diseases. This is a frontier in medicine today; modern chemicals and technologies have created many problems.
>
> Some of the medical school people were appalled that someone dared to question their courses of study. So you have a situation where we get 10 physicians and most of them would classify an illness as a standard disease and not stop to think that it might be job related.

Hearings on H.R. 5482, supra note 2, at 40.

try. The Administration performed two surveys, one in 1972 and one in 1974, of both disabled and nondisabled persons. In addition to collecting information on individuals regarding their disability and demographic factors, the respondents were asked, "Was your main condition or illness caused by your job?"[89] The Department of Labor Interim Report goes to substantial pains to justify this self-reporting means of data collection as being reliable, stating that the data so collected was consistent with other sources of information.[90] Nevertheless, as indicated earlier, the criticism of that method, based on the grounds it exaggerates the magnitude of the problem, is vehement.[91] The fact resort to such procedures is apparently necessary serves to underscore the fact that reliable and available sources of data on occupational disease are sorely lacking.

All in all, one gets the sense from the Department of Labor Interim Report that the present system of compensating for work diseases has fallen far short of adequately and equitably treating the problem. One may accept the views that the prevalence of occupational disease has reached "epidemic" proportions. Or, as the Chamber of Commerce of the United States grudgingly admits, that it is conceivable "the workers' compensation system is unable to deal satisfactorily with occupational disease."[92] Proposals for reform within the workers' compensation context are not new, but H.R. 5482 took an approach to the occupational disease problem which could hardly be characterized as modest. An examination of its provisions leads the author to conclude that ultimately it would have had little effect in ameliorating the occupational disease dilemma, whatever its magnitude. It also would have made a considerable contribution to the view that federal intervention in state workers' compensation programs will lead to a convoluted and inefficient intrusion on the prerogative of the state to remedy the claims of injured workers.

B. *H.R. 5482 and Occupational Disease*

The occupational disease standard-setting provisions proposed by section 5 of H.R. 5482 involved both the Secretary of Labor and the Secretary of HEW[93] in the process. The Secretary of HEW was to conduct studies of diseases which may be employment-related in order to recommend standards for recognizing and diagnosing occupational diseases, as well as to establish criteria for resolving questions of causality between disease and work

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89. *Interim Report, supra* note 67, at 44 (quoting SOCIAL SECURITY ADMINISTRATION/OFFICE OF RESEARCH AND STATISTICS, 1971 SURVEY OF RECENTLY DISABLED ADULTS) (original survey dated 1971, surveys also conducted in 1974 and 1978).

90. *Interim Report, supra* note 67, at 44-46.

91. *See, e.g., Hearings on H.R. 5482, supra* note 2, at 264 (comments of Representative Erlenborn).

92. *Id.*

93. HEW has been renamed the Department of Health and Human Services.

environment. Priority for study subjects was to be given to the recommendations of both the Secretary of Labor and the National Workers' Compensation Advisory Commission created by section 17 of H.R. 5482. Apparently, so as to include each and every governmental agency and non-governmental entity having the slightest interest in workers' compensation, the Secretary of HEW was also to consult with the Director of the National Institute for Occupational Safety and Health "and such other public and private organizations as are appropriate with respect to diseases that may be employment related."[94] This was all *preliminary* to the promulgation of any occupational disease standard.

Enter now the Secretary of Labor. The Secretary was charged with the responsibility of establishing standards for occupational diseases as they related to criteria for diagnosis and work-connectedness.[95] These standards were to be promulgated (or modified or revoked) pursuant to the rule-making provisions of the Administrative Procedure Act.[96] In addition to the APA requirements, however, H.R. 5482 set out a labyrinthine process of alarming intricacy. *Every time* the Secretary ascertained that a minimum standard for an occupational disease was needed,[97] he was not only to prepare a proposed rule, but he was also to appoint a three person advisory committee of medical and scientific experts in the field.[98] Presumably a *new* committee would have been appointed each time a new standard was considered appropriate. This advisory committee, after convening and considering the pertinent information relative to the standard, had 180 days to submit a report to the Secretary.[99] The report was to pronounce whether the rule proposed by the Secretary was "consistent with available scientific and medical knowledge."[100] The report could also suggest improvements in the proposed rule.[101]

It is at this point that the already turgid process became hopelessly bogged down. A capsulized account of the process is sufficient to impart its distention. Upon receipt of the advisory committee's report, the Secretary of Labor could then publish the proposed rule in the Federal Register or pub-

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94. *Hearings on H.R. 5482, supra* note 2, H.R. 5482 § 5(a).

95. *Id.* §§ 5(b)(1), (2), (3).

96. 5 U.S.C. § 553 (1976).

97. This determination by the Secretary may result from studies conducted by the Secretary of Health and Human Services or by other means. *See Hearings on H.R. 5482, supra* note 2, H.R. 5482 § 5(c) (2) (A). However, if the Secretary of Labor receives a recommendation from the Secretary of Health and Human Services and decides not to act upon it by proposing a rule based thereupon, he is to publish that determination in the Federal Register. *Id.* § 5(c)(2)(A)(ii).

