REVIEWS

INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT. By Earl F. Cheit. New York: John Wiley & Sons, Inc., 1961. Pp. xviii, 377. $11.95.

DESPITE recent commemorations of the 50th anniversary of workmen's compensation in the United States, criticism of this once proud paragon of social legislation continues unabated. Designed to provide speedy and adequate relief for the victims of industrial accidents, workmen's compensation was based upon the theory that the worker would surrender his common-law right to seek full compensatory damages in tort against his employer, in return for fixed benefits for all work-connected injuries resulting in death or disability.[1] Few could quarrel with the oft-repeated slogan: "The cost of the product should bear the blood of the workman."[2] Yet the gap between promise and fulfillment remains a matter of crucial concern.

Earl F. Cheit, an economist and professor of business administration at the University of California in Berkeley, sets out to examine how effectively workmen's compensation provides cash benefits, medical care and rehabilitation. The net result is an important contribution to an understanding of the current shortcomings in workmen's compensation. Professor Cheit's quantitative analysis of the adequacy of cash awards sheds new light on a long recognized deficiency.[3] Cash benefits under workmen's compensation are inadequate because the statutes preserve a maximum recovery level far below two-thirds of the average worker's weekly wage. Professor Cheit's findings, based on material provided by the Labor Standards Bureau, the International Association of Industrial Accident Boards and Commissions (IAIABC) and insurance carriers, as well as on figures garnered from an exhaustive study of California compensation cases, reflect in striking terms the difference between what is paid out under the acts and the actual net worth of an employee to his family.

In evaluating death benefits, Professor Cheit constructs a complex formula reflecting the deceased worker's gross earnings a year before his death, his expected working life, his expected wage increments, his expected personal consumption, and the value of the "substituted services" which the survivors would have to purchase. In 1956, the median net loss (discounted to present value) to survivors of workers killed on the job in California was $74,463. Workmen's compensation benefits payable under the California statute replaced a mere 12.2 per cent of this loss. On a national level, 35 states replace 20 per

1. See generally 1 LARSON, WORKMEN'S COMPENSATION §§ 1.00-3.00 (1952).
2. See PROSSER, TORTS 383 n.96 (2d ed. 1956).
3. See, *e.g.*, Katz & Wirpel, *Workmen's Compensation 1910-1952: Are Present Benefits Adequate?*, 1953 INS. L.J. 164.

cent or less of the estimated loss. In New Jersey, the amount of monthly compensation death benefits for a widow with children is actually less than the minimum assistance budgets for basic requirements in the state relief program.[4]

Professor Cheit points to the federal Old-Age, Survivors, and Disability Insurance Program (OASDI) as one explanation for the low level of compensation death benefits. There is no co-ordination between the federal welfare program and workmen's compensation. The OASDI has only limited coverage. Ironically, widows not protected by it receive inadequate compensation death benefits because of the existence of federal payments to which they are not entitled. Obviously, some correlation is necessary. The author suggests that the compensation system provide annuities (offset by any federal benefits received) amounting to two-thirds of the wage loss suffered but without any maximum ceiling, and lasting until the remarriage or death of the beneficiary. A similar plan, with appropriate adjustments, might be extended to those workers totally and permanently disabled, with no hope for rehabilitation.

The most critical set of problems in the area of workmen's compensation today stems from the plight of employees suffering permanent, partial disability from industrial accidents. Cash benefits are generally low. Administrative bodies which should supervise compensation cases from start to finish find themselves cast in an almost exclusively judicial role to decide endless disputes arising under a statute intended to minimize litigation and provide quick relief for work-connected injuries. Because the ultimate goal in most compensation cases is the securing of cash benefits, the worker has little or no incentive to return to gainful employment. Fifteen states retain outmoded limits on medical benefits.[5] Last but not least, there is widespread disagreement as to the actual meaning of the term "disability."[6]

Professor Cheit not only graphically illustrates these problems, but proposes a new approach designed to maximize job restoration. Much of his inspiration derives from the Ontario workmen's compensation act.[7] He advocates unlimited medical care entirely oriented toward rehabilitation. The employee would receive maintenance payments until he is ready to return to work, and then would be rated on the basis of physical incapacity in broad categories of 10-12 per cent. Cash benefits would be paid on the basis of this rating, and would be wholly unrelated to loss of earning capacity or actual post-accident earnings. In order to insure re-employment, the author would make the employer liable to the employee for a sum equal to the cash benefit if he refused to rehire the employee at least at former wages (with appropriate adjustments, if necessary),

4. BERKOWITZ, WORKMEN'S COMPENSATION, THE NEW JERSEY EXPERIENCE 54 (1960).

5. U.S. DEP'T OF LABOR, BUREAU OF LABOR STANDARDS, BULL. No. 161, STATE WORKMEN'S COMPENSATION LAWS 24 (rev. May 1960); *id.* 3-4 (Supp. Dec. 1961).

6. For concise statements of the conflicting views, see U.S. DEP'T OF LABOR, BUREAU OF LABOR STANDARDS, BULL. No. 192, WORKMEN'S COMPENSATION PROBLEMS 72-86 (1956).

