Efficacy and Costs of Workmen's Compensation†

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I

SCOPE AND NATURE OF THE PROBLEM

A QUANTITATIVE assessment of the adequacy and efficiency of workmen's compensation in the United States amounts to a Herculean task, if not a Sisyphean labor. The investigator pursuing such a goal soon finds himself ensnarled in a web of perplexities, the escape from which leads inextricably into a quagmire of guesswork. The main pitfalls and obstacles stem from three converging sets of factors:

(1) the wide disparities and inherent complexities of the coverage provisions and benefit formulae of the 54 governing systems;[1]
(2) the increasing overlaps between more recent systems of social insurance (especially federal survivors and disability insurance) and workmen's compensation; and
(3) the appalling lack of pertinent data and statistics.

Nevertheless, it would seem to be possible to arrive at some significant conclusions of a semi-quantitative character by a composite evaluation of various available data and extrapolation of ascertainable trends and developments.

Two principal lines of approach appear to be helpful in this endeavor: On the one hand, one might try to construct a model of an ideal system of workmen's compensation and inquire to what extent any of the existing arrangements falls short of the optimal expectations. On the other hand, one might take any of the existing arrangements and inquire to what extent its performance has been improved in the course of time. A combined util-

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[1] For a comparative survey of the provisions of the workmen's compensation laws operating in the 54 jurisdictions in the United States as of May 1960, see U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. NO. 161, STATE WORKMEN'S COMPENSATION LAWS (rev. May 1960).

ization of these two relativistic techniques should furnish insights which permit at least a reasonable approximation to a solution of the ultimate problems.

It is only fair to state at the outset that there exists already a number of valuable studies of the subject under discussion. Unquestionably, the most comprehensive inquiry of this type is the pioneering work of Arthur H. Reede, which was completed in 1946 and published in 1947.[2] A more recent investigation by Alfred M. Skolnik, covering primarily the period from 1948–1957, appeared in the Social Security Bulletin in 1958.[3] Other helpful data and appraisals may be found in the comprehensive survey of workmen's compensation by Herman and Anne Somers,[4] dispersed reports by legislative commissions and committees,[5] and the annual reports by the state industrial accident commissions and boards.[6] Despite the great merits of these studies there is unquestionably a need for further compilation and evaluation of experiences. The following study focuses primarily on the California system. However, special efforts are made to project this local experience against the national picture. As the California legislation belongs to the more liberal and advanced types of compensation laws its possible shortcomings will be accentuated in many other jurisdictions.

II

SCOPE OF PROTECTION UNDER WORKMEN'S COMPENSATION SYSTEMS

A. Policy Goals and Practical Realization of Workmen's Compensation in General

The policy goals of workmen's compensation have been the subject of

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[2] REEDE, ADEQUACY OF WORKMEN'S COMPENSATION (1947).

[3] Skolnik, *Trends in Workmen's Compensation: Coverage, Benefits, and Costs*, 21 SOCIAL SECURITY BULL., AUG. 1958, p. 4 (1958).

[4] SOMERS & SOMERS, WORKMEN'S COMPENSATION—PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY (1954). Additional most illuminating data and interpretations pertaining primarily to one particular jurisdiction are found in BERKOWITZ, WORKMEN'S COMPENSATION; THE NEW JERSEY EXPERIENCE (1960). A substantial portion of Professor Berkowitz's figures and findings are analogous to and confirm the materials in this study.

[5] See in particular the printed Report of the Interim Commission on Workmen's Compensation, Submitted to the Minnesota Legislature of 1953 (containing, *inter alia*, significant data relative to the costs of compensation insurance, collected by the author of this paper); Senate Interim Committee on Workmen's Compensation Benefits, *First Partial Report, Second Partial Report, and Final Partial Report*, Appendix to the Journal of the Senate, vol. 2, Calif. Leg., Reg. Sess. 1951; Callahan, Commissioner under Section 6 of the Executive Law, *Costs, Operations and Procedures Under the Workmen's Compensation Law of the State of New York, First Report* (1957), *Second Report* (1958).

[6] Especially illuminating is the Annual Report on Compensable Work Injuries, Parts I and II, issued by the Illinois Industrial Commission and the Illinois Department of Labor (latest year reported 1959).

many attempts at theoretical circumscription or comprehensive definition.[7] Inevitably such endeavors must ultimately reflect the personal value judgments of their authors regarding distributive social justice. Perhaps it is best to forego such challenging opportunity and simply to quote the legislative objectives as formulated by the California Legislature in the preamble to its Workmen's Compensation, Insurance and Safety Act of 1917:

> A complete system of workmen's compensation includes adequate provision for the comfort, health, safety and general welfare of any and all employees and those dependent upon them for support to the extent of relieving from the consequences of any injuries incurred by employees in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment, full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury, full provision for adequate insurance coverage against the liability to pay or furnish compensation, full provision for regulating such insurance coverage in all its aspects including the establishment and management of a state compensation insurance fund, full provision for otherwise securing the payment of compensation, and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any matter arising under this act to the end that the administration of this act shall accomplish substantial justice in all cases expeditiously, inexpensively and without incumbrance of any character.[8]

As may be seen from this programmatic statement, an adequate workmen's compensation system, as conceived by the California Legislature, must incorporate two essential features relating to benefits:

(a) provision for relief of the workman and his dependents from the economic and social consequences flowing from the wage loss and other harmful results produced by the work-connected injury (so-called "disability indemnity" or "indemnity benefits"), and
(b) full provision for medical treatment (so-called "medical benefits").

It must, however, be noted at the same time that while the duty of providing medical treatment necessary to physical restoration is couched in absolute and unqualified terms, the extent of the liability for disability benefits is expressed in vague and relativistic langnage, omitting significantly to refer to "full" provision or "full" relief in that connection. Accordingly, the California law obligates the employer or his insurance carrier to furnish "medical, surgical, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including artificial members, which is reasonably required to cure or relieve from the

[7] See especially Witte, *The Theory of Workmen's Compensation*, 20 AM. LAB. LEG. REV. 411 (1930). For a survey of the various theories see RIESENFELD & MAXWELL, MODERN SOCIAL LEGISLATION 137 (1950).

[8] Cal. Stats. 1917 ch. 586, § 1.

effects of the injury."[9] Conversely, the indemnity benefits are carefully measured as percentages of the average weekly wage of the injured workmen at the time of the injury and limited by additional restrictions in form of waiting periods, ceilings on weekly benefit amounts, and maxima on duration or aggregate amounts.[10]

Generally speaking, the situation in other jurisdictions is similar, though in most instances more stringent.[11] California, for example, introduced the unlimited right to reasonably necessary medical services as early as in 1917,[12] being preceded in that respect only by Connecticut.[13] The great majority of jurisdictions have followed suit in the course of time and either removed all limits on amount and time, or empowered their administrative agencies to grant all necessary extensions of the normal limits.[14] There are, however, still a considerable number of states that retain limits on amount or duration or both.[15] By contrast, a much greater disparity obtains as to the measure, or quantity of disability or death benefits.[16] To be sure, there exists nearly complete agreement on one important principle, *i.e.*, that disability payments are *geared to the previous earning record* of the injured worker. Only three states have laws that specify flat monetary amounts of disability benefits either for all types of disability,[17] or at least for per-

[9] CAL. LAB. CODE § 4600, derived from Cal. Stats. 1917 ch. 586, § 9(a).

[10] CAL. LAB. CODE §§ 4650, 4652 (waiting period); §§ 4653, 4654, 4658 (percentages of average weekly earnings to be paid as disability payments); § 4453 (ceiling on weekly earnings for computation purposes); § 4656 (maximum aggregate temporary disability payments and period); § 4658 (limitations as to time with respect to payments for permanent disability of different percentages); § 4702 (aggregate amounts of death benefits).

[11] The U.S. Department of Labor, originally through its Bureau of Labor Statistics and later through its Bureau of Labor Standards, has published, from time to time, comprehensive comparative surveys of the workmen's compensation laws operative in the United States that are an indispensable aid in the study of the development of the individual state systems. The first of these surveys is U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 126, WORKMEN'S COMPENSATION LAWS OF THE UNITED STATES AND FOREIGN COUNTRIES (1914). The most current bulletin is U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. NO. 161, STATE WORKMEN'S COMPENSATION LAWS (rev. May 1960).

[12] Even before that date Cal. Stats. 1915 ch. 607, § 4 had amended the prior California workmen's compensation insurance act and safety act (so-called Boynton Act of 1913) so as to allow an extension of the ninety-day period originally limiting the duration of medical treatment owed as compensation in case the Industrial Accident Commission made an order to that effect; the statute placed no time limitation on the Commission's power.

[13] Conn. Public Acts 1915 ch. 288, § 3. In addition, the United States Employees' Compensation Act, ch. 458, § 9, 39 Stats. 742 (1916), and the Idaho Workmen's Compensation Act, Idaho Sess. Laws 1917 ch. 81, § 16, entitled an injured employee to medical treatment immediately after the injury and "for a reasonable time" thereafter.

[14] See U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. NO. 161, STATE WORKMEN'S COMPENSATION LAWS, table 6 (rev. May 1960).

