MINUTES

JUDICIARY COMMITTEE
February 25, 1977

Members Present: Chairman Barengo
Assemblyman Hayes
Assemblyman Banner
Assemblyman Coulter
Assemblyman Polish
Assemblyman Price
Assemblyman Ross
Assemblyman Sena
Assemblyman Wagner

Chairman Barengo called the meeting to order at 8:04 a.m. This meeting was called to hear testimony on AB 138 and AB 160.

AB 138: Mr. Bud Campos, Chief of the Department of Parole and Probation, outlined the interworkings of the Board of Parole Commissioners, the Department of Parole and Probation, the Courts and the proposed full-time Parole Board. He stated, as a matter of interest, that 90% of the work the Department of Parole does, is with the courts and less that 10% is directly related to supervision of Nevada parolees.

He stated that he felt that, with the growing pains that Nevada is going through right now, we are asking the Board of Parole Commissioners to do an impossible job based on the work load and the time available to them to do that work. And, many of the things that they can't do, due to being part-time, are the things which do need to be done to adequately assess the risk factors involved with these prisoners before they are released from prison. He pointed out that with all the money that is spent in apprehending, trying, incarcerating, there is practically no money spent on deciding who should get out of prison.

He then compared Nevada with states of similar prison population which, in Nevada, is around a thousand inmates. He stated the current make up of the Parole Board is five Parole Board members and six Parole Board hearing representatives. He then introduced a memo regarding increased Parole Board capabilities which is attached and marked Exhibit A. He explained that all of these points take time that the part-time board doesn't have.

Assembly

Mrs. Wagner asked how often the board currently meets. Mr. Campos said that by law they must meet at least twice a year, but in practice, they meet once a month for two days, one day at a maximum security prison and one day at a minimum security prison. Mrs. Wagner also asked how much the salary for the new, full-time, members would be. Mr. Campos stated each member would receive

$20,000 per year, except for the chairman who would receive $23,500 per year.

He stated that, with the full-time Board, they would be able to work more independently because they would be able to be more knowledgeable. They would be able to rely less on outside information and recommendations than they have to now.

In response to a question from Mr. Price, Mr. Campos reiterated that the state of Nevada is giving less service than any other state with comparable prison population.

Mrs. Wagner asked Mr. Campos to compare Nevada with states of similar total residence population (rather than prison population). Mr. Campos stated that Nevada has a larger prison population, due mostly to the high ratio of transient population. And, he noted that Arizona and Florida have similar transient problems in regard to prison populations compared with state population (in these cases transients are not the same as tourists, as they do not have permanent addresses at time of arrest).

Mr. Carl Hocker, Parole Commissioner, stated that his remarks would be mostly concerned with work load. Prior to July 1976, the Board met every other month and hearing 150-180 cases in two days. He stated this was an exhausting schedule and it was impossible to do an adequate job. This forced them to begin meeting monthly and that is still being done. However, with the continually increasing number of cases to be heard, this is still humanly impossible to cover with a part-time board. He commented further that he did not think justice was being done to the system or to the people coming before the Board due to this problem. He stated that he agrees with Mr. Campos that the Department of Parole and Probation should be apart from any thing else and independent.

In response to a question by Mr. Ross, Mr. Campos stated that the hearing representatives would be left in the system, with the full-time Board, to help fill-in in case of sickness, etc. He did state, however, that the hearing representatives, for consistency sake, would only be used in emergency, short-term situations. Mr. Hocker agreed with this statement.

Chairman Barengo asked Mr. Campos to report back to the committee in regard to the authorizing reference for the rules of procedure for the Board.

Mary Breitlow's statement is attached and marked Exhibit B.

AB 160: Mr. Banner, as introducer, opened the testimony on this bill. He opened with the fact that he had spoken to the two attorneys on this committee and neither handled NIC claims.

Assembly

Mr. Banner then went on to explain, historically, his involvement with the Nevada Industrial Commission and his views regarding those persons who went before this board. He stated that from 1963 to 1967 he served as a commissioner for NIC as hearing officer in the Las Vegas office. He stated that, in effect, this is a no fault insurance program.

He pointed out that it was his opinion that when the state enacts a law by which a state department is allowed to use its administrative authority to interpret the laws, to rule and enforce what they believe is right, then to be fair and just Nevada must offer to the worker the mechanism that will insure the avenue for a proper appeal. He stated that due to the maze of paperwork and chanels the claimant has to go through, perhaps once in his or her lifetime, that person often feels alone, awed, confused and frustrated in this quasi-judicial atmosphere.

Mr. Banner stated that due to this type of a situation, he feels that beginning at the hearing level, the claimant needs an attorney. And, because the state has set up this porcedure and placed this person in this position, that the state owes him the right to an attorney (just as it pays for his physician and hospital services) because the state has not given him the right to suit in this case. He felt that this person has the right to counsel the same as is provided to a criminal in this state.

He then referred to the fiscal note on the bill which was prepared "by this particular department, who has a monopoly and runs this little show to suit theirselves". He stated that since the fiscal note itself had shown an increase in benefits under the new plan, he felt it was obvious that they weren't getting all that they were due now, and that part of the reason that they are not is that they are not represented by an attorney. He then indicated to the committee that there are approximately 128 cases at the hearing officer level, and even if every one of these cases had an increase of benefit come from it, and the attorney costs were $500 each, there would be no way to come up with figures even close to those proposed by NIC.

He pointed out that an attorney would not be furnished for every case, that this applied only to the hearing officer level and then only when there was a realignment of benefits. Chairman Barengo stated he felt there should be some clearer language in the bill to spell this intent out.

Miss Gail Merkel then testified regarding her experience with NIC. She stated that after being hurt on the job, she tried many times to request, from NIC, out-of-state compensation so that she could live with her parents while recovering. Only after an attorney donated his services and went before the commission on her behalf, did NIC settle with her for out-of-state care. In answering a question from Mrs. Wagner, Miss Merkel stated that without the help of this attorney she would never have been able to settle with NIC because she did not know how to go about presenting her case before them.

Note: Due to the relevance of the following testimony, it will be setout verbatim.

John Reiser, Chairman of the Nevada Industrial Commission, stated: If Gail doesn't mind, I might just explain that Milos did call me on this case and I explained to him that the NIC has a rehabilitation responsibility as well as proving the medical care. Gail did request to go to Florida to live with her mother. We did check with her employer and her employer offered her a job in light duty work so that she could go back to employment if she chose to do that. One of the questions that the NIC has to pay attention to is the rehabilitation program and seeing to it that we don't ignore that. We have had problems out-of-state, because others states don't have rehabilitation services programs, similar to those we do have. In her case, she does have the right to either stay in state or go out-of-state. Our claims people wanted to make sure we provided a full service before that claim was closed. She now has the choice of staying here, continuing with medical treatment here and returning to her former employer or returning to Florida. The case did go through an appeal. As far as the Nevada Industrial Commission has been concerned through the last two legislative sessions, we have asked the legislature, with the support of the governor and the Labor-Management Advisory Board, to provide whatever benefits the legislature could justify and whatever rate increases could be justified in the form of benefits to injured workers. The same philosphy, I think, applies, and I think there is a basic difference between the way I feel and the way Mr. Banner feels on this type of legislation. Any increase, and we estimate it to be around four per cent, we feel should be given to the injured worker in the form of increased benefits, as opposed to to being directed to any particular source. That way an employee who chooses to hire an attorney has the same benefit in effect as an employee who doesn't choose to hire an attorney. So I would suggest you think about that difference in philosophy in considering this bill and the other legislation that goes before you this session.

Mr. Banner and I have had, as you know, some difference of opinion on fiscal notes and he referred to that briefly. Even though this bill came in with a fiscal impact"no", I feel I have a responsibility to look at these bills and give you our best estimate and would be very happy to explain, in detail, if you would like. To brief you, I would like to go through the fiscal note with you and give you an idea how we go about calculating a fiscal note and show you that we try to be fair in working up the costs. Jim mentioned the $500 figure that I asume that he probably got that from the California system, or maybe we gave that to you Jim. (Mr. Banner: I picked it out of the air.) Well, I will leave this for the record, in case any of you are interested, this is the California Workmen's Compensation Institute's, "Facts for Injured Workers" (attached and marked Exhibit C) and point out here that"The appeals Board is a court of law, you can represent yourself, of course, but you may want to hire a lawyer. If you do, his fee -- about $500 on the average-- will be deducted from any benefits awarded you by the Appeals Board".

So, in the California system, they point this out to the injured worker if he does hire, or she hires an attorney, the cost of that litigation, hiring her own or his own attorney, will be deducted from the award. So you have an average of $500 in California under their type of system. Since we don't have the extensive litigation that most of the surrounding states do have, I did call my California people who keep a very close track of this and are working very hard to try to figure out their litigation problem.

Just go through the fiscal note, cause I think some of you had questions that weren't quite acurately answered. Any claimant entitled to compensation, approximately 42,000 in 1976, would have the right to an attorney. The attorney fees would be paid from the state insurance fund under AB 160. In California, I got this information from the California Institute, Ron Watson was the man's name, the head of that institute,$35,732,769 was awarded in attorney fees in calendar 1976 by the Workmen's Compensation Board. Now this, an estimate on the north and south part of the state, one out of sixteen claimants in the northern part of the state and one out of thirteen in the southern part retain an attorney. The attorney fees amount to 10.64% of the total value of decisions where an attorney is involved. In other words, it's 10.64% of that 35 million. Nevada would have the potential for in excess of 3200 cases, based on this California example which might be litigated if the bill were passed. Direct cost in attorney fees, using this asumption, in fiscal 1978 could approximate $1,700,000. Additional NIC administrative expense, in the form of added legal staff and supportive personnel and extended temporary total disability as a result of the delays of litigation could increase the cost of the bill to $2,500,000 per annum. The impact on employer premium would approximate 4%. Let me give you a brief idea how we came about that $2,500,000. (Mr. Barengo: How many cases does NIC handle a year?) 42,000 in this state. It's between 40 and 42,000 claims registered, depending on whether you eliminate the duplicate claims and you eleminate those that are denied and that kind of thing. (Mr. Barengo: How many go on after investigation and offer of an award?) Very few, because over 80% of those are medical only type claims which you pay for a nail in the bottom of the foot or that type of thing. There are approximately 8,800 temporary total disabilities and most of those are short-term, less than a month, type of disabilities. (Mr. Ross: Did your asumption on attorney's fees asume that all 42,000 would be getting attorneys?) No, it just asumed that about 3,200 of them would be potential for litigation. (Mrs. Wagner: Can I ask you how you came to that figure?) Sure, we took one out of thirteen, the California rough figure....but... (Mr. Barengo: Is our experience compatible with them always?) No, that's why I say I also looked at three different sources that I want to leave for the record so that you can do your own comparison with this. I took the lowest figure that I could possibly find. I want to see if you agree with me by going through these figures with me. To get up to the, from the 1.7 million, 2,5 million I asked the California people if this is a direct cost for the claimants. What do you estimate to be the cost for

defense and this type of thing and they estimated 5-7%. So, I took the low figure, the 5%, and took about $800,000, about half of what it would cost for the attorneys for the plaintiffs and arrived at that $2,500,000 figure. (Mr. Barengo: But, does California have the same laws that we do, the same proposed law, that it would only get compensated if they got more than was offered?) That's right. That's why I say, I think our figures are probably much lower than they should be, using California's experience because they, number one, take the award out of the injured worker's award. (Mr. Barengo: Does California have this type of provision we're talking about here?) No, they don't. They have a much more restrictive provision. (Mr. Barengo: Let me ask you a question then. If the Board or Commission is offering a reasonable amount of money for the claimant, then he should accept it. If they're not, then the attorney can get more money for them. And, it seems to me that if they're not offering a reasonable amount, they're not doing their proper job.) I agree with you. What you're saying is that this bill isn't written to take that into consideration. This bill would encourage litigation for all 42,000 because you might as well have an attorney come down with you just to fill out the paperwork. (Mr. Barengo: That's the intention of the introducer of this bill, the language may not specific in that.)I agree with you, the language should be changed, I think, if you ...(Mr. Barengo: Asuming we change the language to adequately reflect the intention of the introducer as I questioned it, then what impact would we have?) The impact is asuming that is the intent of the bill. We are using California's example which has that type of legislation in effect, right now. I am asuming that is the intention of.... (Mr. Banner: Mr. Chairman, how many cases are heard at the commission level? Now, I know how many are heard at the hearing officer level cause I got that from the board. Now, how many are heard at the commission level?) Jim, I can give you those figures, I don't have them with me today. (Mr. Banner: Would you say about the same number?) No, I would say there are more heard at the commission level. (Mr. Banner: How many are resolved at the commission level and how many pass through? This is what I'm saying, that there are a number of those that are really the hearing officer level problems cause they pass through the commission, they uphold the claims. That's one of my complaints when I appear before the commission at the commission level, there's only two commissioners. After that, the two commissioners usually split and it goes up here and after three weeks you get the reversal.)No, most of the commission hearings are resolved at the commission level. It's the type of case where you tell an individual not to fire his best shot at the commission level, but to save it till a higher level, that you have a problem. Some of the attorneys, I understand, have your same viewpoint on that, that you don't present the full record to the commission, save your best shot....(Mr. Banner: I do it that way because I'm not fairly treated at the commission level. And, I think it should be eleminated and they should get it in to a non-partial hearing officer. Now the commissioners are not impartial.) (Mrs. Wagner: Where did you come up with 3200 cases as your basis

for fiscal note. Would that be taking one out of thirteen of the total number of claims filed?) That's right. (Mrs. Wagner: Now, I thought I understood you to say that out of the 47,000 claims registered that many of these would not get to this point that we're talking about.) That's right. I asked California that same question, Sue. I said that doesn't even make sense why we should talk about one out of thirteen and they said, well it's actually one out of three of the loss time type cases that are litigated. If you use that same figure you're talking about, somewhere between 2500 and 3500 cases, being potential litigation cases. I think going beyond this in a couple of other avenues, I'd like to leave with your secretary a report to the president of the Congress, completed January 19, 1977. This is a study of workmen's compensation systems around the country that operate under the type of adversary system that is being advocated here. Under delivery, system on page 27, worker's compensation is characterized by the lack of an effective delivery system, far from being non-adversary system, as current practiced, worker's compensation has replaced litigation over who is at fault, litigation over what is at fault and what the effects of the accident will be. Notwithstanding its no-fault characteristics, the system as presently constituted is an adversary, third-party system which expends too much of the premium dollar in friction costs, incident to the delivery of benefits and other purposes entirely alien to the reparation of the accident victim. The rate making process, relative to the construction of manual rates, contemplates as expense component in the rates of about 40%, which allows only 60% of the premium dollar for worker's compensation benefits. From which, however, must be deducted the amounts injured workers must pay their own lawyers. The latter amount has been estimated at about 8% of the benefit. So, it appears that about 52% of the premium dollar goes to the claimant in benefits. The most recent data indicate an insurance loss adjustment factor of about 9% of the premiums. Thus, the total for ajudication of claims constitute about 17% of the benefits. As noted above, two out of five permanent partial and death cases are litigated. One out of two permanent total cases are litigated. This proportion increases to four out of five permanent total cases when the employer is self-insured. So, it's a very informative report and I would recommend, to any of you that are interested in comparing the Nevada system with that that exists around the country, that you take a look at this and there will be many reports following this that will go into considerable detail as to what we're concerned with, if this, and a half-dozen other bills that provide for increase litigation, were to pass by the 77 legislature.