7. For a discussion of the Ontario Act, see SOMERS & SOMERS, WORKMEN'S COMPENSATION 309-14 (1954); see also Horowitz, *Rehabilitation of Injured Workers—Its Legal and Administrative Problems*, 31 ROCKY MT. L. REV. 485 (1959).

and this liability could not be passed on to an insurance carrier. The whole administrative structure would be geared to provide close supervision over medical care and equitable reemployment.

No American compensation act has successfully made job restoration its fundamental goal, despite continuous lip-service paid to the merits of rehabilitation. Professor Cheit's proposals are at least a worthy effort to achieve this end. The penalty for not rehiring the injured worker goes much farther than the Ontario act, and would no doubt face fierce opposition. On the other hand, it would effectively curb the practice of some employers of discharging employees because they seek workmen's compensation.[8] Perhaps some other incentive for re-employment, such as a partial shift in the burden of cash benefits from the employer to a state fund in cases where the employer rehires the injured worker, would be less distasteful to employers and would accomplish the same result.

Professor Cheit's discussion of the administrative aspects of workmen's compensation is oriented toward the California system. The complexities of compensation administration make it sometimes difficult to draw accurate generalizations from such a limited basis.[9] The California experience with lawyer's fees, for example, is cited as the reason for a suggestion that "low fees have tended to concentrate the practice [of compensation law] in the hands of specialists with a typically beneficial result in the general level of plaintiff representation."[10] Even though this line of argument could be used to justify a low rate of pay in any profession, a more logical approach would be to raise compensation lawyers' fees to a level approximating adequacy.[11] Compensation cases on the whole do not require so great a degree of expertise that it cannot be acquired by interested attorneys through post-graduate legal education. And the concentration of compensation practice in the hands of a few tends to reduce available time for the preparation of cases to a point where many claimants do not receive the representation which their cases require.

The author's policy considerations and proposals, while stimulating, create an impression of disarray because the issues they raise are not fully developed. When Professor Cheit adheres to a critical analysis of the compensation acts, his thrust is unerring. But when he suggests radical change without at the same time exploring in some depth the political impasse in which workmen's compensation finds itself, he risks indulging in mere academic exercise. A forthcoming symposium which he has co-edited [12] will touch upon some of these

8. See Blumrosen, *The Right to Seek Workmen's Compensation*, 15 RUTGERS L. REV. 491 (1961).

9. For detailed treatments of the administration of particular state acts, see BERKOWITZ, *op. cit. supra* note 4, at 96-137; Gellhorn & Lauer, *Administration of the New York Workmen's Compensation Law*, 37 N.Y.U.L. REV. 3, 204, 564 (1962).

10. P. 271.

11. See Larson, *"Model-T" Compensation Acts in the Atomic Age*, 18 NACCA L.J. 39, 47 (1956).

12. CHEIT & GORDON, OCCUPATIONAL DISABILITY AND PUBLIC POLICY (to be published in 1963).

policy questions, but it would have been more rewarding if Professor Cheit had applied his incisive mind to these problems, even if it would have meant a considerable increase in the size of the book.

For example, the role the federal government ought to play in the compensation system is the key question today. Though there is little serious agitation for a federal compensation act, the elimination of certain shortcomings in the state acts might well be accomplished by federal action.[13] Prospects for improvement of the benefit structures without some kind of outside intervention in states whose legislators are seduced by the argument that low compensation awards attract new industry are indeed dim. Hence, the setting of mandatory minimum standards by the federal government is a possible approach. The threat of further extension of OASDI into the area of industrial disability might also be used to impress upon the states the need for improved compensation acts.

An example of a workable variation from the compensation system is the FELA. The railroad workers have no compensation act, but enjoy extensive benefits under the Railroad Retirement Act, social security, and collective bargaining agreements, which provide a foundation upon which the FELA remedy is superimposed. Professor Cheit's analysis, though it occasionally confuses the types of benefits, is valuable because it clearly shows that railroad workers are in a more fortunate position under the FELA than they would be under the present compensation acts. But paradoxically he argues that a good compensation act would be preferable. Here again, the presentation of the policy question is glossed over, and the author's preference has no real force. The FELA chapter and the discussion of the remedies of the seaman contain useful material but are essentially digressions. A careful consideration of the feasibility of reinstating the direct tort action against the employer[14] would have rescued these chapters from the limbo of irrelevance.

Injury and Recovery is a significant exegesis of workmen's compensation as it exists in the United States today. Despite a tendency to suggest important changes without considering their social and political implications, this study is certain to add new vigor to the view that we must revitalize the compensation system or else replace it with more adequate methods of dealing with the social problems arising out of industrial injuries.

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13. The practical difficulties of federal action are illustrated by the attempt of the then Under Secretary of Labor Arthur Larson in 1955 to draw up a Model State Act which would combine the best features of the existing state acts. See Larson, *The Model Workmen's Compensation Act*, 23 TENN. L. REV. 838 (1955). Although this Act was designed only to provide impetus for improving the various state statutes and was in no way intended to be the forerunner of a federal act, opposition from employers, insurers and state legislatures was so violent that today copies of the rough first draft have become collector's items.

14. See, *e.g.*, SOMERS & SOMERS, *op. cit. supra* note 7, at 191-93.

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