[15] *Id.* listing Alabama, Colorado, Georgia, Iowa, Kansas, Kentucky, Louisiana, Montana, New Mexico, South Dakota, Tennessee, Vermont, Virginia, and West Virginia.

[16] *Id.* tables 7–11.

[17] *Id.* at 20 (Washington and Wyoming).

manent total disability.[18] In the case of death benefits there is less harmony on the basis of computation. Seven states follow a system that does not relate the payments to the prior earning scale.[19] Other jurisdictions, including California, provide for flat amounts as death benefits, but specify that they are paid to the dependent survivors, at least ordinarily, in weekly wage-related amounts. As a *leveling factor* all jurisdictions specify ceilings for the weekly disability payments[20] and nearly all of them also provide for minimum weekly benefits.[21] Beyond that a veritable Babel exists, both in basic approach and regulatory detail.

The conflicting views and policy considerations articulated at the inception of the various state systems were aptly summarized by Lindley Clark in his synopsis of the workmen's compensation laws of the United States for the Bureau of Labor Statistics in 1913[22] as follows:

> The determination of the scale of compensation is a subject earnestly discussed and on which considerable differences have arisen. The necessity for a workable law on the one hand, not excessively burdensome to the employer and not unduly tempting the prolongation of benefits, while on the other hand it affords actually reasonable benefits to the injured workman so as to prevent hardships of dependents and loss of income of the family wage earner, have led to a wide variety of attempts at a determination of the proper amounts to be awarded. In defending the proposition for a certain waiting time during which no benefits shall be paid the argument is offered not only that trivial injuries will thus be left out of consideration, but also that it is proper that the workman should share in the burden of the accident; so also in determining the scale of compensation, the premise is laid down that the employer should be responsible only for a fraction of the loss incurred, since the employee is also a factor in industry, and it is industry that is to be charged with the burden of the accident, one important report stating that "the scale, so far as possible, should divide the wage loss sustained by the employees and their dependents equally between them and their employers." While it is both impossible and undesirable to compensate injuries by the continuance of the full rate of pay, it can not be overlooked that a large actual burden of pain, inconvenience, and expense, is inevitably borne by the injured workman and his family on which no money value can be set. Furthermore, the employer is in theory and usually in practice able to add the burden of his expense to the selling price of his product, so that the cost of compensation in so far as it is directly chargeable to the employer is capable of being passed on or at least distributed in

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[18] *Id.* at 20 (Oregon).

[19] *Id.* table 11, listing Kansas, Massachusetts, Oklahoma, Oregon, Washington, West Virginia, and Wyoming.

[20] *Id.* table 7 (benefits for temporary total disability); table 8 (benefits for permanent partial disability); table 10 (benefits for permanent total disability).

[21] Nevada has no statutory minima of benefits for either temporary or permanent total disability.

[22] U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 126, WORKMEN'S COMPENSATION LAWS OF THE UNITED STATES AND FOREIGN COUNTRIES 36, 37 (1914).

> a way that is entirely outside the possibilities with reference to the loss borne by the workman.

Turning then to the actual compensation scales adopted by the early laws, the report, after discussing the usual limits on death benefits, offered the following illuminating comments concerning the provisions in cases of permanent disability:

> A few States recognize the fact that a permanently disabled workman is a greater economic loss to his family than if he were killed outright at the time of the accident, and allow in cases of permanent total disability a larger amount of compensation than in case of fatal accidents, some continuing payments for and disability for the full period of the injured workman's life. For the most part, however, the basis of the payments is the same as for death.

The problem of the extent to which, and in what manner, the injured workman and his family must shoulder the financial losses resulting from his injury has remained a controversial issue, though some alleviation of their burdens has been achieved in the course of time. Generally speaking, the progress of the laws has been most disappointing and only recently a few more satisfactory improvements have materialized.

Actually the most drastic advances in the picture have come from outside. The addition to the federal social insurance system of survivors insurance in 1939 and of disability insurance in 1956 and the systematic liberalizations thereof in the various social security amendments[23] have greatly helped to accord to the totally and permanently disabled worker and to the families of killed or totally and permanently disabled workers a deserved substantial economic protection. As a result, however, the role of workmen's compensation in the whole framework of social insurance has shifted significantly and, at least in part, been relegated to a supplementary function. It still may be argued with a high degree of persuasiveness that the workman and his family deserve a higher degree of maintenance of their economic status if the reduction, interruption, or termination of his earning capacity and other losses were the result of a work-connected cause. Even Sir William Beveridge, who in his famous *Report on Social Insurance and Allied Services* pleaded so strongly for unified social security, felt that the cases of death and prolonged disability produced by an industrial accident or disease called for a special type of compensation benefits.[24] True, his arguments are primarily geared to a system that in the main provides for flat rate subsistence benefit. Nevertheless, they do not become inapposite for the American scene if it is recognized that the general system, though

[23] Especially the elimination in 1958 of the credit provisions for benefits received under workmen's compensation. Act of Aug. 28, 1958, ch. 840, § 206, 72 Stat. 1025, repealing 42 U.S.C. § 424.

[24] BEVERIDGE, SOCIAL INSURANCE AND ALLIED SERVICES §§ 77–105 (1942).

earnings-related throughout, does not purport to achieve more than to provide for a general floor of benefits.

Yet it must be recognized that the most pressing problem pertaining to the benefit side of workmen's compensation today is a readjustment of the benefits so as to respond to the principal needs left to be met after the protection now given by federal survivors' and disability insurance.

B. Development of the Coverage Provisions and Benefit Formulae of the California Law

The California Workmen's Compensation, Insurance and Safety Act of 1917[25] was, for its day, a progressive and liberal statute. The coverage was compulsory and extended to all private employers engaged in manufacturing regardless of size or type of business.[26] Apart from full medical costs it provided for compensation benefits in all cases of temporary or permanent disability and for death benefits.[27]

The normal scale of weekly benefit payments in cases of temporary total or permanent total or partial disability was fixed at 65 per cent of the statutory average weekly earnings,[28] such average weekly earnings consisting of 95 per cent of the aggregate amount of the actual daily earnings per work week of the injured worker at the time of his injury.[29] In other words, normal weekly compensation payments in California, in reality, were set at $.95 \times 65 = 61.75$ per cent of the actual weekly wage. However, weekly compensation payments were subject to a lower and an upper limit, the statute providing that average weekly earnings should be taken at not less than $6.41 nor more than $32.05. Translated into practical terms this meant that weekly benefit payments in 1917 were subject to a ceiling of $20.83, and that the maximum effective weekly wage (*i.e.*, that weekly wage above which earnings no longer are reflected in benefit amounts)[30] amounted to $33.64.

Benefit payments were subject to further limitations on duration and amount. For temporary total disability payments the statute of 1917 provided that they be terminated after 240 weeks from the date of the injury and should not exceed three times the average annual earnings.[31] In cases of permanent disability the duration of the weekly payments depended on

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[25] Cal. Stats. 1917 ch. 586.

[26] Cal. Stats. 1917 ch. 586, §§ 7 and 8.

[27] Cal. Stats. 1917 ch. 586, § 9.

[28] Cal. Stats. 1917 ch. 586, § 9(b)2(1) and (5).

[29] Cal. Stats. 1917 ch. 586, § 12.

[30] About the concept "maximum effective weekly wage," see Fratello, *The "Workmen's Compensation Injury Table" and "Standard Wage Distribution Table"—Their Development and Use in Workmen's Compensation Insurance Ratemaking*, 42 PROCEEDINGS OF THE CASUALTY ACTUARIAL SOCIETY 110, 146–47 (1955).

[31] Cal. Stats. 1917 ch. 586, § 9(b)2(4).

the degree of the disability, an injured worker with a permanent disability of less than 70 per cent of total disability being entitled to four weeks of benefit payments for each 1 per cent of disability, and an injured worker with a permanent disability of 70 per cent or more being entitled to normal benefit payments for 240 weeks and thereafter to a life pension consisting of 1 per cent of the average weekly earnings (as computed under the statutory mandates) for each 1 per cent of disability in excess of 60 per cent.[32] The percentage of permanent disability was to be determined in accordance with standards specified in the act and a schedule to be developed by the commission in application of these standards.[33] Where an injury caused both temporary and permanent disability the worker was entitled only to the larger benefit payments.[34] Perhaps the most important restriction on compensation for all types of disability consisted of an uncompensated waiting period of ten days.[35]

Death benefits (including burial expenses not exceeding one hundred dollars and any accrued disability benefits) in cases where the deceased worker left a person or persons wholly dependent upon him were to be equal to three times the average annual earnings, to be taken at no less than an amount corresponding to 52 times the minimum weekly wage and no more than an amount corresponding to 52 times the maximum weekly wage as fixed for computation purposes.[36]

Since its adoption in 1917 this benefit scheme has been the subject of numerous amendments. Generally speaking, these amendments may be classified into two great categories, viz., changes aiming at

(a) adjustment of the floors and the ceilings of the weekly benefit payments and the maxima of aggregate payments to the rise in wages and living costs; and

(b) actual liberalization of the benefit structures and distribution.

