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Cheit-Gordon: Occupational Disability and Public Policy

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BOOK REVIEWS

Occupational Disability and Public Policy. Edited by Earl F. Cheit and Margaret S. Gordon. New York: John Wiley & Sons, Inc., 1963. Pp. xii, 446. \$11.95.

One test of the worth of a symposium is how effectively it focuses on divergent points of view and clarifies the arguments supporting those views. Measured by this standard, *Occupational Disability and Public Policy* has achieved a satisfying degree of success. This latest volume from the Institute of Industrial Relations at the University of California gathers together a series of lively essays which explore the roots of the current discontent with workmen's compensation and assess alternative means of dealing with industrial disability.

Authorities such as Arthur Larson, Earl F. Cheit and Benjamin Marcus examine the basic question of whether the compensation system is really the best possible solution to the social and economic problems posed by the work injury. Jerome Pollack considers the emergence of social security as a method of insuring against death and disability, while Harlan Fox outlines the supplemental benefits which have been secured for the worker through collective bargaining. Ashley St. Clair's presentation of the case for private insurance in the compensation field is balanced in part by Stefan A. Riesenfeld's probe into the efficiency of compensation insurers and administrators. Margaret S. Gordon considers the changes which have taken place in workmen's compensation in Europe and the British Commonwealth. Benefits, medical care and rehabilitation are covered in the remaining essays.

Whether cash benefits for permanent partial disability should be measured by economic loss or degree of physical incapacity is one of the controversies which is subjected to a thorough airing. Under the economic-loss theory, payments are measured by the difference between the employee's average weekly wage before and after the injury, while the physical-incapacity theory looks to the percentage by which the employee's bodily functions are impaired, and applies this figure to his pre-accident average weekly wage.¹

Larson argues strenuously for the former view.² He stresses that the fundamental notion behind workmen's compensation was to create a non-fault system of liability to offset the "social consequence" of impaired earning capacity. Thus, he finds it inappropriate to hold the employer liable for loss such as impotency, which is essentially non-economic. Cheit, on the other hand, reiterates the proposition urged in his recent book³ that the goals of workmen's compensation can best be fulfilled by viewing disability in terms of physical incapacity.⁴ His main point is that the

¹ See U.S. Bureau of Labor Standards, Dep't of Labor, Bull. No. 192, IAIABC Proceedings—1956: Workmen's Compensation Problems 72-86 (1956).

² Pp. 40-43.

³ Cheit, *Injury and Recovery in the Course of Employment* 344-46 (1961).

⁴ Pp. 68-76.

emphasis on wage loss, often determined after lengthy litigation, deters the worker from making every effort to return to gainful employment, since cash benefits are keyed to his inability to earn. Collateral support for this position is found in the essays by Dr. Leon Lewis on medical care,⁶ Dr. E. C. Steele on benefit administration⁶ and Z. L. Gullledge on vocational rehabilitation.⁷

Cheit advocates unlimited medical care wholly oriented toward rehabilitation. Under his approach, cash benefits would be paid on the basis of physical incapacity, rated in broad categories of ten to twelve per cent. In order to insure re-employment, the employer would be liable to the employee for a sum equal to the cash benefit if he refused to rehire the employee at least at his former salary (with adjustments, if necessary). The whole administrative structure would be designed to provide close supervision over medical care and equitable re-employment. Larson, in full accord that rehabilitation should be central to any compensation system, calls for unlimited medical care and an administrative supervision which is both careful and complete.

The criticism of the economic-loss theory on the ground that it impedes rehabilitation appears to be well taken. This argument certainly has not been met in any of the essays under consideration. A physical-incapacity theory along the lines proposed by Cheit solves the problem of job restoration, but it interferes with free enterprise in a manner for which the country may not as yet be prepared. As I have suggested elsewhere, some other incentive for re-employment, such as a shift of a portion of the burden of cash benefits from the employer to a state fund whenever an employer rehires the injured worker, would stimulate considerably less distaste on the part of industry, yet accomplish the same result.⁸

Several of the essays take devastating aim at the litigiousness of workmen's compensation in the United States. Drs. Lewis and Kessler, for example, paint a grim picture of the adversary nature of compensation proceedings. The injured worker finds himself subjected to pressures from doctors, lawyers, employers and insurers, while the administrator confines himself to an Olympian role as impartial arbiter. Both authors cite, as a dramatic illustration, the unnecessary amputation of a worker's crushed finger at the urging of an insurer or company doctor in order to economize on benefit costs.⁹ They prefer as an alternative the Ontario plan, under which the workmen's compensation board closely supervises each case, appeals to the courts are not permitted and an exclusive state fund supplies insurance for all employers.¹⁰ Once again political reality looms as an obstacle, since

⁶ P. 124.

⁶ Pp. 269-77.

⁷ P. 420.

⁸ Page, Book Review, 72 Yale L.J. 614, 616 (1963).

⁹ Pp. 141, 375.

¹⁰ See Somers & Somers, *Workmen's Compensation: Prevention, Insurance and Rehabilitation of Occupational Disability* 309-14 (1954); see also Horovitz, *Rehabilitation of Injured Workers—Its Legal and Administrative Problems*, 31 Rocky Mt. L. Rev. 485 (1959).

BOOK REVIEWS

this approach relies on bureaucratic paternalism and eliminates private insurance.