98. *Id.* § 5(c)(2)(A)(i).

99. *Id.* § 5(c)(2)(B)(i).

100. *Id.*

101. *Id.* § 5(c)(2)(B).

lish his determination that no such rule should be promulgated.[102] Upon publication of a proposed rule, there was a mandated thirty day comment period[103] and an opportunity for "interested persons" to request a public hearing on their objections to the proposed standard.[104] Within 180 days of the closing of the record of any hearing held, the Secretary must again publish any proposed rule, or decision not to promulgate a rule, in the Federal Register.[105] Standards did not become effective until two years after "final promulgation."[106] No self-respecting administrative process would be complete of course without resort to the judicial process. Subsection (e) provided for the filing of a challenge to the standard in the United States Court of Appeals.[107]

What can be said about this process? Is it a painstakingly thorough and thoughtful means of assuring that the standards developed are sound and consistent with available scientific and medical knowledge, one which future reform bills should emulate? The author suggests that its deliberateness, its apparent eclectic nature and its intricacy really result in a duplicative and unnecessarily cumbersome process.

The time span during which the Secretary of Labor would preliminarily identify the need for a standard, appoint an advisory committee, consider its report, publish the standard for comment, hold a hearing and publish a final standard could easily consist of nearly four years when the two year delayed effective date for a new standard is factored in. There is obviously a very real question as to the utility of an occupational disease standard which is four years old (or older) before it even becomes effective. This does not, of course, even take into account the time consumed by the participation of Health and Human Services, the pendency of any judicial challenge to the standard or the failure to meet the time deadlines established by section 5. This last prospect was even contemplated by the H.R. 5482 itself. It stated that standards could not be challenged "on the grounds that the time limitations have been exceeded."[108] This seems to be a sad concession to administrative inefficiency, one which often results in a self-fulfilling prophecy.

Time factors aside, is it necessary to appoint a new advisory committee each and every time the Secretary of Labor believes it necessary to investigate the need for an occupational disease standard? Certainly the occupational disease problem is complex, but couldn't this investigation be conducted as effectively under the auspices of the Advisory Commission created by H.R. 5482? Or by standing committees? Better yet, perhaps existing

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102. *Id.* § 5(c)(3).
103. *Id.* § 5(c)(4)(A).
104. *Id.* § 5(c)(4)(B).
105. *Id.* § 5(c)(5)(A).
106. *Id.* § 5(d).
107. *Id.* § 5(e).
108. *Id.*

mechanisms could be employed to undertake these functions of investigation and review. Part of the stated statutory purpose of the Occupational Safety and Health Act[109] is to maintain healthful working conditions: "by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety. . . ."[110] To help in carrying out this objective, OSHA created the National Institute for Occupational Safety and Health (NIOSH) which was authorized not only to perform studies and experiments relating to occupational disease[111] but also to "develop and establish recommended occupational safety and health standards."[112] H.R. 5482 does include the Director of NIOSH in the standard-setting process as a consultant,[113] but is there any reason the NIOSH resources can not be used more extensively? Such use would eliminate the need for appointing the ad hoc advisory committees every time the potential need for a standard is perceived. Coordination of efforts between NIOSH and the Secretary of Labor in conducting the studies needed to develop occupational disease standards certainly seems preferable to the erection of another costly, duplicative framework. Until it is clearly established that NIOSH is incapable of performing this task, use of its existing resources is the more appropriate and efficient path to follow in any future legislative reform efforts.

The above criticisms of section 5 of H.R. 5482 are certainly not intended to disparage the need for occupational disease research and reform. However, a streamlined administrative process incorporating the above suggestions appears to be the better way of structuring a comprehensive approach to occupational disease problems. Unfortunately, the procedure which H.R. 5482 sought to establish in section 5 was so convoluted, subject to litigation and wasteful that it might properly have been titled "The Government Worker and Private Attorney Full-Employment Act." Future reform efforts, one hopes, will avoid this pitfall.

III. Standard Enforcement

The prior discussion has focused on the establishment of minimum standards for injuries and occupational diseases in workers' compensation. A

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109. 29 U.S.C.A. §§ 651-678 (1975).

110. *Id.* § 651(b)(6).

111. *Id.* § 671(d).

112. *Id.* § 671(c)(1).

113. Section 7 of H.R. 5482 directs the Secretary to evaluate the compensation statutes for all states and determine whether they are in compliance with the standards established pursuant to section 4. If they are, the Secretary is to certify that the state is in compliance or issue a partial certification if there is not complete compliance. *Hearings on H.R. 5482, supra* note 2, H.R. 5482 § 7.

logical inquiry remaining relates to the worker's remedy if he alleges he has not been compensated as called for by the statute.[114] Section 8 of H.R. 5482 addressed this issue, again, however, in a manner that is not without controversy. The controversy does not relate as much to the right of appeal itself as it does to the presence in the process of an appeal to an institution regarded by employers as being symbolic of the necessity of preventing any federal incursion on state workers' compensation programs: the Benefits Review Board.