In considering the adjustment of the ceilings on weekly benefit payments to the rise in wages and living costs it should be noted that the legislature in 1943[37] abandoned its original scheme of identical ceilings on weekly benefits in cases of both temporary and permanent disability and that since that date, except for a period from 1946 to 1951,[38] the ceiling on the weekly benefits for permanent disability has been below that for temporary disability. In part, this discrimination has been offset by a liberalization of the benefit formulae for persons suffering severe disabilities.[39]

[32] Cal. Stats. 1917 ch. 586, § 9(b)2(6).

[33] Cal. Stats. 1917 ch. 586, § 9(b)2(7) and (11).

[34] Cal. Stats. 1917 ch. 586, § 9(b)2(8).

[35] Cal. Stats. 1917 ch. 586, § 9(b)(1) and (2).

[36] Cal. Stats. 1917 ch. 586, § 9(c)(1).

[37] Cal. Stats. 1943 ch. 708 (adding § 4460 to the Labor Code).

[38] Cal. Stats. 1946 (First Extra Sess.) ch. 84; Cal. Stats. 1951 ch. 606, § 5.

[39] See text at notes 47, 48 *infra*.

The first of the following tables indicates the changes in the ceilings on the statutory "average weekly wage," the actual weekly benefit maxima resulting therefrom, and the corresponding maximum effective wage, for both temporary and permanent disability.

TABLE 1

CHANGES IN MAXIMA OF STATUTORY AVERAGE WEEKLY WAGE, WEEKLY BENEFITS AND EFFECTIVE WEEKLY WAGE

	Temporary Disability			Permanent Disability		
Effective date	Maximum statutory average weekly wage	Maximum weekly benefit	Maximum effective weekly wage	Maximum statutory average weekly wage	Maximum weekly benefit	Maximum effective weekly wage
Jan. 1, 1918	$32.05	$20.83	$33.74	$32.05	$20.83	$33.74
Aug. 14, 1929	38.46	25.00	40.48	38.46	25.00	40.48
Aug. 4, 1943	46.16	30.00	48.58			
May 21, 1946				46.16	30.00	48.58
Sept. 22, 1951	53.85	35.00	56.68			
Sept. 7, 1955	61.54	40.00	64.78	53.85	35.00	56.68
Sept. 11, 1957	76.93	50.00	80.98	61.54	40.00	64.78
Sept. 18, 1959	100.00	65.00	105.26	80.77	52.50	85.02

The following summary indicates the most important general liberalizations in the benefit structure and distribution that do not merely reflect the successive raises of the ceilings on weekly benefits:

(1) *Reduction and partial elimination of the waiting period.* An amendment of 1919[40] reduced the uncompensated waiting period from ten to seven days. In 1949[41] the uncompensated period was totally eliminated for injuries causing temporary disability of more than 49 days.

(2) *Relaxation of limitations on aggregate amount and duration of weekly payments for temporary total disability.* The Act of 1917 had restricted payments for temporary total disability as to amount and duration. Aggregate weekly payments in such cases were not to exceed three times the annual earnings nor to extend beyond 240 weeks from the date of the injury. The first of these limitations implied a sub-limitation of 156 times the maximum weekly benefit for temporary total disability.[42] Subsequently, this limitation on the aggregate amount was increased to four times the annual earnings,[43] but the sub-ceiling corresponding to 156 times the maximum weekly benefit amount was nevertheless retained.[44] In 1955 the limitation on the aggregate amount was deleted and weekly benefits made payable for a period not to extend beyond 240 weeks from the date of the

[40] Cal. Stats. 1919 ch. 471, § 4 (effective July 22, 1919).

[41] Cal. Stats. 1949 ch. 705 (effective Oct. 1, 1949).

[42] Cal. Stats. 1917 ch. 586, § 9(b)2(4) in conjunction with § 12(a).

[43] Cal. Stats. 1947 ch. 1033, § 4 (effective Sept. 19, 1947).

[44] Cal. Stats. 1947 ch. 1033, § 3 ($7200 = 156 \times 46.16$); Cal. Stats. 1951 ch. 606, § 2 ($8400 = 156 \times 53.85$).

injury.[45] In 1959 payment of weekly benefits for temporary total disability was authorized up to 240 weeks within a period of five years from the date of the injury.[46]

(3) *Liberalization of benefit formulae for compensation of permanent disability in excess of 60 per cent.* The benefit formulae for permanent disability remained unchanged until 1949. In that year the Legislature[47] extended the duration of the number of weeks for which benefits equal to 65 per cent of the statutory average weekly wage are allowed from a maximum of 240 weeks to a maximum of 400 weeks. This liberalization affected only cases in which the degree of permanent disability exceeded 60 per cent of total. In 1959[48] a further liberalization was introduced by changing the method of computation of the weekly benefits for life to which workers suffering permanent disability exceeding 70 per cent of total are entitled after expiration of the period for which 65 per cent of the statutory weekly wage is allowed. While up to that date the weekly life pension was calculated on a basis of 1 per cent of the average weekly earnings for each 1 per cent of disability in excess of 60 per cent, the amendment raised this factor to 1.5 per cent of the average weekly wage for each 1 per cent of disability in excess of 60 per cent.

(4) *Gradual elimination of the rule against cumulation of benefits for temporary and permanent disability.* Until 1945 a worker was not entitled to a cumulation of benefits for temporary and permanent disability caused by the same injury.[49] In 1945 partial cumulation was introduced for cases where the temporary disability payment exceeded 25 per cent of the disability payment.[50] In 1947[51] cumulation was authorized, subject to the limitation that in cases of permanent disability of 70 per cent or above temporary disability was presumed to have extended beyond 104 weeks. In 1949 all limitations on cumulation were deleted.[52]

(5) *Liberalization of death benefits.* As enacted in 1917 the statute contained four important quantitative[53] limitations on death benefits payable in cases where the deceased left wholly dependent survivors. The total benefit was fixed at three times the annual earnings and was not to exceed an amount equal to 156 times the maximum statutory average weekly wage (= $5,000). This sum was subject to deduction both of burial

[45] Cal. Stats. 1955 ch. 956, § 5 (effective Sept. 7, 1955).

[46] Cal. Stats. 1959 ch. 1189, § 12 (effective Sept. 18, 1959).

[47] Cal. Stats. 1949 ch. 1583 (effective Oct. 1, 1949).

[48] Cal. Stats. 1959 ch. 1189 (effective Oct. 18, 1959).

[49] Cal. Stats. 1917 ch. 586, § 9(b)2(8); CAL. LAB. CODE § 4661 (1937).

[50] Cal. Stats. 1945 ch. 1335 (effective Sept. 15, 1945).

[51] Cal. Stats. 1947 ch. 1132 (effective Sept. 19, 1947).

[52] Cal. Stats. 1949 ch. 107 (effective Oct. 1, 1949).

[53] In addition, the statute limited the time within which proceedings for the collection of death benefits may be initiated, Cal. Stats. 1917 ch. 586, § 11(b)(2) (now CAL. LAB. CODE § 5406, as amended in 1959).

expense and of accrued total disability indemnity.[54] In the course of time various liberalizations occurred in all these aspects. The deduction of the burial allowance from the death benefit was eliminated in 1929.[55] The deduction of disability payments in turn was relaxed in 1939[56] for cases in which death occurred within 12 months after the injury, and abolished in 1949.[57] The method of computing the total amount likewise underwent several liberalizations. Thus the ceiling fixed by means of a reference to a number of annual earnings as the basis of the computation was successively raised to 3½[58] and 4[59] and finally[60] completely deleted. The additional ceiling of $5,000, corresponding initially to 156 times the maximum fixed for the average weekly wage, was retained without change until 1939. In that year it was raised to $6,000, corresponding then again to 156 times the maximum statutory average weekly wage.[61] In 1947 the ceiling was raised by 25 per cent to $7,500 where the deceased worker was survived by a widow and one or more dependent minor children.[62] In 1949[63] the total of the death benefit in cases of a widow and at least one surviving minor child was raised generally by 25 per cent to five times the annual wage, subject to a ceiling of $7,500. In 1951 the ceilings were raised to $7,000 and $8,750 respectively.[64] In 1955 any relation of the death benefit totals to prior earnings was eliminated and the amounts in cases of wholly dependent survivors were fixed at a flat rate of $10,000 or $12,500, according to whether or not these survivors included a widow and at least one minor child.[65] These amounts were subsequently raised to $12,000 and $15,000 respectively[66] and again to $17,500 and $20,500 respectively.[67]

(6) *Mitigation of the effects of the apportionment rule.* In 1929 a provision was inserted to the effect that an employer or his insurance carrier was not responsible for that portion of the results of a subsequent injury that was attributable to a combination with a pre-existing permanent disability or physical impairment.[68] The enactment of this section was accompanied by a scheme for the compensation of the balance of the total resulting permanent disability from a special fund in cases where such