(Mr. Barengo: John, could you tell me how many cases are now represented by an attorney?) How many cases are now represented by an attorney? No, I don't have that. (Mr. Barengo: Could you get that and report it back, please.)I'll do the best I can, but I don't have an acurate count..(Mr. Barengo: I realize that would be pretty tough. How many times have the claimant's benefits been increased at the commission level? Can you tell us that?) I don't have a count on that (Mr. Barengo: Can you get a count on that?)

Not whether they've been increased or not. I can if they've settled without going on to the appeals...(Mr. Barengo: Can you tell us how many times they've been increased at the hearing officer level?) The same type of thing applies. Many of these are remanded at the commission level and the appeals officer level for additional medical consideration based on later medical reports. That isn't the type of information that...(Mr. Barengo: How many in district court?) Yes, we can give you the information. Twelve have gone to the district court. (Mr. Barengo: What happened to those twelve?) I'd have to get that information and get back to you. (Mr. Barengo: Can you tell us any meaningful information on the times benefits have been increased after the person has challenged the system?) Benefits, as you probably know Bob, are reconsidered throughout the lifetime of the injured worker. The worker, contrary to the situation in California, in Nevada has a life-time right to reopen his benefits. And, if his condition deteriorates and the doctor says this is related to the industrial injury, we will reopen that thing and provide benefits throughout his life-time. This happens every day at the claims level and the commission level and at the appeals officer level that the benefits are increased beyond what was previously determined. Our objective is to rehabilitate, to get an individual back to work, Gail is a good example of that type of person because she's going to have continuing medical problems but she can go back to work. There's no reason for her to continue to temporarily totally disabled, as she has been. She can go back to work, we can continue to provide medical treatment to her while she's working. We're looking at a system that encourages people to return to work in the minimum amount of time, discourages disability. Anytime we provide a situation like this, we are going to have delays and we are going to have attorneys representing these claimants. We are emphasizing return to work, minimized disability, emphasize ability. The whole system in Nevada is geared toward that. Consider the fact that the induvidual has a problem under rehabilitation, rather that trying to reward disability. And, that is our whole philosophy and everthing we work toward is along that line. So, when you say, how many times does the commission increase, many times we'll make a decision that rehabilitation services are necessary even though the individual didn't ask for them. Because we can go out and set up an on-the-job training program and pay that employer to hire the individual to come to work and just stay in light duty until she trains and is fully productive. So, the type of question you're asking might fit in some of the other systems, it doesn't fit very well here when you just talk about how much are you rewarding disability. We are rewarding ability and doing everything possible for the motivated individual that does want to return to work. It does give him that opportunity or her the opportunity. (Mr. Price: Mr. Chairman, Do you agree, or do you feel it is our philosophy (state's) that if there are injured workmen, who should be compensated on either temporary or permanent disability, whatever the case may be, that they should have the right to have the best representation and opportunity to put their case forward? Do you agree that the state owes them everything we can possibly give them?) Absolutely. (Mr. Price: Do you agree that if they are not rep

sented by an attorney or an experienced person....Now, I must say that I do disagree with Jim to some degree, I do feel there are (I don't know if you'd call them paralegal)I would think, I feel that Jim probably gives better representation than a lot of attorneys. I'm also aware that a lot of Union representatives who go because of their experience. Do you agree that for whatever the case, whether the person is union or not, that person should be given the opportunities?) Absolutely.(Mr. Price: So, we're on the same side. Now, we're going to have to figure out how to get there. Let's go over some figures. There are were approximately 42,000 registered claims in 1976 and approximately 80% are handled in the initial stages.) That is right. (Mr. Price: This leaves 8,400 cases which procede from there. I took the California average and came up with 14.5%. Then divided the 8,400 by 14.5, which would be the number going to an attorney, I came up with 579 attorneys.....) Bob, Sue asked the same question and I did too when I talked to the California people. When you're talking about one out of thirteen, you're talking about all the cliams that are reported in California and that really isn't a very good figure, is it? They said, No, it's really something like one out of three of the loss time claims. Between one out of two or three of the loss time claims. So, what you're looking at here is the loss time claims, approximately 9,000. In other words, you take a third of the 9000, you'd have about 3,000 loss time claims that are litigated in California. This, AB 160, provides a little more incentive to hire an attorney, because, the injured worker isn't going to have the amount deducted from his award, it's going to be added. (Mr. Price: I have a question about that. You figure about one out of three?) About that. If you take round figures, 9,000 loss time claims, one out of three or about three thousand claims would be potential litigation claims. (Mr. Price: Even if we take the one out of three, I show about a $300,000 difference with your figures. On the California system, is the attorney's fees considered when the ajudication is being made? In other words, can we say we are going to deduct, when it says "the attorney fees will be deducted from your case" could it be left unsaid, that the administrative judge or whoever is making the decision is also figuring attorney's fees into the calculation and they could be adding that $500. Can you tell me if that's a fact or is that how they do it, or do you know?) They don't. They have a schedule system of calculating disability so,...(Mr. Price: And, that system for all you know doesn't?) That system doesn't build in attorney fees. (Mr. Price: You're sure?) Well, as far as the objectives of the system, I'm sure. But, as far as the subjectiveness of the system, you know, where attorneys make agreements outside the written system, I'm sure that has some impact. (Mr. Price: Okay, taking one out of three, I came up with $1,400,000. Now there's some conjecture when you talk about the one out of two or the one out of three figure. What we're really talking about is just off the top somebody's head in California, right?) Let me give you the things that... yes, those are just rough estimates, one out of two or one out of three. They do have some very precise figures, let me give you the precise figures, if you like to have those. There were 66,894 decisions with fees awarded to an attorney in California

in calendar year 1976. $35,732,769 were awarded for attorney fees and $534 per decision was the average attorney fee, and they tell me that that is going up. So, in order to project ahead in 1978 that should be increased. (Mrs. Wagner: How is the attorney's fee set in California? Is it set, as in this bill, by the commission?) No, Sue. I would have to check that again. As I recall they provide something like 25% of the increase that an attorney is able to achieve. But, I want to check that because there are all kinds of laws like that across the country. (Mrs. Wagner: This specifically states that the fees will be fixed by the commissioner or appeals officer and I wondered if that was the same because that will have some bearing on the figures.) Yes, it sure does. They aren't the same as what is stated in this bill and we think this bill will be more expensive than what is provided now. (Mrs. Wagner: Can I ask you why you feel that way since actually the fees would be fixed by the commission?) Certainly, right, because it doesn't require an increase. In other words, to be completely equitable, the commission, if this bill were to pass, would encourage the majority of those 42,000 people to go ahead and get at attorney and have the attorney take care of all the paperwork for you as it isn't going to cost you anything and it was a benefit provided by law. (Mr. Barengo: She just asked you if you were figuring this on the way we take the intent of the bill.) That's,..that's... what we were looking at when we provided a fiscal note is the bill as it reads right now. If you want a fiscal note on a bill, an amended bill, we would be glad to provide that. (Sue Wagner: I understood you to say that you had complied with the bill on the basis of the intent.) No. (Mr. Price: That's what I understood, too.) (Mr. Barengo: That's what we all understood.) No. We asumed the commission would have some decision making authority in this thing the way this bill is written and that we wouldn't allow all 42,000 to have attorneys, because they aren't necessary. (Mr. Barengo: Well, I think we have two things here. Number one, the commission will have the authority to set the fees, only after the attorney has been able to secure an increase....)That's right. If that is it, we should go back and reprice this. (Mr. Barengo: Then, your fiscal note is wrong under that premise.) The fiscal note doesn't apply to that amendment. (Mr. Barengo: You just told us a minute ago that it did.) No, no, I said that we priced this thing out. We didn't use, we couldn't use, we didn't have that...Well, let me go back and say what I did. I took the California system, which isn't the same as the Nevada system, and in 5 days I am supposed to provide a fiscal note. I estimated a fiscal impact that I think is conservative. (Mr. Barengo: January 26 the bill was issued. So, you had more than five days to do it.) But, we have a requirement to send this over as soon as we get a request for a fiscal note. (Mr. Barengo: You called me longer than five days ago on this bill.) On this one, I didn't get a request for fiscal note. I voluntarily provided it and I sent the fiscal note in much earlier that five days ago. (Mr. Banner: Just for the record, didn't the first week I came over here, come over to your office and meet with you and discuss all these bills that I had proposed?) No, you didn't discuss this one. (Mr. Banner: Weren't you with Hagley when I met in you office?) I sure was, but you hadn't made

up your mind on 1/15 whether you were going to amend that or not, Jim. We gave you the figures on that at that time. We gave you the figures on 160 and explained what was wrong with those bills and why they really couldn't be priced out responsibly, because they weren't written the way you intended them. (Mr. Banner: But, I did meet with you and we did discuss the bills?) Yes. (Mr. Banner: Okay.) You said you were going to amend them and we never got the amendment. So, the fiscal office priced it out the best you can without having them. (Mr. Barengo: Based on that premise you then provided your fiscal note, based on that premise?) Based on which premise? (Mr. Barengo: Based on one, the commission will have the reviewing authority and they will set it only after there has been an increase awarded.) You want a figure like 25% of the increase for the attorney fee? Because that would make a difference. (Mr. Barengo: I don't want to set a figure on it.) Well, if we are going to give you a fiscal note that is based strictly on, say, California experience, we need to say that you're going to have a law that is similar to the California law. Otherwise we're ... (Mr. Barengo: I think law we want is: 1. increase gain, 2. how much time has been put into it, the effort and some of the other things that are obtained here and then allow the commission to set a variable rate upon determining all those factors, taking all those things into consideration.) (Mr. Ross: Aren't there other states with NIC than California?) Yes, there are many different types of laws. That's why I say, if we use a state to prepare a fiscal note, we should have a similar law to that state. (Mr. Barengo: As you pointed out a while ago, our state is different than other states, so maybe we have to have a different law.) That's right. That's why we need your amendment before we can price out a cost on this attorney thing. (Mr. Barengo: I think Mr. Banner fairly outlined it and I think I have said...Have I said what to want to say?) (Mr. Banner: Yes.) You're going to consider the time, the effort, the increase...(Mr. Barengo: Yes, and then the commission will be able to set the figure, based upon all those criteria) (Mr. Banner: If they rule correctly or if they administer the thing fairly in the first place, no attorney is going to make any money, you know.) (Mr. Barengo: That's true.) Well, that's why I introduced the federal report because it indicates that about 8% of the premium dollar in other states goes for attorney fees. If that is acurate, you can price out the cost of this bill at 8%. (Mr. Banner: It depends on their error factor.) (Mr. Barengo: Why would 8% of the premium dollar go for attorney fees, if none of those states have the same situation that we're talking about here?) Well, this is an average, taking all states into consideration. (Mr. Barengo: But, do any of them have the particular type of situation that we are talking about?) Yes, some of them do. (Mr. Price: Then I think we should have those states before us, like we have California before us. What would be the....NIC is working without being in the "red" aren't they? What do we have in the reserves?) Well, reserves are liabilities, Bob, and we have about as of July 1, about $115,000,000 of liabilities and about $127 million in assets. (Mr. Price: Is it a foregone conclusion that anything of this nature is going to, in fact, have to raise the rates?) Yes. (Why can't it come out of the other end?) There again, we set up liabilities to pay injured workers benefits over a lifetime,

in the case of permanent total disability and fatally injured. The provision for contingencies that you are talking about is approximately $12,000,000 is about 10% of the assets, or a little less. So that, if over the forty year period, medical costs rise, things that aren't built in to the estimates, if you don't have perfect knowledge, do occur there is a safety margin there to make sure we are fully funded to pay these benefits to injured workers. So, we have a complete, fully funded insurance operation, unlike the Social Security system that operates under the pay-as-you-go, with a very small trust fund. We have a trust fund that will provide benefits to those injured workers. Those are liabilities to injured workers and they can't be used to pay some other injured workers or other benefits. Future premiums are adjusted to take care of the benefits that you determine to be justified this session. So that July first 1977, we will be having a rate that pays the benefits that you determine to be lawful right now. (Mr. Price: Let me ask you this one last question. Since we decided that we are on the same side and would like to give the best representation possible. What would be your suggestion as a way to improve the main question about the fact as to whether the worker does go to disability level has the finest in each opportunity to be represented. What would you suggest.) You have done what I suggested in the 1973 session when you premitted us to do anything necessary to help an individual to return to gainful employment. You also, over the 1973 and 1975 sessions, increased benefits for widows, from $167.50 up to over $870.00 per month maximum. (Mr. Price: You're now really quite answering what I'm asking. All I'm really talking about is the real adversary situation where you are on one side, as an opinion, and the worker is on the other side as an opinion. Those cases, right there, how can we assure ourselves, bearing in mind that you are the adversary actually because at that point in time there is a question, I'm only talking....(Mr. Barengo: They are a protector of the fund.)..what do we do to be, beyond a question of a doubt, that those people that reach that level, who are in dispute with us, that they have the best representation and all their rights protected. What would be your suggestion? If you don't think furnishing an attorney would be the answer, what is the answer?) I would suggest that you have a system that has a labor representative, Blackie Evans is the labor commissioner who represents injured workers, you have an industry representative and you have a public representative, who is myself. If there is a legal question on either side, from either the employer's standpoint or from the employee's standpoint, the process now is to ask our legal counsel to research the thing and give us an opinion on what the legal issues are involved. That concept, as far as I'm concerned, works well. If there is a question about providing a full-time legal adviser, who would be available to injured workers and this type of thing, to sit down with them and explain legal issues and this kind of thing, I would say that would be an improvement over the kind of system that I've seen in these other states, that is detrimental to rehabilitation. (Mr. Barengo: Are you advocating somewhat of a public defender for NIC then?) I would advocate that over this type of thing, if you feel it is necessary to have attorney representation at the appeals level or any other level. (Mr. Barengo: I mean, you're