A claimant who felt aggrieved by the action of a state workers' compensation agency in not awarding compensation in accordance with the provisions of the act or in denying compensation, was entitled to appeal that ruling to the Benefits Review Board established in section 21 of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).[115] Subject to minor exceptions,[116] the Board was to render its decision based upon the record developed before the state workers' compensation agency.[117] The state findings as to eligibility for supplemental compensation were to be regarded as conclusive if supported by "substantial evidence."[118] Finally, section 8 mandated that upon finding an eligible employee was owed supplemental compensation, the Board was to award the eligible employee the supplemental compensation and "the reasonable costs and expenses of litigation, including reasonable attorney's fees."[119]

These provisions may not be remarkable in themselves, though the provision for attorney's fees, even in the case of a good faith refusal to pay supplemental compensation, may strike employers as objectionable. However, the presence of the Benefits Review Board and the consequent reference to the LHWCA calls forth in the minds of industry the most unpleasant of images.

The subcommittee hearings,[120] at which H.R. 5482 was debated, reflect a nearly pathological distaste on the part of industry for the LHWCA and the Benefits Review Board. The LHWCA is described as "a workers' compensation system out of balance"[121] which has reached an "operational crisis,"[122] and which demonstrates "how the good intentions of the federal government can lead to disaster."[123] The Longshoreman's Act, according to

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114. *Hearings on H.R. 5482, supra* note 2, H.R. 5482.

115. *Hearings on H.R. 5482, supra* note 2, H.R. 5482 § 8(a)(1).

116. Section 8(c)(1) of H.R. 5482 sets out situations wherein additional evidence may be considered in rendering a decision. *Id.* § 8(c)(1).

117. *Id.*

118. *Id.* § 8(c)(2).

119. *Id.* § 8(c)(3).

120. *See* note 9, *supra.*

121. *See Hearings on H.R. 5482, supra* note 2, at 166 (testimony of Mary Ann Stiles, Vice-President and General Counsel of the Associated Industries of Florida).

122. *Id.*

123. *See id.* at 238 (statement of Chamber of Commerce of the United States).

some, provides a powerful disincentive to rehabilitation and in fact encourages malingering. It is true that maximum benefits recoverable under the Act now exceed $425 per week.[124] For a worker to recover this amount he would have to earn gross pay of over $600 per week. A hypothetical situation designed to make industry's point is contained in the subcommittee's hearings.

> A single worker living in the District of Columbia makes $400 per week in gross pay. If that worker is injured on the job and becomes temporarily disabled, he is entitled to approximately $264 a week under Longshore. Taking into consideration his weekly social security contribution and his Federal and D.C. tax withholdings, that same worker's normal pre-injury takehome pay would be $261.86. Since this injured worker is at home recuperating, his to and from work travel expenses are eliminated and so are his outside luncheon expenses. Even if these daily costs only amount to $15 per week, there is still a strong incentive to remain out of work. That worker can collect more money at home than he can by going back to work. Increases in all taxes over time make this disincentive even more apparent.[125]

Other equally as virulent condemnations of the LHWCA are evident from the hearing transcripts. A representative sampling of these attacks include claims that compensation costs have increased by 851% from 1970-1980,[126] that the LHWCA has become "an uninsurable hazard,"[127] and that there was "an interesting correlation between periods of high unemployment and increased utilization of Longshore Benefits."[128]

One may inquire what the problems of the LHWCA have to do with workers' compensation reform generally and a proposal such as H.R. 5482 specifically. H.R. 5482 did not of course seek to adopt the LHWCA, though its maximum compensation provisions did eventually reach the 200% of state average weekly wage mandated by the LHWCA.[129] What strikes terror in the hearts of industry is the overall track record of the federal government in the administration of workers' compensation programs. This includes not only the LHWCA, but the Federal Employees' Compensation Act[130] and the Black Lung[131] legislation. The industry perception of these

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124. *See* 33 U.S.C.A. § 906 (1978) which sets the maximum benefit amount at 200% of the national average weekly wage. *See also Hearing on H.R. 5482, supra* note 2, at 307 (chart produced in testimony before subcommittee).

125. *See Hearings on H.R. 5482, supra* note 2, at 168 (testimony of Mary Ann Stiles, Vice-President and General Counsel of the Associated Industries of Florida).

126. *Id.* at 238 (statement of Chamber of Commerce of the United States).

127. *Id.* at 365 (testimony of Andre Maisonpierre, Vice-President, Alliance of American Insurers).

128. *See id.* at 165 (testimony of Mary Stiles).

129. *Id.* H.R. 5482 § 4(b)(1)(c).

130. 5 U.S.C.A. §§ 8101-8193 (1980).