[54] Cal. Stats. 1917 ch. 586, § 9(c).
[55] Cal. Stats. 1929 ch. 222, § 1 (effective Aug. 14, 1929).
[56] Cal. Stats. 1939 ch. 308 (effective Sept. 19, 1939).
[57] Cal. Stats. 1949 ch. 410 (effective Oct. 1, 1949).
[58] Cal. Stats. 1939 ch. 308, § 3 (effective Sept. 19, 1939).
[59] Cal. Stats. 1947 ch. 1031 (effective Sept. 19, 1947).
[60] Cal. Stats. 1955 ch. 956, § 6 (effective Sept. 7, 1955).
[61] Cal. Stats. 1939 ch. 308, § 3.
[62] Cal. Stats. 1947 ch. 1031 (effective Sept. 19, 1947).
[63] Cal. Stats. 1949 ch. 1414 (effective Oct. 1, 1949).
[64] Cal. Stats. 1951 ch. 606, § 7 (effective Sept. 22, 1951).
[65] Cal. Stats. 1955 ch. 956, § 6.
[66] Cal. Stats. 1957 ch. 1996, § 6 (effective Sept. 11, 1957).
[67] Cal. Stats. 1957 ch. 1189, § 16 (effective Sept. 11, 1959).
[68] Cal. Stats. 1929 ch. 222, § 1.

impairment amounted to 70 per cent or more. The statutory arrangement for that additional compensation, however, proved to be unconstitutional.[69] In 1945 new legislation of this type was enacted[70] and finally found to be constitutional.[71] As originally enacted additional compensation was available only where the pre-existing permanent partial disability consisted in the loss or loss of use of a specified member of the body.[72] Subsequently, the statute was amended to include also other cases of pre-existing permanent partial disability,[73] provided that it consisted of a disability of a substantial degree.[74]

(7) *Revision of the Rating Schedule for permanent disability.* In addition to the categories of statutory amendments listed above, another important liberalization was accomplished in 1950 when the schedule for the determination of the percentage of permanent disabilities, adopted by the commission pursuant to Labor Code section 4660(b) was subjected to a major revision resulting in an overall increase of compensation for permanent disabilities estimated at 11.6 per cent.[75]

The foregoing discussion demonstrates that California not only has from time to time adjusted the ceiling on the effective average weekly wage in cases of temporary total and permanent disability for the purpose of keeping up with the inflationary trends in the economy, but, in addition, has liberalized the overall benefit structure of the law. The problem remains, however, whether the aggregate of all these measures has resulted in a substantial improvement of the benefits or whether the beneficial effects of the other amendments are outbalanced or reduced by a failure to keep the weekly benefit ceilings in step with the rising wage scale. An answer to this question will be attempted in the next section.

C. Balance Sheet of the Practical Effects Achieved by the California Amendments between 1917 and the Present

As has been pointed out in the first section of this article, one of the questions that may be posed legitimately in an attempt to assess the efficacy of workmen's compensation in a particular jurisdiction is whether, in the course of time, the benefit structure as a whole has been improved substantially or, at least, has held its own.

In California since 1917 the basic rate of disability compensation has remained unchanged at 61.75 per cent of the normal weekly wage and

[69] Commercial Cas. Ins. Co. v. Industrial Acc. Comm'n, 211 Cal. 210, 295 Pac. 11 (1930).

[70] Cal. Stats. 1945 ch. 1161.

[71] Subsequent Injuries Fund v. Industrial Acc. Comm'n, 39 Cal. 2d 83, 244 P.2d 889 (1952).

[72] CAL. LAB. CODE, § 4751, as enacted in 1945.

[73] Cal. Stats. 1949 ch. 1525.

[74] Cal. Stats. 1955 ch. 1092; Cal. Stats. 1959 ch. 1034.

[75] See Senate Interim Committee on Workmen's Compensation Benefits, *First Partial Report, Part III,* Appendix to the Journal of the Senate, vol. 2, at 81, Calif. Leg., Reg. Sess. 1951.

the principle of full compensation for medical costs has likewise operated consistently throughout that period. As a result the present inquiry must assess and balance the effects of various *other* aspects of the law and their modifications, especially as projected against changes in the general economic background.

1. Relative Effects of the Statutory Ceilings on the Wage Base for Disability Benefits

Undoubtedly, the first topic to be studied in that connection concerns the varying relations between the statutory ceilings on the weekly wages that may reflect themselves in benefits (*i.e.*, the maximum effective weekly wages) and the actual scales and distribution of California wages during the period under consideration.

TABLE 2

AVERAGE WEEKLY EARNINGS* AND MAXIMUM EFFECTIVE WEEKLY WAGES FOR TEMPORARY TOTAL AND PERMANENT DISABILITY BENEFITS IN CALIFORNIA 1921–60

Year	Average Weekly Wage	Maximum Effective Weekly Wage for Temporary Total Disability	Maximum Effective Weekly Wage for Permanent Disability	Year	Average Weekly Wage	Maximum Effective Weekly Wage for Temporary Total Disability	Maximum Effective Weekly Wage for Permanent Disability
1921	$25.60	$33.74	$33.74	1941	$33.91	$40.48	$40.48
1922		↓	↓	1942	44.78	↓	↓
1923	26.50			1943	51.85	48.58	
1924	27.23			1944	55.21	↓	↓
1925	28.70			1945	53.53		
1926	28.53			1946	51.29		48.58
1927	28.72			1947	56.17		↓
1928	29.24	↓	↓	1948	59.57		
1929	30.20	40.48	40.48	1949	61.89		
1930	29.90	↓	↓	1950	65.39	↓	
1931	27.29			1951	71.79	56.68	
1932	23.30			1952	75.85	↓	
1933	21.44			1953	78.82		
1934	22.47			1954	81.05	↓	↓
1935	24.74			1955	85.24	64.78	56.68
1936	26.27			1956	89.93	↓	↓
1937	28.36			1957	92.89	80.98	64.78
1938	27.42			1958	97.36	↓	↓
1939	27.80			1959	101.71	105.26	85.02
1940	28.64	↓	↓	1960	104.28	↓	↓

* Sources for average weekly earnings in California:

(a) For 1921 and 1923: STATE OF CALIF., BUREAU OF LABOR STATISTICS, BIENNIAL REPORTS, 1921–1922 and 1923–1924.

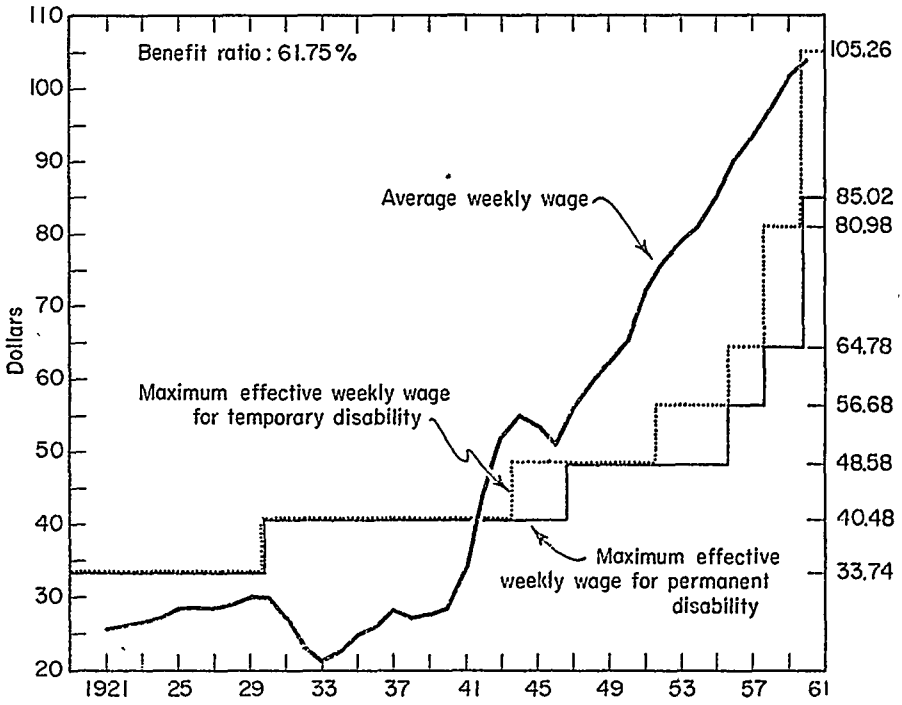
(b) For 1924–1937: California Labor Market Bulletin.

(c) For 1938–1948: STATE OF CALIF., DEP'T OF INDUSTRIAL RELATIONS, LABOR IN CALIFORNIA.

(d) For 1949–1959: STATE OF CALIF., DIV. OF LABOR STATISTICS AND RESEARCH, HANDBOOK OF CALIFORNIA LABOR STATISTICS.

(e) For 1958–1960: STATE OF CALIF., DIV. OF LABOR STATISTICS AND RESEARCH, CALIFORNIA LABOR STATISTICS BULLETIN.

AVERAGE WEEKLY WAGE AND MAXIMUM EFFECTIVE WEEKLY WAGE IN CALIFORNIA



The preceding table and graph give a year-by-year comparison between the average weekly wage in California and the maximum effective wage limiting weekly benefits in cases of temporary and permanent disability.