At this point it is appropriate to inquire what role ought the federal government play in the compensation system. At one extreme is the drastic step which would place all industrial injuries under the jurisdiction of a federal workmen's compensation act. Larson's account of the bitter and overwhelming opposition he incurred when, as Under Secretary of Labor, he undertook to prepare a Model Act, for discussion purposes only, illustrates the perils inherent in merely approximating the position.¹¹ At the other extreme is the "leave-it-all-to-the-states" notion, which is patently unsatisfactory.¹² Somewhere in between is the present arrangement, whereby state workmen's compensation benefits are supplemented by federal social security, collective-bargaining agreement and third-party actions in tort.

Admittedly, this structure is far from perfect, mainly because of inadequacies in the state acts. Yet the loudest, most vitriolic of criticism is now being directed at the contribution made by social security in cases of permanent total disability. Nine state legislatures, the American Bar Association, the National Association of Manufacturers, the United States Chamber of Commerce and the entire insurance industry are pressing for amendments to the Social Security Act which would reduce disability benefits to the employee by the amount of any workmen's compensation he might receive.¹³ This concerted effort appears both bizarre and quixotic in the light of a simple set of statistics. Less than two per cent of those entitled to social security disability benefits also receive workmen's compensation, and less than one tenth of one per cent of *all* workmen's compensation awards involve permanent, total disability.¹⁴ The "evils" of this insignificant overlap pale before such shortcomings as the arbitrary and outmoded limits which a number of state compensation acts still apply to medical benefits.¹⁵ Thus, if one's criterion is the well-being of the injured worker, the money and activity expended in lobbying on behalf of the amendments to social security should be redirected toward improving the state acts. It is true, as the concluding chapter in the book under review points out, that

¹¹ Pp. 26-31.

¹² See, e.g., U.S. Bureau of Labor Standards, Dep't of Labor, Bull. No. 212, *State Workmen's Compensation Laws: A Comparison of Major Provisions with Recommended Standards* (rev. Dec. 1961), which lists standards advocated by groups such as the Council of State Governments, the American Medical Association and the Department of Labor. No state measures up to all the standards, and some fare rather poorly.

¹³ Nuccio, *Insurers Oppose U.S. Competition*, *New York Times*, Jan. 12, 1964, p. F-1. For a revealing presentation of the arguments behind the amendments, see Lowery, *The Relationship of Social Security and Workmen's Compensation*, in U.S. Bureau of Labor Standards, Dep't of Labor, Bull. No. 254, *IAIABC Proceedings—1962: Workmen's Compensation Problems* 108 (1962).

¹⁴ See Cheit, *The Disability Benefit Complex: Workmen's Compensation Social Security*, paper presented to the Fifth World Congress of the International Society for Labor Law and Social Legislation, Lyon, France, Sept. 19, 1963, reprinted in 18 *Rutgers L.J.* (1964); see also Abraham & Wolkstein, *Workmen's Compensation and the Social Security Disability Program: A Contrast*, 16 *Vand. L. Rev.* 1055, 1073 (1963).

¹⁵ See U.S. Bureau of Labor Standards, Dep't of Labor, Bull. No. 244, Cheit, *Medical Care Under Workmen's Compensation* 1-18 (1962).

the overlapping of benefits is potentially a critical problem. Nonetheless, its solution should await the consideration of more pressing matters. Only when the state acts meet their obligations to the victims of industrial accidents should any changes be contemplated in the social security system.

One possible approach which the federal government might take is to establish mandatory standards for workmen's compensation.¹⁶ Those states which meet these requirements would be free to administer their compensation system without federal co-operation. Those states which insist on short-changing the injured worker would be subjected to federal action. This alternative was unfortunately not explored by any of the essays under consideration.

Occupational Disability and Public Policy merits the careful attention of all who are concerned with the human overhead of industry. While the symposium offers no easy solutions, it is at least a beginning. In an area long characterized by stagnation, any intellectual movement is a welcome sign.

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Forms and Procedures Under the Uniform Commercial Code. By Frederick M. Hart and William F. Willier: Matthew Bender & Co., New York, 1963, \$30.00, pp. xxvii 1100.

American lawyers, even in states where the Uniform Commercial Code has not yet been, or may never be, adopted, will no longer be able to shrug off the Code as a well-intended but abortive piece of model legislation. With almost all of the commercial states now in the fold, it is inconceivable that practitioners anywhere could escape its influence.

Had law schools and, particularly, more teachers of commercial law subjects been doing their job properly, the bar would, on the whole, be considerably more familiar with the Code than it is in fact. The first final draft was published over ten years ago, thus at least the younger generation of attorneys should have had the benefit of an intimate examination of its objectives, methodology and provisions. But this does not appear to be true.

For those wishing to begin or add to their knowledge of the Code, there is a healthy body of literature available. Not all of it is worth the time for reading, but a careful selection can easily be made. Little in the way of form books or drafting aids has yet appeared. The Banker's Manual on the Uniform Commercial Code, published by the Massachusetts Bankers Association and the Lawyers Co-operative Publishing Company, first saw the light of day in 1958 and contains an appendix of ten forms dealing primarily with loans on equipment, inventory, accounts and farm products. It is not in-

¹⁶ See Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals*, 1963 Wis. L. Rev. 57, 89.