131. 30 U.S.C. §§ 901-960 (1976).

compensation programs is as unfavorable as that of the LHWCA, as is apparent from an examination of the subcommittee hearings. Testimony by industry spokesmen indicated that in the period from 1969-1979, disability expenditures under FECA rose 928%.[132] Likewise, under the Black Lung legislation, industry testimony asserted that this "pension system" now costs more than one billion dollars per year and contains a totally unreasonable definition of total disability which allows workers to collect total disability benefits even when they are able to work at other gainful employment. In other words, according to some, the concept of wage loss was abandoned.[133]

It is not the intent of the author to suggest that these industry pronouncements of doom are accurate or not. Rather, these comments are designed to indicate the unshrinking opposition of industry to another substantial federal program of workers' compensation or a federal presence in state systems. Though some supporters of a bill such as H.R. 5482 may contend that what is desired is not a federalization of state workers' compensation programs, but merely a setting of minimum standards, the claim is unconvincing.[134] The choice of the LHWCA Benefits Review Board as an integral part of H.R. 5482 was perhaps unfortunate in that it conjured up images of hoary ghosts in the minds of industry. It certainly does little to convince such interests that the "standardization" of state workers' compensation systems can be accomplished painlessly and it certainly provides ammunition for the weapons of those aiming at preventing an increased federal presence in programs historically administered by the states. Reform efforts in the compensation field seem destined to fail so long as the proposals are stated in terms which trigger these almost instinctive negative reactions from industry.

Aside from the provisions noted above, there were few sections of H.R. 5482 which generated any real controversy. The terms appear to be reasonable efforts to implement the program of increased federal participation in state workers' compensation systems and would likely appear in some form or other in legislative efforts of the same ilk. Authorizations for grants to states to assist them in evaluating their compensation programs were provided for.[135] Section 13 extensively addressed the problem noted earlier as to the paucity of data in the compensation field, mandating that the Secretary of Labor "develop and maintain a program of collection, compilation, and

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132. *See Hearings on H.R. 5482, supra* note 2, at 169 (testimony of Mary Ann Stiles).

133. *Id.* at 171.

134. *See id.* at 210. Testimony of Banett K. Seeley, Assistant Director, Department of Social Security, AFL-CIO reads in part: "We also wish to note that we remain committed to a complete federalization of the State workers' compensation programs and that we favor the approach represented by the bill before this subcommittee as a mimimum necessary first step." *Id.*

135. *Id.* H.R. 5482 § 12.

analysis of workers' compensation data."[136] This included the direction that the Secretary require that reports concerning the fact and extent of injury, the payment of compensation, and other information, be filed with the state workers' compensation agency.[137] The Secretary was then obliged, as a condition of making any data collection assistance grant to a state, to have the states submit reports at least annually which analyzed the data collected.[138] There were also provisions for studies of the compensation of partial disabilities by state workers' compensation programs,[139] for research to develop recommendations to improve compensation programs and make them more efficient,[140] and a requirement that the Secretary submit a report to each new congress detailing the "progress toward achievement of the purpose of this Act, and the needs and requirements in the field of workers' compensation."[141]

IV. Third Party Liability and "Sole Source"

One other provision of H.R. 5482 does pose a notable policy problem. Section 10 addressed the issue of exclusivity of remedy and third party liability in workers' compensation. It is a fundamental tenet of workers' compensation theory that in exchange for the benefits received by a worker when he is injured on the job he surrenders his common law right of suit against the employer for the employer's alleged negligence.[142] In other words, the employee's exclusive remedy as against his employer for such an injury or disease arising out of and in the course of his employment is workers' compensation. Section 10 enunciated this principle and extended the immunization from suit to other parties closely related to the employer. This included fellow employees, a course of action followed by many states.[143]

Equally as fundamental a principle of workers' compensation is that this insulation from liability does not extend to *third parties* not expressly protected by the exclusivity provision of the statute.[144] A third party who has caused the injury to the employee can be held liable to the employee's employer for the compensation benefits he has paid the injured employee

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136. *Id.* § 13(a).
137. *See id.* § 13(b).
138. *Id.* § 13(b)(3)(A).
139. *Id.* § 6.
140. *Id.* § 14.
141. *Id.* § 16.
142. *See* 1 Larson, *supra* note 43, § 1.10.
143. Section 10(a) makes the compensation remedy for the employee exclusive as against not only the employer and fellow employees, but also the "employer's insurer or any collective-bargaining agent of the employer's employees and any employee, officer, director, or agent of such employer, insurer or collective-bargaining agent. . . ." *Hearings on H.R. 5482, supra* note 2, § 10(a). *See also* Iowa Code § 85.20 (1981).
144. *See* 1 Larson, *supra* note 43, § 1.10.

and to the employee himself for damages in excess of those benefits.[145] Section 10 treated the situation, however, in a rather peculiar fashion.