The figures and graph demonstrate squarely that during the initial operation of the act and until 1941 the ceiling on the effective weekly wage for benefit purposes lay distinctly and, for some time, considerably above the average wage. This signifies that during that period the *effective* rate of compensation and the *nominal* rate of compensation (61.75%) were identical for a substantial portion of the covered labor force. In 1941 the maximum effective weekly wage for benefit purposes fell sharply below the average weekly wage in the state and stayed at a far lower level for a long period. Moreover, beginning with 1943 the maximum effective wage for permanent disability purposes has been, except for a short interval, substantially lower even than that for temporary disability benefits. In other words, until recently the effective weekly rate of disability compensation for the vast majority of workers has been far below the nominal statutory rate. Only in 1959, and then solely for temporary disability purposes, did the legislature again lift the ceiling for the effective weekly wage slightly above the level of the average weekly earnings, leaving most permanently disabled workers to an effective rate of compensation substantially below

the statutory figure of 61.75 per cent. As a result it must be concluded that in respect to the normal effective rate of weekly compensation the law has markedly deteriorated below its original efficacy, a result which not only frequently leaves a greater proportion than 38.25 per cent of the weekly wage loss of the injured labor force uncompensated but, in addition, has the unfortunate by-product of entailing an unwarranted redundancy of the premium rates for compensation insurance.

It may be thought that this conclusion could be disputed on the ground that a comparison of the *average* weekly wage with the maximum effective weekly wage is not necessarily meaningful or significant. However, such argument quickly collapses in the light of statistical and actuarial experience. In 1923, while investigating the bearing of legal limits of weekly compensation on ratemaking for workmen's compensation insurance,[76] A. H. Mowbray found that it was possible to arrive at a *typical* distribution that could be applied to *any* average wage (existing in any American jurisdiction at that time) and represented the most probable actual distribution within a reasonable margin of error. In other words, the actual wage distribution in the various American states, when brought upon a comparable basis, followed a reasonably identical pattern. In 1955 the National Council on Compensation Insurance undertook a far-flung re-examination of the wage distribution in the different jurisdictions and found that it was still possible to arrive at a standard single country-wide wage distribution and that the new distribution varied only slightly from the former, there being a slightly heavier weight of cases toward higher wages.[77] Generally speaking, the *median* weekly wage differed only slightly from the *average* weekly wage of the labor force and, with but two exceptions, was lower than the latter. In California, for instance, 53 per cent of the covered employees received the average wage or less, while 47 per cent received wages above the average. This picture is still true today.[78]

2. *Weighing the Other Liberalizations of the Benefit Structure Against the Lag of the Weekly Ceilings*

The problem then arises of whether this deterioration of the average effective weekly compensation rate is balanced or outweighed by the other

[76] Mowbray, *Legal Limits of Weekly Compensation in Their Bearing on Ratemaking for Workmen's Compensation Insurance*, 9 PROCEEDINGS OF THE CASUALTY ACTUARIAL SOCIETY 208 (1923).

[77] Fratello, *The "Workmen's Compensation Injury Table" and "Standard Wage Distribution Table"—Their Development and Use in Workmen's Compensation Insurance Ratemaking*, 42 PROCEEDINGS OF THE CASUALTY ACTUARIAL SOCIETY 110, 146 (1955). See also *Report of the National Council on Compensation Insurance Re: Investigation of Wage Distributions*, 1955 PROCEEDINGS OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 159.

[78] See STATE OF CALIF., DEP'T OF INDUSTRIAL RELATIONS, WEEKLY WAGES OF INJURED WORKERS FOR SEPTEMBER 1959, at 3 (1960) (average $98.33, median $95.08).

improvements of the benefit structure. An answer to that question may be approached from a variety of aspects.

a. Development of the costs of workmen's compensation protection to the industry

Obviously, the costs of the protection to the industry stand in some kind of relation to the benefits furnished. As a result, one might conclude that an increase in the over-all real costs to the industry of workmen's compensation protection corresponds in some fashion to an over-all improvement of the benefit structure. Needless to say, it would not be an easy matter to arrive at an absolute measure of the total expenditure of industry for workmen's compensation expressed in stable monetary units. Luckily, however, it is possible to gain valuable clues to the *relative* changes in costs of workmen's compensation to the industry, comparatively free from the distortions produced by the decline of the purchasing power of the dollar, by following the variations of the state manual rate level for compensation insurance. A brief explanation of this connection may be in order without burdening the reader with technical statistical or actuarial details.[79]

Premium rates for workmen's compensation vary according to operational risk classes, specified in a basic manual and therefore known as manual classifications. With a few exceptions the premium rates for the different manual classifications are expressed in amounts per $100 of the payroll for the particular classification. In California the premiums are charged on the basis of the total payroll without any limit per wage earner. The premium rates so determined are the so-called manual classification rates. They are not always the rates that are actually charged, but may be adjusted for the individual enterprise, according to one of the authorized standard merit rating systems. The average of all rates applicable to the individual manual classifications, weighted according to the size of the state payroll for the particular classification, is the *state manual rate level.* In order to provide for adequate minimum premium rates (in California) or for "adequate and not excessive" premium rates (in most other states) the rates must be adjusted from time to time to reflect recent experience as well as intervening law changes. Most states now have at least one rate revision per year and usually include on such occasion a revision of selected individual classifications as well as a revision of the state rate level as such, made on the basis of the total experience of all classifications.

Because premium rates, with a few exceptions, are expressed as a percentage of the payroll, it follows that changes in the state rate level will not

[79] For a detailed description of the various operations and steps in the standard rate-making procedure, see Marshall, *Workmen's Compensation Insurance Ratemaking*, 41 PROCEEDINGS OF THE CASUALTY ACTUARIAL SOCIETY 12 (1954).

reflect such variations in dollar costs that are either directly produced by change in wage scales or, though resulting from other changes, are in step with the payroll fluctuations. Changes in medical costs, in particular, will be mirrored in rate variations only to the extent that their aggregate effect differs from the payroll trends.

The following table and graphs indicate the manual rate level changes in California established by the rate revisions in that state during the period between 1919 and 1960 (by listing the factor corresponding to each modification) and the aggregate result of these changes with reference to the 1919 rate level (by listing the composite factor resnlting from the intervening changes).

TABLE 3

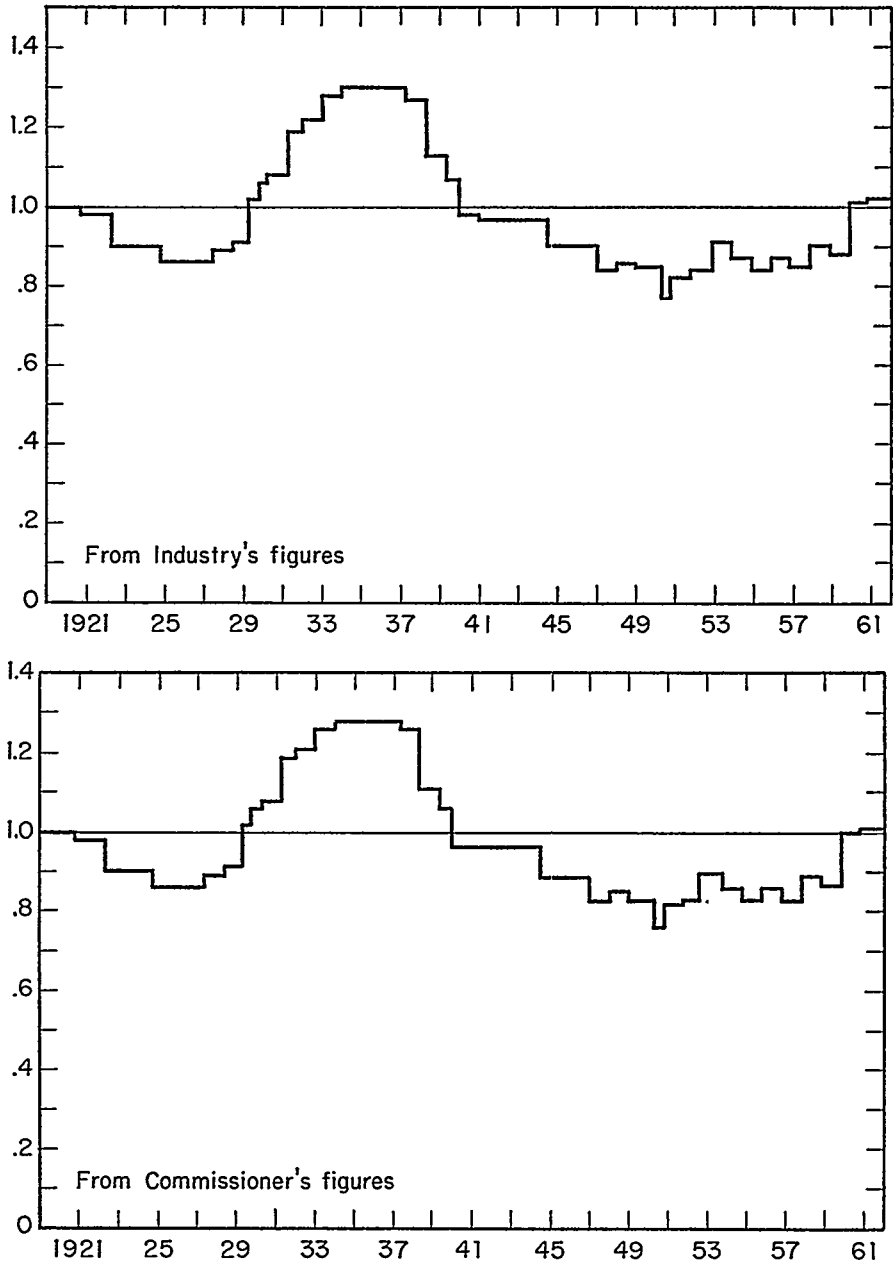
MANUAL RATE LEVEL CHANGES IN CALIFORNIA 1919–1960