all good people and you do a really good job, all of you. And, I think you do a great job, but, you do have a dual responsibility to guard the fund.) Certainly we are concerned with benefits and rates, absolutely.(Mr. Barengo: And, they maybe conflicting. And, what we're trying to do is get somebody to only have the responsibility of representing that individual claim.) And that is, I believe, why you passed the law in 1973 to provide for an appeals office that is strictly independent and not administering the fund. (Mr. Barengo: Yes, but how could he go in there representing himself before the appeals officer and, I know that Bortolin does a fantastic job and tries to cut though all the evidence, still , how can he, when you have the doctors, the figures, the lawyers and everybody else and are familiar with procedures. Just that, by itself, is enough to scare somebody off.) We have asked our attorneys, when that kind of a situation comes up, not to go into the appeals officer hearing. Skip King that Mr. Banner mentioned, has been not going into that appeals officer hearing....(Mr. Barengo: It's just the same thing as small claims court and the collection agencies. They aren't lawyers,but they go there every day. They know a lot more about what's going on than the poor guy that's getting hauled up before them.) Well, that's what I say. If the legislature determines that, or the committee determines that, representation is necessary, it would be worthwhile looking at a representative for the injured worker that would be available to him to give advice. Maybe this would minimuze a lot of these hearings and just advise that this is the way that the law provides and explain to them what their legal rights are under the law and whether or not there is a reason for a hearing or not a reason for a hearing. (Mrs. Wagner: I don't think this question has been asked, but so many have been, I may be repeating. I notice that the attorney fees will be paid from the state insurance fund.) That's the provision in this bill. (Mrs. Wagner: Can you tell me how much is in the state insurance fund?) Yes, those are the assets I mentioned as of last July, $127 million. (Mr. Banner: $127,514,820.) (Mr. Polish: If we are looking for a fair and resonable settlement, that could be agreed upon, don't you think that by using this type of process which we're suggesting here, that some of the steps could be eleminated and there would be some savings? Even though we're talking about additional costs in the steps that need to be taken? I'm talking about the attorney that would be starting out there sooner, that you would come to a fair and reasonable settlement sooner than going back up the line five or six steps.) Again, I don't think that is necessarily so here. Some of the attorneys do get in at the claims level at this point. I think when there's a legal issue involved it wouldn't make any difference whether this bill was in effect or whether the system is as it is right now. There would still be the same type of procedures to be followed to have independent evaluations. (Mr. Polish: What I was thinking is that, if the attorney was there, they would come to a firmer settlement sooner than the "let's wait till the next step".) Unfortunately, that can also happen in an attorney system where the attorney says, let's wait till we get to district court. That is one of the problems the other states are facing now. The district courts are loaded with worker's comp cases. That ended Mr. Reiser's testimony.

Leonard T. Howard, Sr., attorney from Reno, spoke next on AB 160. He stated he felt this type of legislation was extremely important. He then related some historical background regarding the problems that the workers have gone through in this field. He commented that he works with a law firm in California whose business is 95% compensation claims and stated that there are no attorneys in Nevada as trained as these people are because there is no money in these types of cases in Nevada. In fact, in Nevada, nine times out of ten, you are working on a charity basis. He also supported the contention that California is not a good comparison in any way with Nevada and he stated why he felt that way. He also stated that his office is handling NIC which were referred to his office by other attorneys who were afraid to handle the case because they didn't think they would be paid for their efforts. He stated that so far as the worker is concerned, they are working in an indigent situation. Further, he stated there is now way for an attorney, who has an adequate law practice and wants to do right by these people, to work out an agreement for payment with them under the current system.
Mr. Ross asked Mr. Howard to give the committee an idea of how much time is involved in researching and representing these people in a compensation case. Mr. Howard replied that it is about 10 to 20 hours depending on the complexity of the specific case which includes review of the medical background and status, discussion with the claimant regarding his case, preparation for appearance before the board and finally the appearance at the hearing and discussion of the disposition with the claimant.

Mr. Banner asked if Mr. Howard felt that his presence as an attorney benefited the injured party in these procedings as far as the settlement amount is concerned. Mr. Howard stated that there have been very few cases, with which he has been associated, that it did not benefit the claimant with additional settlement. A brief discussion in this area followed and Mr. Howard's testimony was then concluded.

Warren Goedert addressed the committee on aspects of the payment problem regarding attorneys who do NIC work. He stated that at the appeals level hearing it is the same as going before the district courts, or a jury or a judge and all evidence must be submitted at that hearing or will be precluded from being entered later. And, that decision based on that information is final. He further stated that it is a complicated system and is not easily understood by the lay person. Mr. Goedert represented the Nevada Trial Lawyers Assoc.

Hank Gardner, Mallory Electric and Manufacturer's Association, was next to speak regarding the amount of premium dollars expended by small business and voiced his concern regarding the possible rate increases which would be levied if this bill were to pass. He stated he felt Blackie Evans was representative enough for the workers of Nevada. Chairman Barengo pointed out to Mr. Gardner that all the legislators are concerned with the avoidance of raising the rates. However, they must be concerned also, with the people who have not gotten, apparently, a fair deal from NIC or have not been fairly treated.

Chairman Barengo announced that no action would be taken on this bill today. He stated that when the new fiscal note was finished the hearing would be renoticed to those who would leave their name with the secretary. Mr. Reiser and Chairman Barengo discussed the guidelines of the fiscal note and the intent of the bill.

Mr. Price moved to adjourn the meeting and Mrs. Hayes seconded the motion. The meeting was adjourned at 10:40 a.m.

Respectfully submitted,

Linda Chandler

Linda Chandler, Secretary

Note: The Federal report on Worker's Compensation is not included in the copies of the minutes. However, there is a reference copy in the secretary's minute book. This report was referred to by Mr. Reiser in his testimony.

This report is included herein.

GUEST LIST

NAME (Please print)	REPRESENTING	WISH TO SPEAK Yes	No
A A Campos	Parole	✓	
Carl Hacker	Parole Bd.	✓	
Mary Breitlow	AFSC	✓	
Warren W. Doede	NTLA	✓	
JOHN REISER	NIC	✓	
Leonard V. Haworth	Individually	✓	
John Kirk	Caribou Co	✓	
Bob Stone	Kennecott Copper Corp	✓	
Gail M. Merkel	myself	✓	
Mark Gardner	Nev. Mfgrs Assoc	✓	
James Parker	Ben Parker Co.	✓	
Al Escalante	Ben Parker Co.		

EXHIBIT A

77 Budget & Leg

Memo

FROM THE DEPARTMENT OF PAROLE AND PROBATION :: STATE OF NEVADA

To: GOVERNOR MIKE O'CALLAGHAN

Date: April 2, 1976

From: A. A. CAMPOS, CHIEF

Copies:

Re: INCREASED PAROLE BOARD CAPABILITY

Deadline:

Under our current statutes and policies, there are many important and perhaps critical services which the Board of Parole Commissioners is unable to provide. The following are examples of services and/or activities which are desirable, but which the Board is unable to fulfill:

1. Advising inmates, in person, of decisions and the reasons for these decisions.

2. Develop expertise in parole application interviews.

3. Give inmates direction for prison program involvement.

4. Be continually aware of institutional and parole program capabilities and limitations.

5. Be thoroughly knowledgeable of case factors prior to parole decisions.

6. Assure statutes are being complied with regarding statutory good time hearings.

7. Adequately advising inmates of legal choices when consideration is being made for parole to another jurisdiction.

8. Assure proper conduct of hearings and Parole Board orders in parole revocation process.

9. Utilize to the maximum, available tools and alternatives such as Work Release.

10. Review no more than 15 cases per day.

11. Meet at least annually with representatives of relevant criminal justice agencies to develop means of coordinating programs and joint planning.

12. Develop greater degree of expertise on parole risk factors, community resources, etc. through greater exposure and training. The Board should be capable of operating more independently than they presently are, of outside recommendations.

5351

Current Nev s tutes require only that the Parole Board meet twice yearly. Under current Board policy, they are meeting six times annually. The meetings last two days each, which means our Board is meeting a total of 12 days per year.

There are several factors and/or pending situations which could have some influence on Parole Board matters:

1. The Parole Chief and Executive Secretary of the Board are in somewhat of an awkward position in that we act primarily in an advisory capacity to the Parole Board. By law, we work for the Board, not the reverse. Therefore, while we can cite there are many problems to them and urge them to seek better alternatives, we cannot, in effect, make demands.

2. Parole Board members are very dedicated people who, aside from the fact that many actually lose money as a result of being members of the Board, also are placed in situations of making extremely difficult decisions. The demands which can be made upon them, must be limited although perhaps we have not reached that limitation.

3. The current Chairman of the Parole Board intends to request of the members, that they begin meeting monthly rather than every other month. We will not know the results of that request until our business meeting the first week of May, 1976. Should the Board decide on such a course, it would be of great assistance, although obviously, they would still be incapable of performing in all of the areas covered previously in this memo.

   There is a case pending in the Ninth Circuit Court regarding Parole Board activity in Nevada, that case is scheduled to be heard this month. However, whether or not it will, in fact, be heard (it has been continued in the past) and when we will receive an opinion from that Court, is unknown at this time.

   We have yet to receive recommendations from the Federal Civil Rights Commission as a result of their hearings in Nevada regarding Parole Board activities.

4. Nevada, to date, has probably provided poorer Parole Board services than any other state.

The above comments comparing Nevada with other states, is based on the following:

We have just completed a survey of states with comparable prison populations.

When we first decided to do an update of comparisons, we started with states of similar state population, but found this to be not feasible in terms of properly evaluating Parole Board services. Therefore, we attempted to pick states which had prison populations somewhat comparable to Nevada. The following are the results of our survey:

1. MAINE - prison population 905; Parole Board makeup and activity, five part-time members meeting three times per month.

2. NEBRASKA - prison population 1,026; Board activity, three full time members, two part-time members, part-time members work 20 hours per week.

3. NEW MEXICO - prison population 1,160; Board activity, three full time members.

4. WEST VIRGINIA - prison population 1,134; Parole Board activity, three full time members.

5. UTAH - prison population 689; Board activity, three part-time members meeting four times per month.

The only other state with a population near that of Nevada is Minnesota, although their population is higher, currently 1,514. Minnesota has five full time members. It should be noted that the above survey is complete; it covers all states with populations near that of Nevada. We did not, however, include some other states simply because of state population. For example, the state of North Dakota has a prison population of 178 inmates, and certainly would have no necessity for elaborate Parole Board members.

overall Crim. Justice & prison Budget

The prison population has been increasing at a rate of about 40 inmates per year for the last few years. It is anticipated that this number will increase. One of the reasons it will increase is the simple fact that it appears Clark County is finally figuring out the Criminal Justice System. For many years now, Clark County has been far behind Washoe County in their ratio of convictions. This has kept both the prison population down somewhat as well as the work performed by the Department of Parole and Probation.

However, the current District Attorney has increased convictions far and above what has been done in the previous 15 years. It is my opinion that because the system was obviously lacking in previous years, that new precedence will be established in Clark County which will carry-over for several years, despite changes in office.

Our department had been experiencing an average of about a 17% increase per year in Las Vegas. This last calendar year, it has increased more like 40%.

When the new prison is opened in Jean, Nevada, I am of the firm opinion that the necessity for a full time Parole Board will be paramount. In other words, we may be able to delay it for that period of time, but not beyond the opening of the new prison.

If the Parole Board consents to monthly meetings, this may well suffice until November of 1977. Therefore, budgetary requests for fiscal year 1977-78 could begin in September or October rather than July 1.

Alternative means are submitted in this section. In order to provide better Parole Board services, budgetary increases will be necessary regardless of whether or not a full time Board is established.

The current total budget for the operation of the Parole Board, including the Executive Secretary, is $53,424.77.

The cost of a three member full time Board and Executive Secretary, including all operational expenses, would be $119,716.09. This would be an additional cost to the State, over and above current costs, of $66,291.32.

The total cost of a full time Board, deleting the Executive Secretary, would be $100,537.98. This would be an additional cost to the State of Nevada of $47,113.21.

However, these differences are based on the current budget and, as previously indicated, increases in Board activity are essential and, therefore, costs will go up which will further reduce the difference in the cost of a full time Board. For example, if we continued with our current Board structure, but increased our meetings to 4½ days per month, the total operation would cost $73,798.13.

If we chose instead to select a full time Board with Executive Secretary, the additional cost to the State would be $45,917.96. If we chose to delete the position of Executive Secretary, the additional cost to the State for a three member full time Board, with total operating funds, would be $26,739.85.

If we retained the same Board structure we have now, but found it necessary to meet twice monthly in order to cover both prisons (north and south) at 2½ days per meeting, the total cost of the operation would be $77,562.05.

If we chose to go to a three member Board and retain the Executive Secretary, the additional cost to the State would be $42,154.04. If we chose to delete the Executive Secretary, the additional cost to the State would be $22,975.93.

We do have the total breakdown of the above budgets, which are available to you.

There are other matters which, perhaps, need some discussion related only partially to the recommendation for a full time Board. One of the most important discussions has to do with the current legal status of the Department of Parole and Probation, which is currently under the Board of Parole Commissioners.

I would strongly recommend, regardless of which course of action is taken in the immediate future, regarding a full time Board, that the department be removed from that status and that the Chief Parole and Probation Officer be appointed directly by the Governor.

Increased Parole Board activity, and certainly the advent of a full time Board, could create many administrative problems just because the Board members would be more active.

The Parole Board has a fairly limited vested interest, that being Nevada parolees and the parole function.

The department has a much broader scope and, in fact, in total workload, this agency spends only 13% of its man-hours dealing with Nevada parolees. The majority of our work is with and for the District Judges throughout the state and the supervision of persons on probation at the local levels. This matter will be discussed more fully in our Legislative presentations. Another matter which needs attention, is the salary of the Executive Secretary, which is grossly inadequate.

A. A. Campos, Chief
Dept. of Parole & Probation

AAC/pb

EXHIBIT B

TO: Assembly Committee on Judiciary
FROM: American Friends Service Committee
SUBJECT: Testimony-A.B. 138

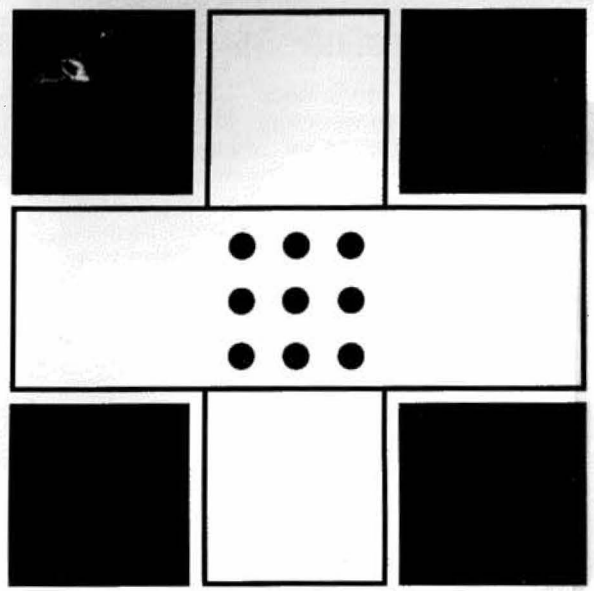
My name is Mary Breitlow and I represent the Reno Area Committee of the American Friends Service Committee. AFSC is a Quaker service organization which has long been concerned with criminal justice and its processes. I am here on behalf of the AFSC to ask your favorable consideration of A.B. 138.