An action against a third party was provided for, and the statute clearly contemplated that many of these eligible employee claims would have a products liability flavor. Section 10 stated this about third party actions:

> [Such actions] shall include but not be limited to all actions brought for or on account of personal injury, disease, physical or mental impairment, disability, or death caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, warning, instruction, marketing, packaging, or labeling of any product. It shall include, but not be limited to, all actions for damages based upon the following theories: Strict products liability; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether deliberate, negligent, or innocent; misrepresentation, concealment, or nondisclosure, whether fraudulent, negligent, or innocent.[146]

Such a provision is not unusual at all; in fact it is, as will soon be demonstrated, merely a recognition of the types of third party actions most frequently filed in a compensation setting. What is peculiar is the treatment H.R. 5482 accorded the judgment recovered by the injured eligible employee. According to H.R. 5482, the amount of such a judgment was to be *reduced* by the amount of compensation (including supplemental compensation) paid to the eligible employee or his survivors for the injuries which presented the occasion for the third party suit.[147]

This provision runs counter to the conventional practice of reimbursing the employer for the benefits he has paid to the eligible employee and allowing the eligible employee to retain the balance. Instead, the third party tortfeasor was to pay the amount of the judgment *less* any compensation benefits paid the eligible employee. This is apparently so even if the third party tortfeasor had been, for example, grossly negligent and the employer was in no way culpable.

A simple example demonstrates the operation of the provision. Let us assume an employee has been injured on the job by a machine which is unreasonably unsafe, and which has been manufactured by a third party, i.e., not the employer. If the injury arises out of and in the course of the employment, the employer will be obligated to pay the employee compensa-

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145. See for example, IOWA CODE section 85.22 for a representative treatment of this issue. The right to proceed against the alleged third party tortfeasor is initially vested in the employee. If he fails to bring such an action, his employer may do so. In any event, the employer is to be repayed the compensation he has paid the employee. *See* IOWA CODE § 85.22(a) (1981).

146. *Hearings on H.R. 5482, supra* note 2, H.R. 5482 § 10(b)(3). The present value of future compensation payable is also to be deducted from the judgment amount against the third party.

147. *Id.*

tion benefits even if the cause of the employee's injury is the defective nature of the machine made by the third party manufacturer.[148] Further assume the employer pays the employee $1000 in compensation benefits. Typically, the employee could still, after recovering compensation benefits, sue the third party for its breach of duty.[149] If we assume the employee does this and collects a judgment of $10,000, there are at least two possible courses of action. One would be for the employee to collect the $10,000 judgment and repay his employer the $1000 in benefits received by the former. This is the manner in which a large number of states treat the matter.[150] Another method, which was that proposed by H.R. 5482, is to *deduct* from the judgment amount owed by the third party the $1000 previously paid to the employee as compensation benefits.

What is the effect of choosing one or the other method? In neither case does the employee collect anything more than $9000 from the third party. But if the third party has been found, for example, negligent, why should he be permitted to gain from the fact the employee has been paid workers' compensation benefits? Why should a blameless employer be compelled to bear the $1000 compensation payment if there is a culpable third party? Equity seems to demand that the manufacturer be required to shoulder this loss rather than the employer in such a situation. Any future compensation act in the vein of H.R. 5482 should reconsider what the proper balance of liability between these parties should be.[151]

The products liability context supplies another interesting aspect of workers' compensation standardization acts such as H.R. 5482. This issue is reflected in the hearings before the House Subcommittee on Labor Stan-

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148. Of course, the problem can present itself in the converse fashion. It may be that while the product has not been manufactured negligently, still the maker is held liable under principles of strict product liability. Yet it may be that the employer acted unreasonably by not adequately training his employees so that they could safely use the machine. As between the two parties, employer and manufacturer, the former is the more culpable. Nevertheless, the employee can still recover in a third party action against the manufacturer, and the latter may be barred from seeking contribution from the employer if the exclusivity provision of the compensation act is construed to release the employer after he has paid compensation from *all* liability, *whatsoever*, either to the employee *or* to a third party. *See generally* 2A LARSON, *supra* note 43, §§ 76.00-.53.

149. *See, e.g.*, IOWA CODE § 85.22 (1981).

150. *See, e.g.*, IOWA CODE § 85.22.(1) (1981).

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dards of the Committee on Education and Labor in the Second Session of the 96th Congress, previously referenced.[152]

One witness testifying at the hearings was Robert Taft, the former Senator from Ohio. Mr. Taft appeared in his capacity as general counsel for the Special Committee for Workplace Product Liability Reform.[153] A statement from Mr. Taft's testimony sets forth his proposal: "While our Committee is in general agreement with the increased benefit standards and enforcement mechanism contained in H.R. 5482, we believe such increases would be appropriate only if Section 10 is amended to make the increased benefits mandated thereunder the sole and exclusive remedy for workplace injuries."[154] As is apparent from Mr. Taft's statement, the products liability claims of workers would be eliminated in return for the increased benefits (among other things) outlined in H.R. 5482. According to Mr. Taft, the need for a sole source approach is made out in part by a 1977 survey by the Insurance Services Office (ISO).[155] This study found that while only 11% of the claims of workers who were injured at work were product related, such claims resulted in 42% of the total amount of payments made on *all* product liability claims.[156] The result, according to Mr. Taft, has been an enormous increase in insurance premiums for manufacturers of worksite products and a "products liability crisis in the workplace."[157]