Effective Date of Revision	Rate Change Factor	Aggregate Change since 1919	Effective Date of Revision	Rate Change Factor	Aggregate Change since 1919
10/1/20*	.980	.980	5/1/44	.920	.901
4/1/22*	.920	.902	1/1/45	1.000	.901
9/30/24	.956	.862	1/1/47	.935	.842
7/24/25	1.000	.862	1/1/48*	1.036	.867
4/1/27	1.043	.899	1/1/49	.976	.846
5/1/28	1.018	.915	4/1/50	.917	.776
3/1/29	1.116	1.021	10/1/50	1.0686	.829
8/13/29*	1.041	1.063	10/1/51*	1.018	.844
3/1/30	1.021[a]	1.085	7/1/52	1.081	.912
3/1/31	1.103	1.197	10/1/53	.956	.872
1/1/32	1.025[b]	1.227	10/1/54	.965	.841
1/1/33	1.046[c]	1.283	10/1/55	1.045	.879
1/1/34	1.015	1.302	10/1/56	.963	.846
4/1/37	.983	1.280	10/1/57*	1.066	.902
4/1/38	.888	1.136	10/1/58	.978	.882
4/1/39	.946	1.075	10/1/59*	1.153	1.017
1/1/40	.912	.980	10/1/60	1.010	1.027[d]
1/1/41	.999	.979			

* Also applicable to outstanding policies.
a The factor listed is that supplied by the California Inspection Rating Bureau. A check by the Office of the Insurance Commissioner gave a slightly different factor, *i.e.*, 1.020.
b The factor given by the Office of the Insurance Commissioner was 1.017.
c The factor given by the Office of the Insurance Commissioner was 1.040.
d Reliance on the figures in the Office of the Insurance Commissioner, listed in notes a, b, and c, would result in an overall change of 1.011.

From the facts given above it can be seen that the 1960 manual rate level in California exceeds that of 1919 only by 2.7 per cent—in other words, the average manual premium rate per $100 payroll today is only 2.7 per cent higher than 40 years ago. It must be concluded, therefore, that the overall costs of workmen's compensation to the industry, measured as percentage of the aggregate payroll, are today substantially the same as in

CALIFORNIA RATE LEVEL (RELATIVE TO 1920 RATE LEVEL)



the early days of the act. Actually, as has been mentioned before, the manual rates do not reflect the true costs of the industry in view of the effects of the various permissible merit rating plans. The overall result of the operation of merit rating produces an off-balance, which renders the level of the

collectible rates below that of the manual rates.[80] The off-balance factor is subject to fluctuations. In California the combined off-balance effect of schedule and experience rating in 1960 was a 10.76 per cent reduction of the manual rate level; the comparable data for the early period are unfortunately not known, but it can be safely assumed that it was not substantially larger than the present value.

Looking at the rate level development then indicates that as a whole the costs of the system as a proportion of the payroll in 1960 are roughly at the level of 1919. Accordingly, one might be tempted to conclude that roughly the same holds true for the overall benefit structure. However, in order to avoid serious errors, this estimate must be subjected to further analysis that takes account both of changes in injury frequency and severity rates and of the effects of a possible special development in the costs of the medical benefits accorded by the system.

b. Effect of changes in accident frequency and severity; development of the costs of medical care

There can be no doubt that had there been no other changes of the factors determining the overall costs of workmen's compensation, the costs of the system to the industry would have decreased substantially in the course of time because of the favorable development of the frequency and severity rates for industrial accidents.

Unfortunately, severity rates for industrial accidents in California are not in print and published data of frequency rates for that state commence only in 1940.[81] However, national rates for accident frequency and severity can be followed back to 1925. In 1955 there occurred a change in the method of reporting severity rates, but the pre-1955 figures are easily converted to the new base.[82] The California frequency rates are computed quite differently[83] and can be compared only as to the general trend.

[80] Ordinarily the aggregate of the credits due to merit rating exceeds that of the debits. For the details regarding the computation and role of the off-balance factors used in compensation insurance ratemaking see Marshall, *supra* note 79, at 17, 25.

[81] California frequency rates between 1940 and 1949 can be gleaned from a chart published in 38 CALIFORNIA SAFETY NEWS, DEC. 1954, p. 16 (1954). Subsequent data are given in the biennial *Handbook of California Labor Statistics*, 1949–to date, and the annual *California Work Injuries*, 1948–to date, both published by the California Department of Industrial Relations, Division of Labor Statistics and Research.

[82] National frequency rates indicate the average number of disabling work injuries for each million employee-hours worked; national severity rates indicate the average number of days of disability resulting from work injuries, for each million employee-hours worked. Prior to 1955 severity rates were given per each 1000 employee-hours worked; in other words, the old data are converted to the new units by multiplying the old rates by 1,000. See U.S. Bureau of Labor Statistics, Dep't of Labor, *Revised Standards of Work-Injury Statistics*, 78 MONTHLY LABOR REVIEW 565 (1955).

[83] California frequency rates connote the number of work injuries per 1,000 covered workers.

The following table and graph indicate the national frequency and severity rates since 1925 and add the not directly comparable California figures for the purposes of comparing trends.

Table 4, as well as the graph of the annual fluctuations in frequency and severity rates, shows a marked downward trend in the incidence of, and time-loss produced by, industrial accidents. As the manual rate level, and, correspondingly, the costs to industry today are again at virtually the same

TABLE 4

CHANGES IN ACCIDENT FREQUENCY AND SEVERITY RATES FOR MANUFACTURING IN THE U.S. AND CALIFORNIA 1925–1960

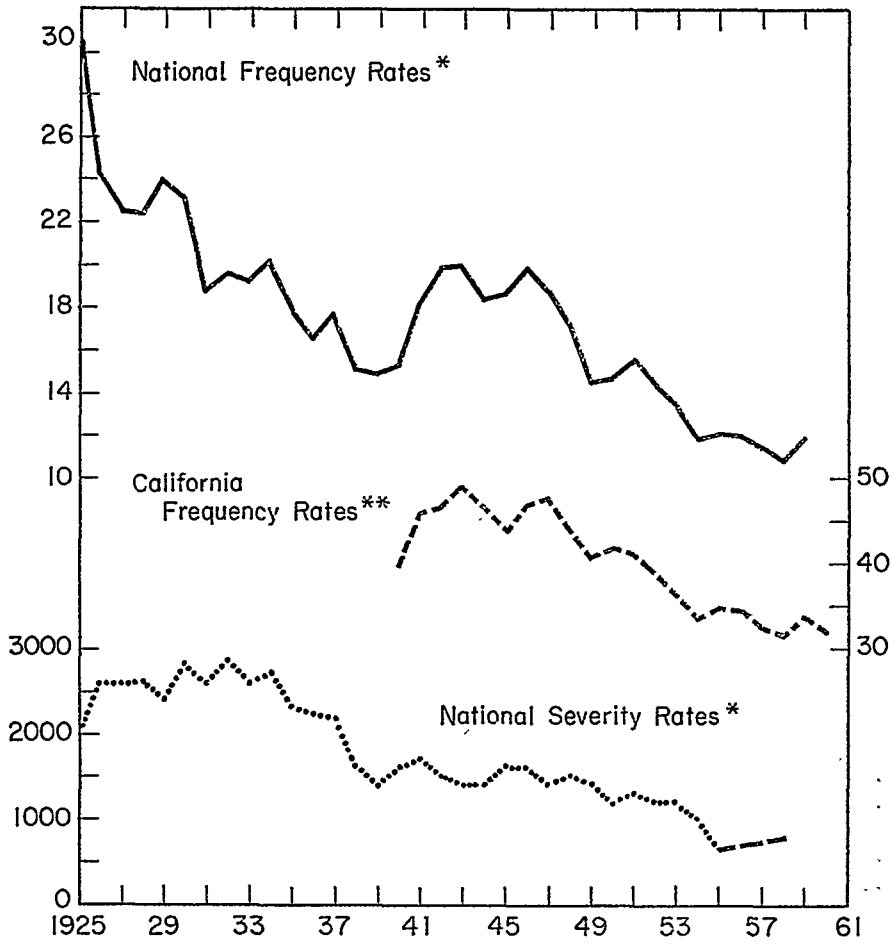
Year	National Frequency Rates*	National Severity Rates*	State Frequency Rates**	Year	National Frequency Rates*	National Severity Rates*	State Frequency Rates**
1925	30.6	2020		1943	20.0	1400	48.9
1926	24.2	2620		1944	18.4	1400	46.7
1927	22.6	2580		1945	18.6	1600	44.1
1928	22.5	2640		1946	19.9	1600	46.8
1929	24.0	2430		1947	18.8	1400	47.4
1930	23.1	2820		1948	17.2	1500	44.2
1931	18.9	2590		1949	14.5	1400	40.7
1932	19.6	2860		1950	14.7	1200	41.8
1933	19.3	2590		1951	15.5	1300	41.0
1934	20.2	2690		1952	14.3	1200	38.9
1935	17.9	2320		1953	13.4	1200	36.3
1936	16.6	2250		1954	11.9	1000	33.6
1937	17.8	2170		1955	12.1	637	34.8
1938	15.1	1620		1956	12.0		34.6
1939	14.9	1400		1957	11.4		32.4
1940	15.3	1600	39.6	1958	10.9	763	31.7
1941	18.1	1700	46.2	1959	11.9		33.7
1942	19.9	1500	46.6	1960			31.8

* For a definition see note 82.
** For a definition see note 83.

percentage of the payroll as they were during the early days of the system, it can be concluded that the savings to industry resulting from the advances in industrial safety (and medicine) have been utilized toward an overall improvement of the benefit structure, unless such line of reasoning is overturned by the development of the costs of medical benefits. In other words, the above conclusion holds true, provided that the increase in medical costs has not outrun the increase of wages to such an extent that it has consumed all the savings from the improvements in injury frequency and severity.