A.B. 138 is a step towards greater responsiveness and responsibility in the criminal justice process. However, there are two aspects which should be presented.

First, in taking the step to formulate a full-time parole board we ask that the commissioners be appointed such that the board is more reflective of the racial, ethnic and sexual make-up of the prisoners within the Nevada prison system. We feel, also, that this should be a matter of legislative direction to the Governor.

Secondly, we feel that this board will operate most justly under set criteria when determining approval or denial of parole, and one aspect of the criteria should be to provide, in the case of denial, written explanation of that denial. We recommend that these provisions ~~should~~ be included in the NRS by this bill or some other.

Thank you for this opportunity to present our views.



Facts for Injured Workers

EXHIBIT C

What are the benefits?

The California law guarantees you three kinds of workers' compensation benefits:

- *Medical care to cure the injury.* Not just doctor bills, but also medicines, hospital costs, fees for lab tests, X-rays, crutches and so forth. There's no deductible and all costs are paid directly by your employer's insurance company, so you should never see a bill.
- *Rehabilitation services necessary to return to work.* Sometimes this is just an extension of medical treatment — for example, physical therapy to strengthen muscles. However, if the injury keeps you from returning to your usual job, you may qualify for vocational rehabilitation and retraining too. Again, all costs are paid directly by your employer or his insurance company.
- *Cash payments for lost wages.* The most usual kind are payments for "temporary disability", which will be made so long as the doctor says you're unable to work. Additional cash payments will be made after you're able to work if there's a permanent handicap — for example, the amputation of a finger or loss of sight. If the injury results in death, payments will be paid to surviving dependants.

How much are the cash payments?

Two-thirds of your average weekly wage, up to a maximum amount set by the State Legislature. The amount of the payments and when and how they'll be paid are part of the State law. Only the State Legislature can change the law.

- Workers' Compensation payments are tax-free. There are no deductions for state or federal taxes, Social Security, union or retirement fund contributions, etc. — so for most people the compensation check will be close to regular take-home pay.

When are the cash payments made?

If you report the injury promptly, you should receive the first compensation check within 14 days. After that you'll receive a check every two weeks until the doctor says you're able to go back to work. In extremely serious injuries the payments may continue for life.

- Payments for lost wages aren't made for the first three days you're unable to work (including weekends). However, if you're hospitalized or off work more than 21 days, payments will be made even for the first three days.

What if there's a problem?

Fortunately most claims — better than 9 out of 10 — are handled routinely. After all, Workers' Compensation benefits are automatic and the amounts are set by the Legislature. But mistakes and misunderstandings do happen. If you think you haven't received all benefits due you, contact your employer or his insurance company. Many questions can be cleared up with a phone call.

- If you're not satisfied with the explanation, get advice from the nearest office of the State Division of Industrial Accidents. (It's listed in the white pages of the phone book under "California — State of".) If the problem still can't be resolved, it may be necessary to file an "Application for Adjudication" with the Workers' Compensation Appeals Board. That's the State agency which reviews cases where an injured worker believes he hasn't received what's coming to him.
- The Appeals Board is a court of law. You can represent yourself, of course, but you may want to hire a lawyer. If you do, his fee — about $500 on the average — will be deducted from any benefits awarded you by the Appeals Board.
- If it's necessary to go to the Appeals Board to resolve your case, be sure to do it within one year from the date of the injury or one year from the date of your last medical treatment. Waiting longer could mean losing your right to benefits.

Hurt on the job.

That can be a grim experience. But fortunately for California workers, there's a way to take a lot of the worry out of job injuries and illnesses.

That way is the California Workers' Compensation Law, a no-fault insurance plan paid for by employers and supervised by the State. This guide explains this valuable fringe benefit.

What's Workers' Compensation?

California's no-fault compensation law was passed by the State Legislature over 60 years ago to guarantee prompt, automatic benefits to workers injured on the job.

Before Workers' Compensation an injured worker had to sue his employer to recover medical costs and lost wages. Lawsuits took months and sometimes years. Juries and judges had to decide who was at fault and how much, if anything, would be paid. In most cases, the injured worker got nothing. It was a costly, time-consuming and unfair system.

Today there's a better, faster, fairer way for injured workers. Today if you're unable to work because of a job injury, Workers' Compensation takes care of your medical expenses and pays you money to live on until you're able to go back to work. Automatically, without delay or red tape.

Who's covered?

Nearly every working Californian is protected by Workers' Compensation, but there are a few exceptions. People in business for themselves and unpaid volunteers may not be covered. Railroad and maritime workers and Federal employees are covered by similar Federal laws.

What's covered?

Any injury is covered if it's caused by your job — not just serious accidents, but even first-aid type injuries. Illnesses are covered too if they're related to your job. For example, common colds and flu aren't covered, but if you caught tuberculosis while working at a TB hospital, that's covered. The main question is if the injury or illness is caused by your job.

When am I covered?

Coverage begins the first minute you're on the job and continues anytime you're working. You don't have to work a certain length of time, and there's no need to earn so much in wages before you're protected.

How do I get the benefits?

Report the injury to your employer or supervisor immediately. There are no reports for you to fill out, no forms to sign. Just tell him what, where, when and how it happened — enough information so that he can arrange medical treatment and complete the necessary reports.

- Prompt reporting is the key. Benefits are automatic but nothing can happen until your employer knows about the injury. Insure your right to benefits by reporting *every* injury, no matter how slight. Even a cut finger can be disabling if an infection develops.

This pamphlet is available in Spanish.
For a free copy, please write or call:
California Workers' Compensation Institute
201 Sansome St., San Francisco, Ca 94104
Telephone 415 981 2107

Este folleto está traducido al español. Para conseguir una copia, favor de escribir ó llamara a CWCI, 201 Sansome St., San Francisco, 94104
Telefono 415 981 2107

Prepared and published as a community service by

California Workers' Compensation Institute
201 Sansome Street, San Francisco, California 94104

EXHIBIT C

FISCAL NOTE

BDR _____
A.B. 160
S.B. _____

Transmitted February 1, 1977

• STATE AGENCY ESTIMATES Date Prepared February 1, 1977

Agency Submitting Nevada Industrial Commission

Revenue and/or Expense Items	Fiscal Note 1976-77	Fiscal Note 1977-78	Fiscal Note 1978-79	Continuing
Total				

Explanation (Use Continuation Sheets If Required)

Any claimant entitled to compensation, approximately 42,000 in 1976, would have the right to the services of an attorney. The attorney fees would be paid from the State Insurance Fund.

In California, $35,732,769 was awarded as attorney fees in Calendar 1976 by the Workmen's Compensation Board. One out of 16 claimants in the northern part of the state and one out of 13 in the southern part retain an attorney.

The attorney fees amount to 10.64 percent of the total value of decisions where an attorney is involved ($335,817,051).

Local Government Impact YES ☐ NO ☐
(Attach Explanation)

Signature John R Reiser
John R. Reiser
Title Chairman

• DEPARTMENT OF ADMINISTRATION COMMENTS Date _____

Signature _____

Nevada would have the potential for in excess of 3,200 cases per year which would be litigated if the bill was passed.

The direct cost in attorney fees in fiscal 1978 could approximate $1,700,000. Additional NIC administrative expense in the form of added legal staff and supporting personnel, and extended temporary disability benefits as a result of litigation could increase the cost of the bill to $2,500,000 per annum. The impact on employer premium would approximate 4 percent.

1,700,000
800,000
$2,500,000

651 cases
447 disposed of
128 per year

128
500
64,000

workers' compensation:

Is There A Better Way?

PAUL B. COSSABOON
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a report
on the need for reform
of state workers' compensation

433

REPORT TO THE PRESIDENT AND THE CONGRESS

OF THE POLICY GROUP

OF THE INTERDEPARTMENTAL WORKERS'

COMPENSATION TASK FORCE

January 19, 1977

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INTRODUCTION

This is the official report of the policy group of the Interdepartmental Workers' Compensation Task Force. At the time of the establishment of the Interdepartmental Workers' Compensation Task Force, it was expected that this report would be submitted by the spring of 1976.

The research studies and findings which, along with the results of technical assistance, were to be the basis of the recommendations contained in this report were unfortunately considerably delayed. As a consequence, this report is based only upon initial findings from draft reports and surveys which will not be completed for several months. The policy group feels, nevertheless, that it is important that a report and recommendations be prepared for the President and Congress, based on the two-year Task Force's findings.

Although the Policy Group takes full responsibility for the findings and recommendations in this report, they could not possibly have completed it without the dedicated work, creative ideas, experience, and analysis of the staff which carried out most of the work of the Inter-agency Task Force. Mr. J. Howard Bunn, Jr., as Executive Director of the Task Force, Dr. Ronald Conley, as Research Director, and Thomas C. Brown, as Technical Assistance Director, were clearly key in this effort. Justine Farr Rodriguez was the major drafter and editorial craftsman. The advice and assistance of Barry Chiswick, John Noble, Howard Clark, Louis Santone, Lloyd Larson, June Robinson, and Tom Arthur were also invaluable and necessary to the completion of this report.

The Policy Group hopes that these efforts will assist the States in improving and strengthening the diverse workers' compensation systems in the United States. We hope that this report, and the information which has been gathered will be the focus of discussion and additional research and action at the State level. We expect the strengthened Interdepartmental effort at the Federal level to monitor activity and assist States in adapting to the ever increasing challenge of the workers' compensation system.

WORKERS' COMPENSATION: Is There A Better Way?

A sharp reordering of priorities and a new mode of operation will be necessary if workers' compensation is to achieve its traditional goals. Without such changes in emphasis, workers' compensation is in danger of becoming more expensive, less equitable, and less effective. This is the key conclusion of an Interdepartmental Policy Group that has been providing technical assistance to States and conducting basic research into workers' compensation over the past two and a half years.

This report is made to the President and the Congress, to State administrations and State legislatures, to employers and employees, insurers, lawyers, physicians, and concerned citizens. The introduction sets out the main conclusions of the Policy Group and the principles that provide a framework for reform. The next section briefly summarizes the background of the Policy Group's activities, and then assesses the progress which has been made by the States since the Report of the National Commission on State Workmen's Compensation Laws, and the major problems which remain. Then we set out our recommendations for reform, and the steps necessary to get these reforms underway.

Main Conclusions

From a broad perspective, workers' compensation clearly fills an essential function. Although both public programs and private fringe benefits have expanded considerably, no program or combina-

tion of programs on the immediate horizon seems likely to replace or outmode workers' compensation. Moreover, it is important to establish whether the potential advantages inherent in combining the objectives of workers' compensation within one program can be reached.

Secondly, a program so affected by local employment conditions and local services, and requiring so much interaction with claimants probably is more effectively managed at the State level. On balance, the Group recommends giving the States a while longer to strengthen their workers' compensation systems. Legislation to Federalize the system is not warranted at this time.

However, the Policy Group feels that State progress must be both assisted and monitored by the Federal Government. In making its recommendations, the Group has tried to give special attention to the problems which have slowed the pace of reform so far. Our attention is directed as much to effective implementation of reforms as to the principles which should guide them.

In support of accelerated progress, the Policy Group recommends that the technical assistance effort be increased significantly in size -- making experts on workers' compensation available on a consulting basis to States which seek assistance. Further, we recommend that the Federal Government offer an appreciable amount of short-term grants to States interested in installing State data systems or implementing particular administrative reforms. A more active and effective role for State workers' compensation agencies is central to our recom-

mendations for re-orienting the workers' compensation system.

Our overall assessment of the system today is mixed. We believe that the medical only and temporary disability claimants are handled well. These cases represent about 95 percent of those in the system.

However, we are deeply concerned about the permanent disability, work-related death, and occupational disease cases. Although the permanent disability and death cases constitute only about five percent of workers' compensation claims, they are responsible for about 50 percent of the benefit payments. With respect to these cases, we find excessive litigation, long delays in payment, high subsequent rates of persons without employment, and little relationship between the benefits awarded and the actual wage loss.

A major part of the problem is caused by a settlement system which focuses on terminating the liability of carriers and employers, either by compromise and release, or by a lump sum or "weeks of benefits" arrangement which attempts to foretell the amount of wage loss that will be sustained by a person with a specific type and degree of impairment. Studies for the Task Force indicated that such estimates are subject to large error.

Principles for Reform

This analysis leads to one of the main recommendations of the Policy Group. We propose that compensation for wage loss be separated from any other benefits provided by workers' compensation, and that these wage-replacement benefits be paid as wage loss accrues.

In one stroke, this recommendation greatly increases both the equity and the adequacy of benefits. Compensation will be directly related to the losses as they occur, and so long as compensation is not arbitrarily limited in amount or duration, benefits will continue in parallel with need. Moreover, without the reliance on future estimates of losses, determination of the amount of benefits should be accomplished with much less controversion.

With wage loss as the main element of compensability, there is increased incentive for the system to help claimants meet one of the other goals of workers' compensation — rehabilitation and re-employment. In effect, experience rating becomes net of the re-employment experience of claimants, because those without jobs — or with lower income — are drawing benefits, and those who have returned to work at their former earnings are not.

The third principle we have adhered to is internalization of the costs of work-related injuries and diseases. This principle is supported by recommendations for broad coverage of employees, full coverage work-related injury and disease, and adequate benefit levels. It is intended to provide incentives for employers to seek and implement measures to make the workplace safer and more healthful.

With these interrelated principles, we are attempting to start the workers' compensation system in a constructive direction, harnessing the need to control the costs of the system to the social objectives of prevention and re-employment, rather than the present litigation.

In making these recommendations, the Policy Group is going beyond the previous standards for measuring State reform progress. Although we endorse the 19 essential recommendations of the National Commission, we believe that they represent a too limited approach. Some of the reforms we recommend will not be easy for the States to undertake. State governments, insurance carriers, employers and others will have to assume new roles and make substantial breaks with deeply ingrained practices and concepts. Many States will need to further amend their workers' compensation statutes to accomplish these reforms.

We recognize that systemic changes are very difficult to undertake, and that their results are not always predictable. But from the national perspective, we are convinced that some of the problems of workers' compensation are severe enough to threaten the future of the system unless the States set in motion some reforms that are more thorough than would come from enacting the 19 essential recommendations of the National Commission, and nothing more.