Mr. Taft specified other reasons that dictated the need for a sole source remedy provision. First, most states do not permit a work product manufacturer to be indemnified by an employer who was, for example, negligent in his maintenance of a product or in not providing adequate instructions or warnings to his employees.[158] This fact is a result of some state statutes which make an employer liable for workers' compensation to an employee for a work-place injury and releases him "from all other liability . . . whatsoever, whether to the employee or any other person."[159] Second, an employer possesses a subrogation lien against third party recoveries obtained by the employee even in cases where the employer has caused in whole or in part the employee's injury.[160] This produces no incentive, it is argued, for the employer to maintain a safe workplace.

What effect would the sole source remedy provision have on employee's claims? According to Mr. Taft, only one-half of one percent of product-related work injuries ever develop into suits where an employee obtains a re-

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152. *See* note 9, *supra*.
153. *See Hearings on H.R. 5482, supra* note 2, at 99.
154. *Id.* at 100.
155. *See id.* at 104 (Insurance Services Office (ISO) Closed Claim Survey of 1977).
156. *Id.*
157. *Id.* at 100.
158. *Id.* at 107.
159. *See, e.g.*, MO. REV. STAT. § 287.120 (1980).
160. *See* 1 LARSON, *supra* note 43, §§ 76.00 - .53.

covery considerably higher than workers' compensation benefits.[161] Thus the overwhelming majority of workers would profit by the sole source provisions since workers' compensation benefits will be higher and they "will avoid having to pay 25-40% of [the] award to plaintiff's attorneys and the uncertainty, delay, and mental anguish suffered during tort litigation."[162] Even when one considered the lowered insurance rates as a result of lessened transaction costs, the incentive for the employer to create a safe workplace, the benefits inuring to most workers and the other beneficial qualities of the sole source remedy provision, Mr. Taft contended that its flaws were vastly overshadowed by its favorable attributes.[163]

With such an array of positive characteristics, the sole source notion has some appeal. Yet there are clearly formidable problems which drafters of compensation reform statutes must consider. Is it enough to say that the substantial majority of workers would be benefitted by a sole source provision? What about those workers who are injured on the job by a product which has clearly been manufactured defectively, perhaps even recklessly? Is it satisfactory to limit the worker's remedy to increased compensation

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161. *Hearings on H.R. 5482, supra* note 2, at 111.

162. *See id.* at 109.

163. *Id.* at 113. The sole source provision offered by Mr. Taft as section 10 states:
(a) The benefits to which employees are entitled under Sec. 4 of this Act shall constitute the employee's exclusive remedy against all parties, including, but not limited to, the employer, fellow employees of the same employer, any manufacturer or seller of machines, equipment, materials, or services, and collective bargaining agent of the employer, such employee, or any other third party, and in place of all other liability of such parties to the employee, his or her legal representative, spouse, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such parties at law on account of any injury or death arising out of and in the course of employment.
(b) Any employer or workers' compensation insurance carrier which may be liable to pay compensation benefits under Sec. 4 of this Act may join as a party defendant into the original workers' compensation proceeding any third party whose fault has caused or contributed to the cause of the employee's injury for which such compensation benefits are sought; Provided, however, that the liability of the third party shall be limited to the total amount of the compensation benefit payment.
(c) (1) In any action brought against a third party by an employee for disability not covered by Sec. 4 of this Act, no state workers' compensation statute or other state law shall bar recovery by such third party against an employer, whose fault caused or contributed to the cause of the employee's injury; Provided, however, that such recovery shall be limited to an amount no greater than the employer's total liability under the state workers' compensation statute.
(2) In any action brought under Sec. 10 of this Act or in the case of disabilities not covered by Sec. 4 of this Act, in any action by an employer or workers' compensation insurance carrier for subrogation under a workers' compensation law or similar state statute, or by an injured employee in his or her own name, the employer's contributory fault shall be a defense where such fault involves failure to comply with any Federal or state statutory, administrative or common law requirement relating to industrial safety.

benefits despite crippling and permanent injuries?