A word of caution may be added in order to forestall an exaggerated conclusion regarding the savings in compensation costs flowing from the favorable progress of industrial safety on the improvement of workmen's compensation. The frequency and severity rates cover a substantial number

COMPARATIVE TRENDS OF SEVERITY AND FREQUENCY RATES



* For a definition see note 82.

** For a definition see note 83.

of work injuries that do not entail indemnity benefits because of the statutory waiting period. A decrease in their number or severity, accordingly, would reflect itself only in a reduction of medical costs, if any. Unfortunately, separate statistics segregating the changes in frequency and severity of the injuries producing a time-loss of more than a week are not available.

Turning now to the development of medical costs in comparison to that of the underlying payrolls, of the total benefit payments, and of indemnity benefits, the following table and graph demonstrate clearly that the rise in aggregate costs of medical benefits has not outrun the growth in payrolls,

but rather that the ratio of medical benefits to payrolls for the period after World War II consistently has been distinctly below that for the period prior to 1941. Actually, the figures expressing medical costs as percentage of the payroll have fluctuated very little between 1946 and the present. Perhaps in view of the decline of the frequency and severity rates a greater reduction of the medical costs might have been expected. At any rate, the utilization of more costly medical techniques has not reflected itself in a relative increase of aggregate medical costs beyond that which is offset by the decrease in incidence and duration of need for medical treatment. The proportion of the medical benefits to the total compensation benefits has likewise not shown any dramatic changes. In the period from 1946 to 1958 the ratio of medical benefits to total benefits has varied between 36.4 per cent and 40.6 per cent, *i.e.*, by 4.2 per cent of the total.

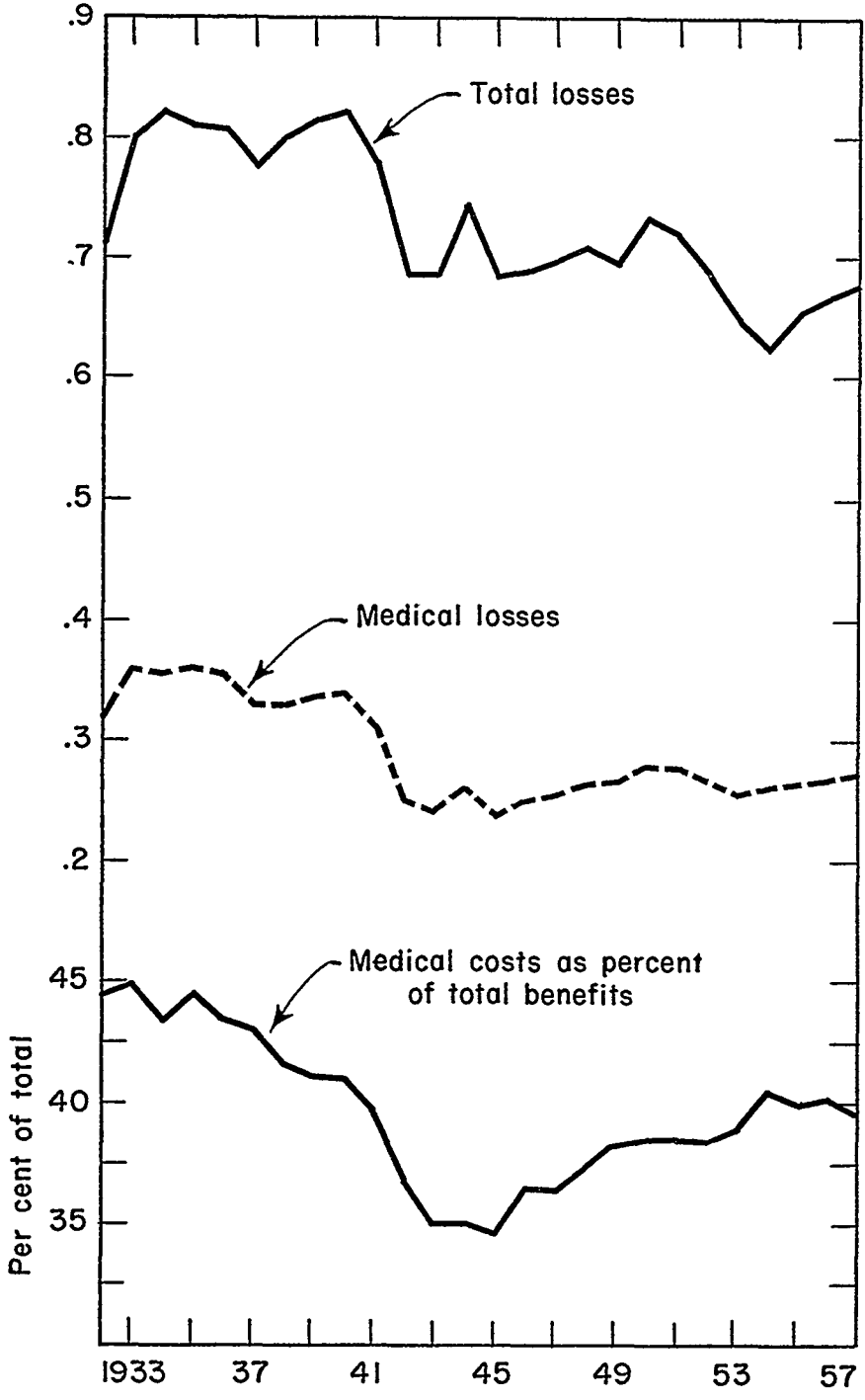
TABLE 5

DEVELOPMENT OF MEDICAL BENEFITS IN RELATION TO INSURED PAYROLLS AND TOTAL BENEFITS BY POLICY YEARS*

Policy Year	Insured Payroll in $1,000s	Total Incurred Losses in $1,000s	Incurred Medical Losses in $1,000s	Total Losses as per cent of insured payroll	Medical Losses as per cent of insured payroll	Medical Losses as per cent of total losses
1932	$ 1,120,055	$ 7,977	$ 3,559	.712	.318	44.6
1933	1,152,582	9,253	4,158	.803	.361	44.9
1934	1,264,294	10,369	4,507	.820	.356	43.5
1935	1,464,177	11,956	5,328	.811	.363	44.6
1936	1,704,777	13,776	6,007	.808	.352	43.6
1937	1,831,478	14,181	6,061	.774	.331	42.7
1938	1,842,425	14,685	6,127	.797	.332	41.7
1939	2,042,164	16,594	6,842	.813	.335	41.2
1940	2,352,885	19,283	7,933	.819	.337	41.1
1941	2,966,312	23,207	9,244	.782	.311	39.8
1942	3,621,883	24,829	9,132	.686	.252	36.8
1943	4,447,805	30,499	10,740	.686	.241	35.2
1944	4,323,028	32,252	11,283	.746	.261	35.0
1945	5,458,206	37,358	12,969	.684	.237	34.7
1946	6,332,002	43,641	15,885	.689	.251	36.4
1947	7,197,971	50,207	18,340	.698	.255	36.5
1948	7,510,665	53,273	19,880	.709	.265	37.3
1949	7,774,221	54,154	20,662	.697	.266	38.2
1950	8,902,093	65,044	25,109	.731	.282	38.6
1951	10,243,586	73,999	28,504	.722	.278	38.5
1952	11,460,651	79,080	30,428	.690	.265	38.5
1953	12,140,520	78,684	30,959	.648	.255	39.3
1954	12,808,562	81,710	33,181	.638	.259	40.6
1955	14,365,302	94,265	37,743	.656	.263	40.0
1956	15,762,187	105,219	42,291	.668	.268	40.2
1957	16,366,047	111,422	44,362	.681	.271	39.8

* Source: STATE OF CALIF., DIV. OF LABOR STATISTICS AND RESEARCH, CALIFORNIA WORK INJURIES 1958.

TOTAL AND MEDICAL LOSSES AS PER CENT OF INSURED PAYROLL
(POLICY YEARS 1932–1957)



Summarizing then the result of the analysis up to this point the following conclusions seem to be legitimate:

(1) In terms of overall efficacy California workmen's compensation law has held its own since 1917 and has made some modest advances.

(2) There has been a marked lag in adjusting weekly ceilings to rising wage scales, with the effect that for prolonged periods the maximum effective weekly wage has fallen far below the average weekly wage. This condition still persists with respect to permanently disabled workers.