Traditional System in a Modern Context

Workers' compensation was the first social insurance system in the United States. It developed as a consequence of the high rate of industrial accidents in the nineteenth and early twentieth centuries. When these resulted from employer negligence, and this could be proven in court, the worker and his family received reparations.

In all other cases — when employer negligence could not be proven, when the employee or a fellow worker caused the injury through lack of training, fatigue, or carelessness, when there were multiple causes, or when all precautions were taken and the unexpected happened — the injured employee and his family got nothing. Few workers could prevail against the legal expertise that the employer could bring into the courtroom.

This led to the proposal that the right to tort action against employers on the grounds of negligence be exchanged for workers' compensation benefits for all injury "arising out of and in the course of employment". The costs of all work-related injuries were to be allocated to the employer, not because of any presumption that he was to blame for every individual injury, but because the inherent hazards of employment were a cost of production. This no-fault approach spread rapidly: between 1911 and 1920, all but six States passed workers' compensation statutes.

Since that time, many other social insurance systems have been established to deal with related problems. Private fringe benefits have expanded. Many changes have taken place in the U.S. economy, its labor force, and production technology. And our knowledge of the complex relationships, both in technology and in social systems has increased.

Thus, more than half a century later, far from settling into routine, workers' compensation is under criticism for some notable failures and is in the midst of controversy. Can the entire cost of work-related injury

and disease be internalized? Can protection be provided to part-time or intermittent workers? Can the conflict be resolved between delivering adequate benefits to the injured and controlling the growing cost and abuse of the system? Can the record of rehabilitation and re-employment be improved? Can employers be given stronger incentives to maintain a safe and healthful workplace? Are litigation and administration costs too high? What are the effects of adversary versus inquiry methods of determining benefits? What should be done about the problem of "permanent partial disability"?

Workers' compensation is unique in drawing together in one system attempts to deal with all of these issues. From this perspective, it is not surprising that calls for changes in this very complex system have come from many sides, that a great many actions to improve the system have been taken at the State and Federal levels, and that consideration of substantial further change is underway.

The National Commission and the Policy Group

At the Federal level, the antecedents to this report began with the Occupational Safety and Health Act of 1970, which established the National Commission on State Workmen's Compensation Laws. The Commission, appointed by the President, was composed of knowledgeable people with a variety of viewpoints on workers' compensation. The Commission held 18 days of hearings with more than 200 witnesses in nine cities, contracted for numerous studies, surveys and reports, and employed a full-time staff of 30. They published a Compendium on Workmen's Compensation, which pro-

vided a comprehensive review of issues and information, and three volumes of Supplemental Studies.

In July 1972, the National Commission issued a Report making 84 recommendations. Of these the Commission identified 19 as essential to a modern workers' compensation system, and urged the States to implement these promptly. The Commission recommended that the President appoint a follow-up commission to provide encouragement and technical assistance to the States, and to develop supplemental recommendations — particularly in the areas of permanent partial disability and the delivery system, which the Commission had not been able to examine thoroughly.

The Administration responded by establishing an Interdepartmental Policy Group to review the recommendations of the National Commission. In May 1974, the Secretaries of Labor, Commerce, and Health, Education and Welfare, and the Federal Insurance Administrator transmitted to the President and published a White Paper on Workers' Compensation which summarized that review. This generally supported the 19 essential recommendations of the Commission, and also noted the need for cost-of-living adjustments to long-term benefits and for major improvements in State data systems. To encourage State efforts to improve workers' compensation, the White Paper recommended formation of a task force, reporting to the Policy Group, to provide technical assistance. Concurrently with this plan of action, the White Paper proposed and described in detail a major program of research to be undertaken by a research unit within the task force.

Seven technical assistance advisers work directly with States out of the U. S. Department of Labor Regional Offices. They furnish assistance to State workers' compensation administrators and private groups with an interest in workers' compensation reform. The task force described and interpreted for the States five objectives, which closely resemble the National Commission's 19 essential recommendations. Examples of assistance provided include estimating the costs of specific reforms, encouraging development of advisory groups, and drafting legislative language that would meet task force objectives.

The regional advisers are backed up by an experienced group of workers' compensation specialists, headed by Lloyd Larson, on loan to the task force from the U. S. Department of Labor. This group helps to formulate proposals for meeting objectives, and in addition, closely monitors and documents State legislative developments.

A conference on compensation for occupational disease, organized by June Robinson of the task force staff, was held and the papers and proceedings were published.

Six research surveys commissioned by the task force and one by the National Science Foundation have generated new information about the workers' compensation system and its beneficiaries. Fifteen experts have prepared draft analytical reports for the task force, using information from these surveys and other available sources. Analytical reports cover the following subjects: occupational disease, litigation, data systems, permanent partial disability, financing workers' compensation, re-employment,

program interrelationships, efficiency, state agency operations, rehabilitation, benefit adequacy, coverage, product liability and workers' compensation, experience rating, and promptness of benefit payments. Unfortunately, time has not permitted complete analyses of the reports, most of which are still not finalized. As soon as these are complete, a research report will be published, and the data made available to researchers. A technical assistance report including details on the progress and lack of progress for the States since the Report of the National Commission will also be published.

An Assessment of Progress

The following briefly summarizes those findings. Since the National Commission's 1972 Report, State compliance with the 19 essential recommendations has increased from an average of eight per State to 11 1/2 — a 44 percent improvement. Significant gains have been made in raising weekly benefit maximums to the recommended levels. Gains have also been made in worker coverage. In 1976, New Hampshire complied with 18 1/2 of the 19 essential recommendations, and 12 States complied with more than 14.

Our assessment of the progress which has been made by the States shows that they have put forth considerable effort to improve their workers' compensation systems. In the 1976 legislative year alone, approximately 100 amendments were made to the workers' compensation laws of 45 States. This is a substantial acceleration in the pace of improvement from the 1960s, prior to the National Commission Report.

On the other side, many States have far to go to meet the essential recommendations of the Commission. In fact, 16 States still meet fewer than 10 of the 19 essentials. Some of this delay has been due to the recession in economic activity which turned the attention of legislatures, business and labor to other matters. Employers have tended to balk at expanding coverage and benefits unless and until solutions are found to the excesses and abuses of permanent partial disability which the Commission did not have time to address. The pattern of compliance implies that some States disagree with some of the recommendations, or find compliance particularly difficult.

On the basis of the information from the task force — the technical assistance, the consultations, the surveys, and analyses — the Policy Group has assessed the progress of the States in improving workers' compensation, and the problems yet to be overcome. This assessment was made against the five major objectives set out by the National Commission:

* Broad coverage of employees and of work-related injuries and diseases. Protection should be extended to as many workers as feasible, and all work-related injuries and diseases should be covered.

* Substantial protection against interruption of income. A high proportion of a disabled worker's lost earnings should be replaced by workmen's compensation benefits.

* Provision of sufficient medical care and rehabilitation services. The injured worker's physical condition and earning capacity should be promptly restored.

* Encouragement of safety. Economic incentives in the program should reduce the number of work-related injuries and diseases.

* An effective system for delivery of the benefits and services. The basic objectives should be met comprehensively and efficiently.

Broad Coverage: While there has been definite progress in compliance with the National Commission recommendations on coverage, the numbers and types of workers protected by workers' compensation is unsatisfactory. The number of States having compulsory coverage laws and prohibiting waivers increased from 18 to 31 between December 1972 and July 1, 1976. During the same period, States with no numerical exemptions increased from 30 to 38, and six States reduced their numerical exemptions without entirely eliminating them. Special occupational exemptions, such as for logging and sawmilling, or for work in charitable or religious organizations, were eliminated in nine States. About 30 States added additional groups of employees to their coverage.

On the other hand, coverage of farm workers has improved only slightly, with the number of States meeting the 1975 standard of the National Commission increasing from seven to 13. Still less progress has been made in covering household and casual workers, partly because of the problems of providing insurance for such coverage at reasonable rates. New Hampshire and California are the only States which meet the National Commission recommendations to cover such workers on the same basis as for Social Security; as of January 1, 1977, both these States comply with all the essential recommendation related to employee coverage.

The Social Security Administration periodically estimates the percentage of actual to potential coverage. These estimates include only workers who are covered under the law and whose employers have secured their compensation liability either through insurance or self insurance, thereby assuring coverage in practice. In 1972, the estimate showed 84% of the potential workforce to be covered. This had risen to 88% in 1975.

There is wide variation among States in the proportion of the workforce covered. While 17 States and the District of Columbia covered more than 90 percent of their workforce in 1975, five States covered less than 70 percent of their workers. Comparable figures for December 1972 were eight States with coverage above 90 percent and 11 States below 70 percent.

Therefore, significant numbers of workers are without workers' compensation coverage. It is estimated that 793 thousand employees lack coverage because of the exclusions of small firms, 541 thousand because of agricultural exemptions, and 902 thousand because they were household workers. The potential hardships imposed by lack of coverage may be great. A disproportionate number of uncovered workers have few assets to fall back on, little likelihood of other fringe benefits, and little ability to withstand a period of no earnings without having to rely on public income maintenance.

A related recommendation of the National Commission was that workers should have the option of filing claims in the State where the injury occurred, where the contract of hire was signed, or where the employment was principally localized. Tracking progress in achieving this objective has been difficult because much depends upon a multitude of court decisions in the various States. However, it appears that as of July 1, 1976, 27 States met this standard, compared with 12 in 1972.

A second major kind of broad coverage recommended by the National Commission was "full coverage" of work-related injuries and diseases, defined as coverage not limited to a list or schedule of specified diseases. Since 1972, eight States enacted full coverage of occupational diseases, raising the number of States with full coverage to 49. However, many State laws still limit considerably the compensability of diseases which "arise out of and in the course of" employment. The arbitrary nature of these limitations, which was of concern to the National Commission, is of continuing concern to us.

For example, twenty States provide full coverage only for those diseases "peculiar to the worker's occupation". But current knowledge indicates that there are few, if any, diseases of mankind that can occur only because of an activity or an exposure at work, though there are some which are typically contracted due to risks most often found in the workplace. Many diseases can be caused by more than one agent or by agents which may be found both in the workplace and elsewhere. Many States exclude "ordinary diseases of life," which is another variation on the notion that the disease should be "peculiarly" job-related, rather than the specific case of the disease being related to the particular exposure of that individual. Most States exclude infectious diseases.

Thirty-nine States have "by accident" clauses that are applied to occupational diseases. An accident is defined as an unexpected, undesigned, and unlooked for mishap, or an untoward event which can be reasonably located as to the time when or the place where it occured. The exposure, not the outcome, is the accident which must be documented. The nature

of contraction of occupational disease is difficult to relate to such a requirement, and the National Commission recommended that such language be eliminated. Some States require that the toxic materials or working conditions which cause a disease must be responsible independent of any other cause.

At least 15 States have time limitations that bar occupational disease claims unless the claimant can prove that his exposure to a hazard at the workplace occurred over a specified minimum period of time. At least 19 States, including most of those using a minimum exposure rule, also have laws that bar claims for diseases caused by hazards encountered in the workplace more than a specified number of years earlier. Several States also have requirements regarding the minimum duration of on-the-job exposure in that State. In addition, States typically require that workers notify employers of claims within some time period. In 13 States, this period begins at the time the hazard was encountered; in 9 of these, the time period is one year or less. Recently, States have been moving toward broader statutes of limitations which start at the time the claimant knows or "should have known" of the existence and potential compensability of the disease. In 17 States, the employer must be notified within one year of such knowledge.

Many of these time limits related to hazard exposure are not based on -- and some are quite at odds with -- current medical and scientific knowledge. Many industrial chemicals and agents found in the workplace can cause respiratory and other ailments that develop slowly. Moreover, the duration of latency for any specific agent/illness combination can

vary as much as four decades. For example, exposure to asbestos can result in cancer from 4 to 50 years later. The exposure time sufficient to result in an occupational disease may also vary considerably, depending on the intensity of exposure, presence of other interacting substances, and individual sensitivities.

The data on occupational disease are so poor that the magnitude of occupational illness and its trend are really unknown. There is wide agreement among experts, however, that only a small proportion of the workers who contract an occupational disease actually file and are found compensable in the workers' compensation system.

Several estimates of occupational disease, each subject to serious criticism, but each quite different in method from the others, suggest that annual deaths from occupational disease may be at or above 100,000 a year, and incidence rates about 400,000 a year. Hundreds of toxic industrial substances have been identified, and the National Institute of Occupational Safety and Health estimates that tens of millions of workers are being exposed to substances of varying degrees of toxicity.

Yet not many victims of work-related disease receive workers' compensation. Only two percent of the cases in a survey of closed claims done for the task force were occupational disease cases (including heart attack cases) — a disturbingly low figure, even recognizing that many diseases may not be disabling during their development. About 30,000 new occupational disease cases are now being compensated annually — less than half the estimated number of occupational disease fatalities. Moreover, a substantial proportion of the cases receiving workers' compen-

sation for occupational disease are for short-term and often non-severe conditions such as dermatitis. A study by Discher and others for the National Institute of Occupational Safety and Health examined workers who might be exposed to work-related disease; of those identified as having such a disease, only 3 percent had filed a workers' compensation claim.

Of the occupational disease cases which are filed, two out of three are controverted — three-quarters of them over the basic issue of compensability. Fifty-six percent of these cases result in compromise and release. Litigation is involved in 90 percent of the respiratory or hearing cases, compared with 17 percent of the skin diseases.

Overcoming the problems of limited coverage and excessive litigation will be an especially difficult problem for occupational disease. There are extremely difficult conceptual and empirical problems in relating a disease to the exposure that caused it. The same disease may be caused by either an occupational exposure or a non-occupational exposure. It is usually impossible to determine with certainty which is the appropriate cause in a particular case. Or a disease may be the consequence of the interactive effects of agents to which a person has been exposed on the job or off of the job. The contribution of the occupational exposure may be small, and difficult to ascertain. Or a disease may be aggravated by the workplace exposure. The question arises in the latter two cases as to whether the entire disease should be compensated or if it should be compensated only according to the degree of aggravation caused by the workplace, or its contribution to disease

in the case of interactive factors.

Income Protection: All but two States have increased benefit levels since 1972. The number of States paying 66 2/3 percent of wages for temporary total disability increased from 29 to 47. The number paying 66 2/3 percent of wages for permanent total disability rose from 25 to 46.

Maximum benefits for total disability have also been raised. In 1972, only two States had a maximum weekly benefit for temporary total disability at or above the National Commission recommendation of 100 percent of the State's average weekly wage, and only 10 States had a maximum level of 66 2/3 percent or more. By July 1976, 22 States had achieved the objective of a maximum weekly benefit of at least 100 percent of the State's average weekly wage, and 35 had attained the level of 66 2/3 percent or more. For permanent total disability, the number of States with a maximum at or above 100 percent of the State's average weekly wage increased from two to 20.