Mr. Taft asserted that the present system is inequitable since an employer cannot be sued by a third party manufacturer for indemnity even when the employer is the principal cause of the harm suffered by the employee.[164] This, it is argued, diminishes the employer's incentive to maintain a safe work place. Conversely, since it is the employer who is charged with making compensation payments, what incentive is there for the manufacturer of work-site products to make them safe if he is insulated from liability by a sole source provision? The sole source proposal suggested by Taft attempted to address this problem. It permitted an employer (or insurer) to join the allegedly responsible third party in the original compensation proceeding brought by the employee.[165]

Is this a desirable approach to the problem? Such a proposal seems likely to convert the workers' compensation claim into a mini-civil suit. Since workers' compensation programs are administered with a goal of resolving claims for benefits in an expeditious manner, one wonders whether such an objective is advanced by a provision which interjects the impleader and cross-claim into a process primarily designed to aid an injured worker. Moreover, it can be persuasively argued that the policy bases for the third party action on the one hand and workers' compensation on the other are quite different. The third party action focuses on traditional tort principles of fault or strict liability for manufacture of a defective product. Certainly with adoption of a sole source provision having provisions for joinder, the focus as between defendants would be on relative fault. The danger that the proceedings between or among defendants would delay or perhaps even jeopardize the employee's recovery of benefits is not to be taken lightly. In workers' compensation, these notions of fault are clearly inappropriate, and the sole source proposal with such joinder provisions seems to ignore this most basic distinction between a system of employee social legislation and a tort system. The interjection of fault concepts even as between defendants in a compensation setting is inappropriate. Until there is further study on whether the worker really is sufficiently benefitted by the proposal it seems best to proceed cautiously. That the sole source notion is one designed to ameliorate the "work place products liability crisis," such as it is, does not presently seem to be a sufficient justification for its adoption in a federalized workers' compensation statute.

V. The Future of Workers' Compensation Reform

H.R. 5482 has been examined as a representative effort to gain workers' compensation reform by injecting an increased federal presence into state-administered programs. Such efforts have certainly inspired much criticism

164. *Id.* at 107.
165. *See id.* at 147.

and little success. The issue, however, remains: Is there a need for federalization or quasi-federalization of state workers' compensation programs?

If the answer to this inquiry is yes, a large part of the reason must be attributed to the complexities and seemingly intractable nature of the occupational disease issue. It is a field where much remains to be done. Even the much-debated National Commission Report deals only cursorily with occupational disease. It states that, "[w]e recommend that all states provide full coverage for work-related diseases."[166] However, this Report considers no further the problems of work-related diseases previously noted herein. Namely, what is the role of presumptions in occupational disease statutes? How should the law regard the interaction between smoking and exposure to various substances such as coal or silica dust where the "multiplicative effect" is prevalent? What type of work-connection for occupational diseases need be established? These and other pressing matters went unaddressed by the National Commission Report perhaps because the problem was not perceived as being as acute as some perceive it to be presently.

The disparate treatment accorded occupational diseases and injuries may not necessarily dictate that a federalized workers' compensation program is needed, but it at the very least indicates a dramatic need for additional review and considered action. The study undertaken would necessarily evaluate the scope of the occupational disease problem in a way creditably done by the Department of Labor in its Interim Report to Congress. Yet the author suggests that this is merely the first preliminary step toward a sufficient review of the issue before action is taken. H.R. 5482 did provide for a systematic program of data collection in section 13 which would serve as a palliative of sorts. By the same token, the hearings for H.R. 5482 reflect a need for additional physician education to aid in recognition and treatment of occupational diseases.[167]

What seems evident about the above suggestions is that they could be implemented through the states as well as the federal government. Section 12 of H.R. 5482 provided for grants to states to investigate these problems. Through the judicious use of the money appropriated, states might be able to achieve valuable results with minimal federal intervention. What is most apparent is that H.R. 5482's approach to occupational disease was both distended and wasteful. It proposed an expansion of research efforts which might better be pursued through efficient use and consolidation of existing resources. Perhaps the most needed course of action is for the appointment of a new National Commission which could focus its attention more precisely on the occupational disease problem. The Commission could also review the progress since 1972 of state workers' compensation plans. Such a Commission was suggested in the original Report.[168] Though the proposal

166. NATIONAL COMMISSION REPORT, *supra* note 10, at 50 (recommendation 2.13).
167. *See Hearings on H.R. 5482, supra* note 2, at 478-79.
168. *See* NATIONAL COMMISSION REPORT, *supra* note 10, at 126.

may seem like a temporary expedient which merely buys time, the author suggests there is reason to believe otherwise. The Report of the Commission in 1972 added respectability to a systematic analysis of workers' compensation which had been previously absent, and it generated a dialogue among industry, labor, government and others as to the proper role of workers' compensation. Further study by a National Commission might go a long way toward giving visibility to the occupational disease problem and supplying assistance in the analysis of the insistent issues which pervade the area.