The number of States providing payment in cases of total disability for life or for the duration of disability increased from 29 States in 1972 to 36 in 1976, increasing the application of this provision from 60 to 80 percent of the covered workforce. The remaining States restrict the aggregate amount of benefits payable for total disability either by duration or by dollar amount.

In cases involving a work-related death, 29 States now pay survivors 66 2/3 percent of the worker's wage, up from 13 States in 1972, and the maximum has reached at least 100 percent of the State's average weekly wage in 17 States compared with only one in 1972. But only four States comply with all four components of the National Commission's recommendation 3.25: benefits to the spouse for life or until remarriage, two years' benefit in lump sum in

the event of remarriage, benefits to a child to age 18 or beyond if actually dependent, and benefits to full-time student dependents until age 25. Among these components, 16 States pay children until age 18, and 15 States pay the spouse for life or until remarriage.

An annual cost-of-living adjustment for benefit levels, as recommended in the White Paper, is provided in only 15 States. These vary widely as to the types of benefits adjusted and the formulas used in computing the adjustments.

Provisions on the duration of benefits are irrelevant in practice to the cases that are settled by compromise and release, or by stipulation or other procedure which releases the carrier or employer from further liability. Surveys for the task force found that in 1973, 17 percent of all cases were so settled. But compromise and release was much more common in cases of serious injury or illness. Half of the permanent partial cases and half of the death cases were settled by compromise and release. For permanent total cases, the proportion reached 72 percent.

Such a large proportion of cases receiving lump sums in exchange for all further claims on the insurer has some important implications, particularly when considered in the light of the data collected for the task force on the proportion of workers' compensation recipients who are not employed. Two interview surveys were conducted. One by Cooper and Company interviewed claimants in four States (Illinois, Georgia, New York, California) whose cases had been settled in 1973. All levels of disability were sampled. The results of this survey showed that 24 to 39 percent of the minor permanent partial claimants, 40 to 45 percent of the major permanent partial claimants, and 66 to 100 percent of the total disability claimants were not em-

ployed at the time of the survey in 1975-76. A second survey was taken for the task force by the Maxwell School at Syracuse University following up the status of workers whose compensation cases were opened in 1970, and who were permanently impaired with an impairment rating over 10 percent. Of those who were below the age of 65, the proportion who had never worked after the injury ranged from 7 to 17 percent in the four States surveyed, and the proportion who had worked after the injury but who were out of work for all of 1974 was an additional 15 to 19 percent. Furthermore, of those employed, an unusually high 7 to 16 percent worked part-time. The proportion employed full-time in 1974 ranged from 55 to 68 percent. About 85 percent of the sample were men with a known work record; their median impairment rating was 13 percent.

One should not infer that everyone who was not employed at the time of the survey was not employed because of their industrially-caused impairment. A few may have been facing normal unemployment and be between jobs. A few may have voluntarily left the labor force in an early retirement plan, or perhaps they were living on their workers' compensation benefit (or other disability benefit) and were reluctant to return to work for fear of losing the benefit. All of these factors together are unlikely to account for more than a small percentage of the not employed. It is more likely that their injury and their workers' compensation experience detached them from the employed workforce. It is noteworthy that almost all of those persons in the Syracuse survey that never returned to work gave poor health as the reason.

Compromise and release settlements are less worrisome because of the compromise than because they release from all further responsibility the carrier, the employer, and perhaps the State agency. In effect, these settlements become a guess about the future from which some workers gain, in that their benefit is greater than their losses. Others lose, especially those with low earnings or who face prolonged unemployment. The result of such agreements is to create serious inequities in the system, and great hardship for workers who have substantial and prolonged losses of earnings.

Rehabilitation: The National Commission recommended that there be no statutory limits of time or dollar amount for medical care or physical rehabilitation services for any work-related impairment. They also recommended that the right to medical and physical rehabilitation benefits not terminate by the mere passage of time. Six States came into compliance with each of these essential recommendations since 1972, raising the total number meeting these criteria to 45 States and 41 States respectively.

Financing medical care for injured workers has been one of the central objectives of workers' compensation, and one which the system seems to handle reasonably well. Less attention is directed at each of the steps beyond medical care, namely physical rehabilitation, vocational rehabilitation, and re-employment. Although the National Commission, recommended that the employer pay all costs of vocational rehabilitaion; that maintenance benefits be provided during this rehabilitation; that the State workers' compensation agency have a unit to oversee rehabilitation; and that each State have a broad

and well-publicized second-injury fund, it did not include any of these among the essential recommendations.

In practice, the workers' compensation system creates a conflict for the worker. In order to receive benefits, he must show that he has suffered impairment and disability. Since 39 percent of the permanent partial and 52 percent of the permanent total cases are litigated, and since average delay between start of lost time and start of payment appears to be 134 days in contested cases and over a year in the worst State, the worker's mind is on proving his case for some time. Since these are averages, nearly half of the cases must take longer — perhaps much longer. On the other hand, rehabilitation is known to be more effective when started immediately after injury, and the mental state of the patient is very important to its success. The patient is required to focus on what he can do, and strengthen his determination to expand those capacities.

It is also clear that the workers' compensation system is not very effective at screening cases to assess the potential need for rehabilitation services — either physical or vocational. There are some differences among States in their efforts to do this, and States with some screening have higher levels of referral to rehabilitation services. Even such referrals are insufficient to assure that claimants get the necessary services, however. In the interview survey conducted by Cooper and Company, of 251 persons with permanent disabilities who were advised that they needed rehabilitation, only 101 persons got such help, and only 81 were assisted by the State vocational rehabilitation agency, the carrier or the employer. Further, only 17 received any job training, and only 9 received placement assistance.

It is impossible to say how many more persons should receive job training or placement assistance. In the Cooper interview survey, roughly 25 percent of the persons with minor permanent partial cases (paying benefits of less than $2,500) and about 40 percent of the major permanent partial cases were not employed at the time of the survey. In the follow-up survey conducted by Syracuse University, four years after their cases had been opened, 25 percent of interviewees of working age were not working, and one-third of these had never worked since their injury. Of those interviewed, 85 percent were men and they had an average impairment rating of 13 percent. If these data are confirmed through additional scrutiny and analysis, they are very relevant to the issue of proper rehabilitation and re-employment.

Safety: With respect to improving the safety and healthfulness of the workplace, the National Commission made four recommendations. They recommended that a standard workers' compensation reporting system be devised which would mesh with the forms required by the Occupational Safety and Health Act of 1970 and permit the exchange of information among Federal and State safety agencies and State workers' compensation agencies. This is the keystone, not only to safety, but to improved delivery of workers' compensation, and will be discussed below.

The National Commission also recommended that insurance carriers be required to provide loss prevention services which would be audited by the State workers' compensation agency, that experience rating be extended to as many employers as practicable and that the relationship between the experience of an employer and that of other employers in its insurance classification be reflected more equitably in the employer's insurance rate. It

appears that more employers are now in experience rating categories than in 1972 because their premiums are above the minimum level for such rating.

The incidence of occupationally-related injuries and illnesses per 100 full-time workers rose slightly in 1973 and then fell in the next two years. For the private sector as a whole, the rate was 10.9 in 1972 and 9.1 in 1975, the latest year available. Similar declines occurred in manufacturing and contract construction. In manufacturing, the rate was 15.3 in 1972 and 13.0 in 1975. In construction, the figures were 19.0 and 16.0, respectively. The incidence of lost workdays, which reflects the more serious injuries and illnesses, has been stable at 3.3 for both 1972 and 1975 in the private economy. These statistics do not show the incidence of work-related illness, to the extent that this relationship is not recognized at the workplace.

A more difficult problem is recognition of toxic or hazardous substances and combinations of substances in time to prevent illness. As noted in the discussion of occupational disease, this will require a more intensive effort to trace the epidemiology and etiology of disease, and the limits to the intensity and duration of exposure. Under the Toxic Substances Control Act of 1976, the Federal Government is authorized to regulate the manufacturing, processing, distribution, and use of chemical substances which present an unreasonable health hazard or risk to the environment. Chemical manufacturers and processors are required to report to the Environmental Protection Agency adverse health and environmental data, and the number of workers exposed to certain chemicals. The Occupational Safety and Health Administration is issuing regulations on exposure to and awareness of hazardous substances in the workplace.

Delivery System: Workers' compensation is characterized by the lack of an effective delivery system. Far from being a non-adversary system, as currently practiced, workers' compensation has replaced litigation over who is at fault with litigation over what is at fault and what the effects of the accident will be.

Notwithstanding its no-fault characteristics, the system as presently constituted is an adversary, third party system which expends too much of the premium dollar in friction costs incident to the delivery of benefits and other purposes entirely alien to the reparation of the accident victim. The rate making process relative to the construction of manual rates contemplates an expense component in the rates of about 40 percent which allows only about 60 percent of the premium dollar for workers' compensation benefits, from which, however, must be deducted the amounts injured workers must pay their own lawyers. The latter amounts have been estimated at about eight percent of the benefits so that it appears that about 52 percent of the premium dollar goes to the claimant as benefits. The most recent data indicate an insurance loss adjustment expense factor of about 9 percent of premiums. Thus the total for adjudication of claims amounts to about 17 percent of benefits.

As noted above, two out of five permanent partial and death cases are litigated. One out of two permanent total cases are litigated. This proportion increases to four out of five permanent total cases when the employer self-insures. The proportion of contested cases of all types varied widely among States in the closed claim survey from no reported cases to 58 percent of all cases involving a compensable

temporary disability, permanent disability, or death.

Delays in receipt of benefits are substantial. In uncontested cases, our research indicates that the mean time from the start of lost time to the date of first check was 33 days. In contested cases, the mean time was 134 days. Here too the differences among States were very substantial. In uncontested cases, the range was from 14 to 81 days. In contested cases, the range was from 25 to 368 days. In cases of work-related death, the delays in payment average 136 days for uncontested cases, and 544 days for contested cases. It appeared to require an average of 282 days from the start of lost time to the time of filing a request for a hearing and another 134 days before the hearing was held, or a total of 1 1/4 years — and this does not count appeals.

The hub of the workers' compensation system is the insurance carrier. This is the only publicly-mandated system which is run on an actuarially sound basis, and roughly 65 percent operated by the private sector. As such, it is very important that the insurance carriers share a perception of the system which will help to achieve its social objectives, and that the incentives for carriers and employers support that perception.

The State governments are responsible for overseeing the system. The National Commission made many recommendations to strengthen the professionalism and processes of State agencies. Some States have been much more active than others in both oversight and improvement of workers' compensation, as well as more effective in those operations carried on by the State itself. For a system with such diffuse responsibility to work well, a State agency must take an active part in informing all parties of their rights and responsibilities and carefully monitor the system.

The paucity of data that State agencies have to help them evaluate and manage the program is linked to the current orientation toward case settlement rather than case management. The State agency survey for the task force revealed that most State agencies know how many cases they handle, but know little about the types of cases, types of settlements, time lags, and other data for an assessment of the effectiveness of the system in meeting the five objectives discussed by the National Commission. The data collected by the National Commission and by the task force, while very useful, is no substitute for systematic collection of the information required for ongoing management of workers' compensation.

Program Interrelationships

Since the workers' compensation system spread so swiftly through the States half a century ago, many other social insurance systems have been enacted, and employee "fringe benefits" have expanded considerably. The relationships among these should be clear and fair. Three kinds of problems can occur: overlaps, in which some people get additional benefits, gaps, in which a person finds himself unable to get any benefits, and spillovers, in which costs which should be covered by one program are absorbed by others.

The interview survey conducted by Cooper and Company indicates that the problem of overlaps is significant. Of all respondents, 37 percent said that they received benefits related to their injury or illness from at least one other source and 18 percent from at least two other sources. The proportion receiving such benefits from one other source included 20 percent of the temporary total cases, 25 percent of the minor permanent partial cases, 42 percent of the major permanent partial cases, 60

percent of the permanent total cases, 75 percent of the work-related deaths, and 49 percent of the occupational disease cases.

The largest overlap is with Social Security disability insurance benefits. Of 1036 people sampled, 124 received such benefits, including half of all permanent total cases, and one sixth of all major permanent partial cases. The next largest overlap was with Social Security survivor's benefits. Seven out of ten survivors who received workers' compensation benefits also got these. Only 14 of the respondents received Social Security retirement benefits.

With respect to other public programs, 33 of the respondents received unemployment insurance, 25 got Medicare, 30 got public assistance, 7 got Medicaid, and 7 got Supplemental Security Income.

A substantial number of the respondents received income from private insurance, financed by their employers or themselves. These included 34 each with group health insurance and short-term disability insurance, 33 with individual accident and health policies, 28 with group life insurance, and 21 with veteran's benefits. 21 respondents reported receipts from a lawsuit against their employer.

Gaps between workers' compensation and other programs occur when there are disputes as to the work-relatedness of an injury or illness. Many medical, disability, and automobile insurance policies exclude coverage of work-related cases, and until the dispute is resolved, neither carrier pays. There is a waiting period before application for Social Security disability insurance can be made; Supplemental Security Income requires both an income and an asset test. Unemployment Insurance requires an active search for work. Sometimes, therefore, none of these

is applicable to the injured worker.

Possible spillover of costs of injuries and occupational diseases can partly be assessed by examining the data on overlaps with public programs, including Social Security disability insurance and survivor's benefits. However, the total is higher than this, because many workers who should be covered by workers' compensation are not, many illnesses which are work-related are not so identified, many lump sum settlements run out. In these and similar cases, workers receiving other benefits would not be known to be spilling over from workers' compensation. The identified cases, and the general magnitude of the unidentified cases, clearly amount to a very appreciable spillover into other public programs.

Specific Recommendations

Broad Coverage: In accordance with the principles discussed above, we believe that workers' compensation should be extended to all employees, and that every practical means should be employed to make this effective. We reaffirm the National Commission recommendations that coverage should be compulsory and no waivers should be permitted. Coverage should be extended to all classes of employees, to all occupations and industries without regard to hazard, to government employees, and to farmworkers. Each of these recommendations has been adopted by at least 13 and as many as 48 States.

A major problem in practice is the extension of coverage to certain household and casual workers, and to intermittent and seasonal workers on farms that do not have employees year-round. This problem occurs not so much because of the casual attachment of the worker to the workforce, as because these workers are hired by employers who are not usually employers, and therefore do not have the knowledge of employment requirements or the insurance coverage usual among employers. The high turnover of many casual workers, and the paperwork involved for employers also discourage compliance.

The two States which now require coverage of household and casual workers who earn more than $50 a quarter from any employer do so through riders on other insurance policies. It is much too soon to assess just how this will work out. But it is clear that many of those who hire such workers will be unaware of required coverage, and assuring compliance will be difficult. The potential cost to any employer who fails to secure liability through insurance is very substantial.

Another option would be to establish a special fund in each State, run either by the State workers' compensation agency or by the insurance carriers providing workers' compensation in that State. The fund would sell coverage to any employer of such hard-to-cover workers. With such a fund, coverage could realistically be extended to all household and casual workers who earn more than $200 a quarter -- the approximate amount a worker would earn working one day a week at the minimum wage. The State could make arrangements for workers' compensation forms to be distributed with all Social Security tax forms to such employers. All employers paying more than $200 a quarter to a worker would be required to send the form to the special fund, either noting that they were covered by another insurance policy and identifying that policy, or, sending their premium to the fund. This arrangement would not cover workers whose earnings from each employer were less than $200, unless they worked for a temporary help agency, cooperative, or similar unit.

The special fund could also guarantee benefits to workers' compensation claimants who were in danger of not receiving benefits because their employer did not insure his workers' compensation liability, or because the carrier or self-insured employer became bankrupt. In addition to premiums, the fund would be financed partly by fines levied on those who failed to obtain coverage. These could range in size from twice the premiums which would otherwise be paid in those instances when the employer was unaware of his liability to substantial penalties for employers who deliberately failed to secure their liability. The fund could also be financed by assuming the workers' litigation rights against any

insolvent insurer or employer, and if necessary by an assessment on workers' compensation premiums.

While we are not anxious to delay coverage for these workers any longer, such a phase-in process may ultimately secure more coverage more quickly than mandating a precipitous and impractical extension that can cause insurance availability problems. For example, coverage might first be mandated for farms which use more than 500 man-days quarterly, and then extended to all farms paying more than $200 a quarter to a worker.

To be sure that all workers have a jurisdiction in which they can file claim for a work-related injury or disease, we recommend that all States cover workers whose employment is principally localized in that State for injuries or illnesses which occur or to which they are exposed in any other State or location, provided that it was in the course of the employment so principally localized. If the worker is not covered by the workers' compensation system in the State where his employment is principally localized, he should be able to file claim in the State where the injury or disease occurred, or finally, in the State where he was hired.

We recommend coverage of all work-related diseases, and we are strongly opposed to arbitrary barriers to compensability. This coverage should extend to all illness "arising out of and in the course of employ ment". To help extend coverage, we make several recommendations.

Some States may wish to define disease as a component of injury as is done in the Model Act published by the Council of State Governments.

This says: "Injury means any harmful changes in the human organism arising out of and in the course of employment, but does not include any communicable disease unless the risk of contracting such disease is increased by nature of employment." As the National Commission recommended, the "by accident" phrase should be eliminated as a requirement for compensability. This criterion is not really applicable to the contraction of disease. Requirements that the illness be "peculiar to the workers' occupation", or that the "ordinary diseases of life" be excluded do not accord with current medical and scientific evidence.

Nearly all diseases which can be caused by agents found in the workplace can also be caused by the same or other agents found elsewhere. This means that it will continue to be necessary to show in each case that the worker has a specific disease, and that there is a reasonable medical certainty or a high probability given the exposure in the workplace that the disease is work-related. This assessment will often be very difficult to make, but at least the whole focus is on the relationship between the workplace exposure and the disease rather than extraneous factors.

In making these difficult determinations, the goal should be to minimize the total number of cases which are misclassified — both the cases which are classified as work-related which may not be, and the cases which are classified as not work-related but which may be. Toward this end, we suggest that work relationships be determined by the expert panel proposed hereafter under the following guidelines:

1. When the disease has been diagnosed, and there is reasonable medical certainty that it is work-related; that is, when the etiology of the disease is known; or

In order to expand knowledge of the etiology of disease, we recommend that the Secretary of Health, Education, and Welfare take the lead in a Federal effort to add to the list of potentially significant occupational diseases for which there is documented etiology. Better statistics are needed on the number of workers exposed to various toxic agents, and evidence on the precise relationships among intensity of exposure, duration of exposure, other substances which may interact with the agent under study, and the varied sensitivities of individuals. The Federal Government should also undertake a substantial effort to coordinate collection and analysis of data on the epidemiology of diseases which might be work-related. Agencies which collect and use such data,such as the National Institute for Occupational Safety and Health, other National Institutes of Health, the National Center for Health Statistics, the Social Security Administration, the Occupational Safety and Health Administration and the Environmental Protection Administration, should participate in this endeavor.

Further, this research and analysis about diseases which are known to be or potentially may be work-related -- and the means by which hazards can be mitigated -- should be made widely available to workers, employers, State workers' compensation agencies, State occupational safety and health agencies, physicians, and researchers. We urge unions, employers' associations, State agencies, and medical and scientific associations to join in this effort to spread information. In particular, we hope that medical societies will encourage specialization in this highly technical area, and will keep their members informed of current developments.

Hospitals and physicians should get work histories as well as medical histories. Workers should have access to employer information on the nature

2. When the disease has been diagnosed, the worker can show that there is epidemiological evidence that the incidence in his occupation, industry, or plant significantly exceeds the incidence in the population, and the employer fails to show that the employee's illness is not due to exposure in the workplace; or

3. When the disease has been diagnosed, contributing causes from outside the workplace are present, but it can be shown that agents or exposures in the workplace constituted a substantial factor in causing the worker's illness, and the risk of contracting the disease is increased by the nature of employment.

The first criterion is the usual one at present, in which the worker must show the work-relatedness of a disease, the etiology of which is known. The second requires the worker to show that he or she has a disease which is likely to be work-related, and makes this rebuttable if the employer can show that the necessary exposure is unlikely to have occurred. This shift in the burden of proof in these particular circumstances is meant to place the burden on the party in a position to gather the necessary evidence as to the agents or exposures which were present, namely the employer. The third criterion is meant to screen out minor workplace aggravation of non-work-related illness, and focus the resources of workers' compensation on those cases in which the workplace contribution is substantial.

We cautiously recommend this approach to the States. We urge that State agencies and their expert panels exercise great care when using presumptions to assure that the rights of all parties are protected. This would be especially necessary if the States act to limit litigation over compensability in work-related disease cases as we recommend.

and intensity of their exposures to hazardous substances, and to the results of any physical examinations. When exposures to hazardous substances occur, a registry should be established by the employer to maintain the record. Insurance carrier records should be available to researchers under conditions preserving the confidentiality of individual records on payment of the costs of access.

To provide clear information and equitable decisions in this difficult area for workers and employers, we recommend that each State establish a panel of experts, including or using the advice of physicians, industrial hygienists, and epidemiologists, to determine the compensability of occupational disease cases in that State. The findings of this panel of experts should be binding as to all questions of fact or causation except for questions of law. This approach should increase the consistency and fairness of the decisions on compensability of disease.

We recommend elimination of existing State legal compensability restrictions based on exposure criteria that are unrelated to medical and other scientific evidence, including restrictions on duration of exposure, recency of exposure, and whether exposure was in the State where the claim is made. Because such evidence is continually being expanded, schedules of exposure requirements necessary to show that a particular disease is work-related should be kept by the State's panel of experts that determine compensability and should be frequently updated. Time limits within which claims must be filed should start at the time the claimant knows or should have known of the existence and potential compensability of the disease.

Claimants with work-related disease should receive benefits at the

same level and of the same duration as those with work-related injuries. Their benefits should be based on their most recent earnings, or, if the disease has diminished their earnings prior to the claim, on the average of their last five years of earnings.

No waivers of workers' compensation should be permitted for any pre-existing condition when employees are hired. When the exposures which caused the disease have been incurred in the employ of more than one employer, we believe that the most easily administered approach to assessing liability is the "last employer principle." An alternative which has many advantages is to have the State second injury fund contribute toward the benefits. That fund might then levy a special assessment on the former employers of that worker in whose employ he was subject to significant hazardous exposure, apportioning the assessment for the second injury fund according to the exposures received in the course of such former employment.

Finally, we recommend that the Social Security Administration develop the data and analyses necessary to assess the extent to which claims for disability insurance from people with specific diseases are coming disproportionately from certain industries, occupations, or companies. Where this is shown to be the case, legislation should be developed for consideration by the Congress to assess a variable surcharge on the employers' share of the payroll tax to finance this excess incidence of disease.

Income Protection: We recommend that the main focus of compensation for work-related injury and disease should be replacement of a substantial portion of lost earnings. Focus on that objective has been lost in the

present system, partly due to the confusion as to the purpose of compensation for permanent partial disability, and partly due to the great prevalence of compromise and release settlements for the more severe cases.

To provide this focus, we recommend that replacement of wages lost due to any work disability resulting from an impairment be separated from any indemnity which might be paid for impairment -- that is any anatomic or functional abnormality or loss after maximum medical rehabilitation has been achieved.

The task force found the system for compensating permanent disability, and particularly permanent partial disability, to be inequitable and to cause great hardship for some claimants while providing windfalls to others. Degree of impairment or impairment modified by other factors such as age and occupation do not seem to be good predictors of the amount of earnings which will be lost.

Loss of earnings may take three forms: a reduction in earnings among disabled persons who are later reemployed, intermittent unemployment, and continuous unemployment. For claimants with reduced earnings but steady employment, long-run supplementation of pay is needed, not benefits defined in terms of weeks of pay. For claimants with intermittent unemployment, the second or third spell of unemployment will likely find the injured worker dependent on other funds. For claimants with continuing unemployment, benefits are likely to be inadequate. Most permanently impaired workers who get back to work on a regular basis, may well return to their pre-injury earnings.

Under present practice, to say that a worker has a 10 percent impairment is not to say that his or her earnings will decrease 10 percent or even

that those earnings will decrease less than those of a worker with a 30 percent impairment. Rather it may be that the worker with a 10 percent impairment has a substantial chance of no loss of earnings beyond the recovery period, and some chance of being unemployed. A worker in this category probably has a somewhat better chance of being employed than one with a 30 percent impairment. Thus, if all workers in a category receive the same settlement, those who subsequently find employment may be overcompensated for their earnings loss, while those who are without employment are undercompensated.

To deal with the problem of the unpredictability of the effects of an injury or disease, we recommend that wage loss be compensated as it accrues. Compensation should continue until the worker returns to his old job, gets another job, or it is determined to the satisfaction of the State workers' compensation agency that he or she is employable but refuses to work. If a worker can only work part-time or at a less remunerative job, benefits amounting to two-thirds of the difference between his new earnings and his old (or the maximum earnings compensable under the State law) should continue to be paid.

In cases of minor impairment, after the worker returns to work at or above his old earnings, the case could generally be closed (subject to reopening) with the permission of the State workers' compensation agency. This would normally be granted routinely unless there were a reasonable chance that the minor impairment would lead to compensable wage loss. However, in cases of major impairment, after the worker returns to work, if he might have trouble getting another job because of his impairment should he become unemployed again, the case would remain open, subject to reacti-

vation upon request of the claimant. In implementing this system, we recommend that the terms permanent partial disability and permanent total disability be eliminated.

Since the principle of substantial replacement of lost earnings as they accrue cannot be met if lump sum or compromise and release settlements occur, we recommend that such settlements be strongly discouraged. If permitted at all, their use should be limited to a very small number of unusual cases, where the agency, carrier, and claimant find substantial benefits for the claimant's future employment and employability would result. This should require written approval by the State workers' compensation agency, following high-level review.

As the National Commission recommended, benefits should be 66 2/3 percent of the worker's wage, up to a maximum of 100 percent of the State's average weekly wage. Because workers' compensation is not a welfare system but social insurance, and because it is given in exchange for the right to tort action, this maximum should continue to increase, as the Commission recommended, up to 200 percent of the State's average weekly wage.

We recommend that long-term wage replacement benefits to disabled workers or survivors be increased annually in proportion to the increase in the State's average weekly wage, and that the pre-injury wage be similarly escalated in all calculations. We urge that State insurance regulatory authorities carefully review and control proposed trend or projection factors in respect to such escalation provisions and that alternative methods of funding increments be explored. This recommen-

dation would apply to all new cases entering the workers' compensation system.

Cases already receiving long-term benefits should also be adjusted to current wage levels. It is difficult to know how the cost of such payments should be allocated, however. States which decide to enact such adjustments, may wish to provide part or all of the funding.

In addition to the wage replacement benefits, we recommend that employers be required to continue to pay Social Security taxes on such wage replacement benefits, and likewise continue to contribute, based on those benefits, to any company or industry retirement plan. At the time of retirement, then, we would recommend that workers' compensation wage replacement be superseded by retirement benefits. If a retiree returns \to work, he should be covered by workers' compensation for that job, but should not receive both workers' compensation and retirement income based on the same work experience. Similarly, we recommend that the employer continue any health insurance coverage on the same basis as during employment during the time the employee is without a job which would provide access to group health insurance.

States may also wish to require indemnity to workers for non-wage losses over and above the wage loss compensation discussed above. If so, we suggest that the State set a maximum value on based on "the whole man", and divide that into a ten-point scale according to the degree of impairment. One-tenth of the "whole man" amount would be paid for each point on this schedule. The schedule should be comprehensive, including all injuries and disease that the State decides should be

compensable beyond wage replacement. Because the wage replacement is handled separately, and because we recommend that the maximum amount of indemnity for impairment be kept well below amounts awarded in court cases in instances of tort action for negligence, this schedule, although still based on difficult value judgments, should be easier to construct than current injury schedules.

Recommendations for benefits in instances of work-related death also involve difficult value judgments. On consideration, we recommend that they follow the same general pattern set forth above for wage replacement. The spouse of the deceased worker would receive benefits amounting to 66 2/3 percent of the worker's weekly wage up to the State's maximum benefit. Workers' compensation should also finance any necessary training, placement assistance, or child care to help the spouse find employment, appropriate to the new circumstances, and should supplement the spouse's earnings up to the level of the worker's earnings, as escalated by the State's average weekly wage. In other words, the spouse would receive exactly the same treatment as a worker with a major permanent impairment, including the opportunity to reactivate the case at any time upon loss of employment. This would be an incentive for the spouse to work, but we are not recommending that the spouse be required to work.

When there are young children or other dependents who require care, the spouse would have the choice of continuing to stay home and care for such dependents, or going to work and receiving a supplemental dependent care allowance. The spouse would also receive any indemnity for the whole man that the state may have established. (The difficult problem of benefits to children and other dependents following remarriage of the spouse needs further study.)