Apart from the occupational disease dilemma, are there sufficient additional reasons for federalization of state workers' compensation programs? One measure of this, as indicated earlier,[169] is the progress made by states in complying with the nineteen essential recommendations of the National Commission. The average number of the nineteen essential recommendations adopted as of January 1, 1980 is 12.03, with New Hampshire, having complied with 18.5 of the recommendations being the highest, and Mississippi, at seven, being in compliance with the fewest.[170]

Since 1972, significant progress has been achieved by the states in moving toward compliance with the nineteen essential recommendations. The adoption of compulsory coverage has been widespread;[171] full medical benefits without limitations as to time or amount are increasingly evident;[172] benefit levels generally have risen dramatically, with the number of states setting the maximum weekly benefit at two-third's of the state average weekly wage or higher having increased substantially.[173] Does this represent "satisfactory progress"? Obviously, the question is begged by use of the term "satisfactory." The sponsor of H.R. 5482, Representative Edward Beard, stated in the Subcommittee Hearings:

> I have been here for 6 years, and for 6 years they have talked about coming up to the 19 points. Few States are going to move unless they are forced to move, that is the way they operate out there. Very few States have volunteered to go from 14 points to 19 points. As a matter of fact, some of them have gone the other way. So, that is the story, those are the facts we are dealing with.[174]
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> . . . .
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> We have to do something. Ten years from now we could still be sit-

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169. *See* text accompanying notes 12-15 *supra*.

170. *See Hearings on H.R. 5482, supra* note 2, at 220 (table prepared by AFL-CIO Executive Council from information supplied by U.S. Department of Labor and submitted to subcommittee). Iowa has recently joined New Hampshire as being in substantial compliance with recommendation 18.5.

171. *See id. See also id.* at 298 (table prepared by American Insurance Association). All states except New Jersey, South Carolina, and Texas are in compliance with recommendation 2.1 making compensation coverage compulsory.

172. At least 45 jurisdictions so provide. *See id.*

173. *See id.*

174. *Id.* at 53.

> ting here and you or your replacement will be telling me, "We are going to look into it and the States will take care of it." We have a plan of action here. Something has to be done. No matter what the chamber of commerce or big business says, we are going to get it through the Congress.[175]

On the other hand industry spokesmen talked of the states being in "substantial compliance with the 19 essential recommendations,"[176] and of "important improvements"[177] indicating "progress is being made."[178]

It is not surprising that there is a difference of opinion as to the sufficiency of progress. Yet the fact remains that the trend appears to be toward the adoption of more rather than fewer of the nineteen recommendations. The tension involved in a labor-management issue like workers' compensation makes gradual progress nearly inevitable. Moreover, measuring the adequacy of state compensation systems solely by compliance with the nineteen essential recommendations fails to take into account that some of the nineteen may be more important than others. Consequently, though a state may not be in total compliance with a recommendation, it may be in partial or even substantial compliance. All in all, state progress toward adoption of the nineteen recommendations does not seem so recalcitrant as to supply in itself a basis for federalization of state compensation programs.

A substantial impediment to industry acceptance of a new federal presence in state workers' compensation schemes is, as noted earlier,[179] the federal history under LHWCA, Black Lung, and the Federal Employees' Compensation Act. Also, with the indexing of benefits in H.R. 5482 for permanent total disability and death to reflect increases in the statewide average weekly wage,[180] there was a concern that the phenomenon of inflation was being "institutionalized" in the benefit structure.[181] Yet there is a more cogent albeit philosophical basis for advancing slowly into a federalization of workers' compensation. The notion of states being the "laboratories" of progress wherein the "experiments" of social legislation could be conducted and analyzed applies in the workers' compensation context. States have peculiar problems relating to industrial injury which arise out of such things as the state's size and extent of industrialization, to name but two factors. Should states with a small cotton industry, for example, be subject to the same occupational disease standards relating to byssinosis as a state whose primary industry relates to cotton? What about a state with no

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175. *Id.* at 329.

176. *Id.* at 231 (testimony by Chamber of Commerce of United States).

177. *Id.* at 48 (testimony of Donald Brain, President, the Independent Insurance Agents of America, Inc.).

178. *Id.* at 329 (testimony of Robert W. Flockhart, Counsel, American Insurance Association).

179. *See* text accompanying notes 12-15 *supra*.

180. *Hearings on H.R. 5482, supra* note 2, H.R. 5482 § 4(f).

181. *See id.* at 291 (testimony of Robert Flockhart).

cotton industry whatsoever? Might there not be distinctive qualities about the work injury problems in a state which warrant individual treatment? On the other hand, there is a certain logic to the argument that "[s]ince American industry is dominated by national and international corporations, it is illogical to have a workers' compensation system which changes at state borders."[182] Moreover, experimentation *above* the standards set by H.R. 5482 would still be permitted inasmuch as those standards are labelled as minimum and are considered, at least by some, as being but a minimum necessary first step.[183]

Though H.R. 5482 met a fate similar to its predecessors,[184] the issue of workers' compensation reform is by no means dead. One can expect new efforts to interject the federal government into the workers' compensation process more extensively. Whether the "new Federalism" of today which looks with disdain upon proposed federal government solutions to many social problems will give way to a philosophy of governance which embraces these proposals presently found unpalatable by many remains to be seen.

182. *Id.* at 429 (testimony of Franklin C. Mirer, Assistant Director, Social Security Department, International Union, United Auto Workers).

183. *Id.* at 210 (testimony of Barrett K. Seeley).

184. The bill was not reported out of the subcommittee. To date, the bill has not been reintroduced.