Rehabilitation and Re-employment: We believe that re-employment should be regarded as a major goal in workers' compensation and pursued vigorously. Positive steps to help workers return to work, rather than litigation and compromise and release, should be the thrust of efforts to minimize the costs of compensation. The shift to replacement of wages as wage-loss accrues, recommended above, lays the groundwork for this new emphasis. Other recommendations designed to reduce litigation and improve the delivery system will support this new thrust.

We recommend also that the carrier/employer have the primary responsibility for developing and implementing a physical and/or vocational rehabilitation plan for any claimant whose prospect for re-employment and return to former earning capacity would be thereby significantly improved. The carrier/employer should be fully liable for all rehabilitation costs, including maintenance and necessary travel and expenses.

The State workers' compensation agency should oversee rehabilitation and re-employment. It should be responsible for screening injury reports, physician's reports, periodic reports of continuation or resumption of wage replacement benefits, and case re-openings. It should encourage rehabilitation, review plans which are filed, resolve disputes between carriers/employers and claimants as to what constitutes appropriate rehabilitation, and, when the carrier/employer is unable to develop a suitable plan, refer the case to the State vocational rehabilitation agency, with the costs charged to the carrier/employer.

The key element is re-employment itself. We recommend that employers make every effort to rehire the employee on the same job, an equivalent job, or a job within the capacities of the worker, if such jobs are reason-

ably available, or to give the employee priority if such job becomes available. When a job with the same employer is not available, the employer and carrier should help the employee to find a job elsewhere. Whenever possible, it may be desirable to identify the job into which the employee will be hired prior to starting vocational training. Possibilities for job redesign to fit the capacities of the impaired worker should also be considered. Discharge or discrimination against workers who file a workers' compensation claim should be prohibited.

In support of re-employment, we recommend that all States have broad second injury funds, not limited to specific impairments or to persons whose impairment before employment or re-employment was severe or major. These second injury funds should be widely publicized and adequately financed, and should be actively coordinated with efforts to place workers' compensation claimants.

When a worker with temporary disability is not rehired or given a bona fide job offer, he should receive placement assistance and up to 60 additional days of workers compensation, provided he is actively engaged in job search. He may choose between workers' compensation and unemployment insurance, but in no case should he recieve both. In cases of permanent disability, where the injury appears to have a minor effect on employability, three months of stable employment should be required before the carrier/employer can petition the State workers' compensation agency to close the case. As recommended above, all cases of permanent disability, where it appears that the disability would have a significant effect on employability if the worker were to become unemployed should be subject to reactivation whenever the worker loses a job and is unable

to find a new one because of his impairment. We recommend that State agencies have simple procedures for status change within an open case (i.e., reducing wage replacement if the worker gets a part-time or lower paying job, eliminating them if he is hired at the pre-injury wage, or re-starting them if he becomes unemployed) that would minimize use of formal hearings. Notice should be sent to the agency for review, but no prior approval should be required unless the claimant objects to the change.

The benefit recommendations we have made provide workers with incentives to return to work, both because benefits do not replace all of lost earnings and because we recommend that workers be permitted to keep one-third of a dollar of benefits for each $1 of earnings up to the worker's former earnings. However, when suitable employment is available, if the employee refuses to return to work, the carrier/employer should be permitted to petition the State workers' compensation agency for permission to end wage-replacement benefits.

Safety: The first line of defense in containing the cost of workers' compensation -- even before the effort to rehabilitate and re-employ workers -- is the prevention of injuries and illness. Workers' compensation, improved in accordance with our recommendations, would support this goal by internalizing the costs of work-related accidents and disease, and by properly rating employers. These costs provide financial incentives for employers to seek ways to make the workplace safer and more healthful -- to invest in safer machinery, provide protective equipment, train workers in proper proceedures, reduce exposures to hazardous substances,

and even change the method of production or the product itself.

In principle, to the extent that the costs of accidents and illness are not internalized in the costs of production, employers will under-invest in safety and health. Moreover, again in principle, internalizing costs should be one of the best ways of encouraging prevention, because the effect is to leave the employer free to decide on the best methods of prevention and thereby to encourage innovation which may develop methods more effective than any of the current means of prevention.

In practice, it is not known how effective such incentives are. One argument has been that so little of the current cost of work-related injuries and disease is now internalized, that the workers' compensation premium rates are below the "attention threshhold" of many employers. Our recommendations on coverage of all employees, effective coverage of occupational disease, compensating wage loss as it accrues, and increasing maximum benefits should go far to correct this problem.

Experience rating should be extended to small as well as large firms. In addition, we recommend that both premium rates and dividends be related to the safety, health, and re-employment experience of the employer. The replacement of lost wages as they accrue makes the relevant experience automatically net of success in re-hiring or placing workers. Dividend payments should reinforce this by rewarding those employers with improvements in safety and/or good re-employment records.

Insurers should also increase their assistance to employers in the area of prevention. Employers should receive copies of the survey of the workplace at the time the insurance contract is drawn. And the insurance industry is in a position to do more analysis of accident and disease pat-

terns, and provide this information to employers.

The Occupational Safety and Health Administration can supplement these prevention incentives and activities in several key ways. OSHA can focus its inspections on those employers who have a particularly poor prevention record, pulling down the experience for that industry. And OSHA can give particular attention to hazardous substances which may result in long-latency diseases, where the unknown magnitude of the problem or the conversion to present-value, tend to undermine the prevention incentives inherent in workers' compensation.

Although we did not substantively address the relationship of workers' compensation to product liability and other third party problems, we believe the relationship needs further examination. This view is shared by some of the participants of the Interagency Task Force on Product Liability, who believe that a significant part of the product liability problem could be addressed by improvements in the workers' compensation system. The Product Liability Task Force will release its final report within the next few weeks.

Delivery System: Many of the recommendations we have made with respect to the other objectives of the system are expected to improve the delivery of workers' compensation. The separation of wage replacement from other compensation, and the payment of wage replacement as it accrues should simplify the determination of the amount of benefit payable. The National Commission recommendation, which we strongly endorse, that both compromise and release settlements and lump sum payments be strongly discouraged and subject to approval by the State workers' compensation agency, should help to ensure that the wage replacement objective is met. The separate and simplified scales

for indemnity of impairment should make the determination of such benefits easier and more equitable.

The recommendation that extraneous requirements for the determination of the work-relatedness of disease be removed, the specific statement of the criteria for work-relatedness, the increasing research in disease etiology and epidemiology, and the proposed determination of the compensability of occupational disease by State panels of experts should make such determinations more equitable and, we hope, simpler.

We hope that the above recommendations will discourage litigation over the extent of disability and over compensability of disease. We further hope that energies devoted to cost containment in the system can be harnessed toward the socially desirable objectives of re-employment and improving the safety and healthfulness of the workplace. The incentives for this shift are provided by linking both experience rating (automatically) and dividends (by discretion) to these objectives.

To further improve the promptness of benefits, and to clear small medical-only and short-term cases from the workers' compensation system, we recommend that State agencies encourage employers to self-insure or merge with non-work-related coverage, the first few hundred dollars of medical coverage and the first few days of illness. Judging from experience with non-work-related benefits, such cases can be effectively handled by the employer himself. If the limits are low, assurance of reliability of the coverage would not need to be as stringent as for employers who self-insure all or most of their workers' compensation liability. Any case which went beyond the dollar and/or time limits, or in which the claimant requested such protection could be immediately

reviewed by the State agency. In all other cases, only the usual accident reports would be filed.

We further recommend that State agencies explore the possibility of permitting employers with extensive fringe benefits to combine their work-related and non-work-related medical and/or wage replacement coverage. Such combination would require the employer to prove to the State agency that the workers' compensation protections had been provided, and would probably require special assurance of follow through for long-term benefits and long-latency disease manifest after the employee may have left the firm. On the other hand, we recommend that employers who self-insure should be required to carry insurance on excess risk, and perhaps to contract claims management and adjustment for long-term cases. Oversight of self-insurers is necessary, and perhaps they should be encouraged to reserve their liability by a tax credit such as that for insurance carriers.

We believe that it is vitally important for State agencies to take a much more active role and to considerably strengthen their administration of workers' compensation. Included in this recommendation are the following:

— State agencies should mount a vigorous program to inform workers, employers, insurers, physicians, and others about the workers' compensation system, including their rights and responsibilities,

-- State agencies should identify firms that do not have satisfactory workers' compensation coverage and bring them into compliance,

-- A State fund should be available to provide hard-to-get coverage and guarantee benefits against lack of security or bankruptcy,

-- A State panel of experts would determine the compensability of work-related disease,

-- A unit should be established within the State agency which would initiate contact with the worker on the first report of injury or illness, provide him with information on the system, help him to file his claim, and repeat contact to see whether he needed further help,

-- The above unit should be available by telephone to answer any queries about the system, and should have ready access to information about specific cases in order to provide prompt specific answers,

— Carriers/employers should be required to begin payment within 15 days or to send the State agency an explanation for the delay,

— If a hearing is requested or necessary, it should be held within 45 days from the time of the accident, unless the State agency grants an extension,

-- Carriers/employers should be able to begin payment of workers' compensation claims immediately, subject to agency review,

-- Changes in status should also be on a notice-and-review basis unless the claimant wishes pre-review or the status change is a case closing,

-- Legal fees should be regulated, and generally should be based on work done; agencies should review the appropriateness of contingency fees to a system replacing wages as wage-loss accrues,

-- In cases of frivolous defense, legal fees and/or penalties should be assessed against the carrier/employer, which should not be included in the experience base for rate-making,

-- The State agency should also review medical care, physical and vocational rehabilitation, and re-employment plans and issues, and help the worker to make informed choices among services,

— State agencies should cooperate with State and Federal safety and

health agencies in identifying hazards and improving prevention, To finance this more active role for the State workers' compensation agencies, we recommend that all taxes on workers' compensation premiums and on self-insurers be reserved for financing the administration of the system, and not be returned to general revenues.

We recommend that State workers' compensation agencies take strong steps to develop information systems that will provide the information necessary for good management. We also recommend that the long-run goal be to develop a single information system that will meet the needs of both workers' compensation and the Occupational Safety and Health Act.

As intermediate steps, we recommend that the Basic Administrative Information System developed by the International Association of Industrial Accident Boards and Commissions and the Model Data System developed for the task force be reviewed to reach a concensus on common definitions and uniform basic tabulations. We also recommend that the Federal Government fund pilot projects in three States to establish an MDS system. All States should be encouraged to initiate an MDS system combining workers' compensation and OSHA data after the pilot projects have refined the system.

Program Interrelationships

We recommend that workers who apply for Social Security disability insurance and who are recipients of workers' compensation benefits be permitted to receive the higher of the two benefit levels, but not more than they would receive on one program alone. If the disability insurance payment is higher, workers' compensation benefits should be supplemented up to the level the worker would get on disability insurance alone.

Implementation

The Policy Group of the Interdepartmental Workers' Compensation Task Force believes that the problems in workers' compensation are due as much to the structure and management of the system as they are to the adequacy of benefits. More and more may be less the answer than better and better. This is in contrast to the National Commission which emphasized the importance of improving benefit levels and extending coverage to uncovered workers. Although we concur with the thrust of the nineteen essential recommendations of the National Commission, we believe it is time to move beyond these recommendations and endeavor to improve the efficiency of workers' compensation programs, and their effectiveness in attaining their fundamental objectives.

Perhaps the most important of our recommendations is that the administration of the system by State agencies and carriers must be strengthened. This is prerequisite to our most fundamental recommendation: refocusing the system on wage replacement benefits for permanently impaired workers and placing greater emphasis on rehabilitation and re-employment.

We see an important Federal role in implementing the recommendations in this report. We recommend continuation of a Federal Interdepartmental Policy Group to analyze and monitor State programs and to undertake additional research. We recommend a strengthened technical assistance role by the Labor Department to assist States in improving their programs with special emphasis on improving

We recommend that survivors in cases of work-related death who apply for Social Security survivor's benefits similarly be permitted to receive the higher of the two benefit levels, but not more than they would receive on one program alone. If the Social Security benefit is higher, workers' compensation should be supplemented up to the level the survivors would get on Social Security alone.

We recommend that unemployment compensation not be available to recipients of workers' compensation wage replacement benefits and vice versa.

In the long-run, we recommend that workers' compensation wage replacement benefits be superseded by Social Security and other retirement benefits at the age of 65. In preparation for this, we have recommended that employers continue to pay Social Security taxes on workers' compensation wage replacement benefits. The question of who should pay the employee's share must have further study. For the present, we recommend that Social Security retirement benefits be supplemented by workers' compensation up to the level of the workers' compensation benefits alone, if those benefits are higher. The full change-over should take place when those who have had Social Security and other retirement contributions paid on their workers' compensation benefits reach the age of 65. Retired persons who return to work should be covered by workers' compensation, but should not be able to receive both benefits based on the same work experience.

administration in order to take on some of the additional burdens which we are recommending. Another responsibility of the Policy Group would be to facilitate public discussion of this report, as well as the final research reports, and make further recommendations.

We expect also that the Federal Government will give assistance to States in implementing a wage replacement approach to paying benefits. Improved State administration will be necessary if these models are to be feasible. As more States focus on actually measuring and replacing wage losses, their experience should be made available to other States through Federal technical assistance. Federal financial assistance should be made available to assist States to adopt improved data systems and to improve the administration of their programs.

In case of those States which are not ready at this time to go completely to a wage replacement system, we believe there are beneficial interim steps that should be taken which can later integrate into a future complete wage replacement system. Some of those interim steps are:

- Active case management, particularly for severe injury and disease cases,
- Implementation of a more complete data system,
- Reduction in the number of lump sum settlements, and compromise and release agreements
- Reducing the impact of litigation through regulation of legal fees and severe restriction of contingency fees,

- § Focus on re-employment of injured and diseased workers, preferably with their previous employer,
- § A more discriminating experience rating system taking into account reemployment history as well as safety,
- § Better information for use by State medical panels of experts for determining compencability of occupational diseases,
- § Extending coverage to as many workers as can feasibly be handled administratively,
- § Integration of workers' compensation with our other social insurance systems, thereby better internalizing in workers' compensation the costs of accidents and injuries, and reducing the burden on the other systems.

Adoption of the recommendations in this report will require increased attention to the administration of the system and probably increase State administrative costs. We recommend that administrative costs be financed by a tax surcharge on workers' compensation premiums or their equivalent in the case of self-insurers. In many States, considerable revenue is derived from these means; however, these revenues are sometimes added to the general revenues of the State.

The intent of the recommendations in this report is to correct serious deficiencies in workers' compensation. They represent a challenge, yet one that must be met if the system is to achieve its objectives. We hope and expect that the insurance industry will rise to meet the challenge, and work cooperatively with the States in improving the system. If workers' compensation is to move toward greater equity,

greater efficiency, and more complete coverage for those injured and diseased from their work, cooperation among the Federal Government, State governments, and the private sector will be necessary.