(3) Other liberalizations in the total benefit structure have off-set the effects of this lag and, in addition, have also consumed possible savings resulting from the decrease in incidence and severity of work-injuries.

(4) The development of aggregate medical costs has kept in step with the development of the underlying payrolls. The various factors affecting the aggregate cost have fairly balanced one another.

(5) The total cost of workmen's compensation to the industry has fluctuated, but taken as a percentage of the covered payroll the amount at present is substantially the same or (in view of the effect of experience rating) perhaps slightly less than it was in 1919.

III

OVERHEAD OF BENEFIT ADMINISTRATION

While the chief interest of labor in workmen's compensation centers primarily on the protection achieved by the benefit structure, a full appraisal of the efficacy of this system must also take account of the *overhead* of the benefit administration. A socially wasteful arrangement of benefit distribution would saddle industry with a needless burden and siphon off funds that otherwise could be devoted to a liberalization of the protection afforded.

The chief overhead of the benefit administration stems from the costs of workmen's compensation insurance and the settlement of disputes regarding the entitlement to, and amount of, benefits. These two matters, however, are interrelated. The fact that the insurance carriers have a business interest in keeping disbursements down is bound to reflect itself in the incidence and severity of controversies over claims.

The assurance of compensation payment may take one of three forms: (a) self-insurance, (b) insurance with a specially created state fund, (c) insurance with a private carrier. Special state funds for compensation insurance exist at present in nineteen jurisdictions. In eight of them no insurance with private carriers is allowed (exclusive state funds),[84] and six of

[84] Nevada, North Dakota, Ohio, Oregon, Puerto Rico, Washington, West Virginia, and Wyoming.

these eight jurisdictions extend this prohibition also to self-insurance.[85] In the other eleven jurisdictions the state fund is in competition with private carriers (competitive state funds).[86] Texas is the only state where insurance with private carriers is the sole recognized form of compensation insurance.

Insurance with private carriers may be of the participating or non-participating type. Carriers writing participating policies pay dividends to policy holders based on their profits from underwriting and investment. Carriers operating on a non-participating basis conversely will distribute all profits to their stockholders. Private carriers of the participating type include not only mutuals, reciprocals, or exchanges, but also a substantial number of stock companies. State funds, of course, must operate on the mutual principle.

Insurance with private carriers has been blamed for four cardinal vices:

(1) Redundancy of premium rates in times of inflationary developments.
(2) Excessive expense loading of the premium rates.
(3) Failure to account in the rate-making procedures for income from investment and unutilized reserves.
(4) Propensity toward excessive litigation.

All of these charges are to some extent legitimate. On the other hand, caution must be taken against an exaggeration of these defects.

1. Redundancy of Premium Rates in Times of Inflationary Developments

There is no question that the existence of statutory ceilings on weekly benefit payments and aggregate amounts in a period of constant rise of the wage levels has caused redundant, *i.e.*, excessive, premium rates. Since premiums are charged usually as a percentage of either the *total* wage or that portion of the wage which does not exceed a fairly high limit,[87] a rise in wage levels during the period for which manual rates are in force will result in a larger premium income than that which is *statistically* expected, and because of the ceilings this excess in premium income will not be balanced by an equivalent increase in losses. This result is accentuated by the fact that the basis of the standard rate-making process is past policy-year experience so that there is always a lag between the past experience and the

[85] In Ohio and West Virginia insurance with the state fund or self-insurance is permitted.

[86] Arizona, California, Colorado, Idaho, Maryland, Michigan, Montana, New York, Oklahoma, Pennsylvania, and Utah.

[87] At present 27 jurisdictions have a payroll limitation of $300 per week or an approximation thereof, while six states, including California, compute and charge premiums on the basis of the total payroll. NATIONAL COUNCIL ON COMPENSATION INSURANCE, ANNUAL REPORT 1959, at 8 (1960); NATIONAL COUNCIL ON COMPENSATION INSURANCE, ANNUAL REPORT 1960, at 7 (1961).

date of revision. The introduction of a "rate level adjustment factor"[88] has alleviated somewhat this shortcoming. Nevertheless, this adverse effect of ceilings deserves careful attention.

2. Excessive Expense Loading

Compensation insurance premiums are composed of two parts: (a) the "pure premium" portion, which is designed to cover expected losses, and (b) the "expense loading" portion, which is designed to provide the funds necessary for the operation of the business. The loading factor is a flat percentage independent of the risk classification and, in most states, of the size of the risk. Most states subject smaller risks to an additional expense constant.[89]

The calculation of the loading factor traditionally is based on the average requirements of the most expensive type of underwriting, *i.e.*, that of the non-participating carriers. In defense of this practice it is usually argned that an employer may procure insurance from a less expensive type of carrier, such as a state fund or mutual company, and recover the unused portion of his premium in the form of dividends.[90]

The National Council on Compensation Insurance advocates that the loading factor should take care of the following expense items and, in the absence of expense constants, be distributed over the *net* premium dollar as follows:

Commissions, Brokerage, and Field Supervision	14.2%
Adjustment of Claims and Litigation	8.8
Salaries and Office Expenses	7.7
Contingencies and Profit	2.5
Taxes (other than federal income taxes), Licenses, and Fees	2.5
Accident Prevention and Safety Engineering Services for Employers	2.0
	37.7%[91]

In California the overall expense allowance in the *manual* rates currently is fixed at 36 per cent plus the California gross premium tax of 2.35

[88] For details regarding the purpose, calculation, and application of the state rate level adjustment factor, which is based on the most recent underwriting experience, see Marshall, *supra* note 79, at 29–33.

[89] California introduced an expense constant of $10 for policies with annual premiums of less than $300 in the rate revision of August 10, 1951, Ruling No. 62, CALIF. INS. COMM'R, 84TH ANNUAL REPORT 49, 51 (1952), but dropped it again in the revision of August 19, 1955, Ruling No. 83, CALIF. INS. COMM'R, 88TH ANNUAL REPORT 52, 61 (1956).

[90] This principle has been challenged in many rate revisions in California, but has never been abandoned. See, for instance, Decision of March 1, 1950, CALIF. INS. COMM'R, 83D ANNUAL REPORT 95, 97 (1957); Ruling No. 62, CALIF. INS. COMM'R, 84TH ANNUAL REPORT 49, 51 (1952); Ruling No. 73, CALIF. INS. COMM'R, 86TH ANNUAL REPORT 74, 76 (1954).

[91] NATIONAL COUNCIL ON COMPENSATION INSURANCE, ANNUAL REPORT 1960, at 5 (1961). For a corresponding breakdown of the standard expense allowance in the *manual* rates see Marshall, *supra* note 79, at 79.

per cent.[92] California does not allow a profit and contingencies factor, but otherwise the overall magnitude of the loading corresponds to the equivalent aggregate computed by the standard method (*i.e.*, 35.5 per cent plus 2.5 per cent).

In order to appreciate the significance of these figures a discussion of the situation in California relative to self-insurance, insurance with the State Fund, and insurance with private carriers seems to be in order.

Currently there are in California approximately 275 self-insurers. Unfortunately, data revealing the size of their covered payrolls are not in print. However, a published table listing their annual compensation payments for the years 1948–1955[93] permits a computation of the percentage that these payments represent of the total of annual compensation payments in the state. The result shows that the compensation furnished by the self-insurers amounted to an average of 8.66 per cent of the state total. The breakdown reveals further that the medical benefits paid by the self-insurers constituted a higher proportion of the total benefits paid by them than was the case of compensation benefits paid by the carriers. Data disclosing the cost of administering the self-insurance programs are likewise unavailable.

A comparison of the business of the State Compensation Fund with that of all other private carriers operating in California, in terms of "direct premiums written" and "direct losses incurred," shows that in the period between 1948 and 1958 it wrote an average of 26.16 per cent of all the direct premiums written by carriers in the state and paid an average of 27.28 per cent of all losses. The following table, compiled from the annual reports of the Insurance Commissioner, shows its business on a year-by-year basis.

TABLE 6

DEVELOPMENT OF THE SHARE OF THE STATE COMPENSATION FUND IN THE CALIFORNIA UNDERWRITING MARKET

Year	Direct Premiums Written All Carriers	Direct Premiums Written State Fund	Percentage	Incurred Losses All Carriers	Incurred Losses State Fund	Percentage
1948	$103,018,138	$26,402,009	25.62	$54,093,671	$14,518,148	26.84
1949	97,806,816	25,957,590	26.54	54,610,300	16,578,117	30.36
1950	97,095,547	26,370,847	27.16	58,178,868	17,649,575	30.34
1951	116,826,349	30,385,818	26.00	77,106,778	19,663,977	25.50
1952	141,233,766	35,000,918	24.78	85,166,881	23,234,003	27.28
1953	162,175,605	41,071,776	25.33	90,636,500	23,758,065	26.21
1954	155,727,596	40,861,063	26.24	80,472,564	20,011,546	24.87
1955	159,789,248	42,944,421	26.88	85,806,776	25,660,038	29.90
1956	174,116,621	45,986,356	26.41	94,679,757	25,773,930	27.22
1957	184,782,356	47,679,383	25.78	108,440,102	27,111,961	25.00
1958	192,371,576	51,277,335	26.66	120,768,278	32,120,552	26.60
Annual average			26.16			27.28

[92] Ruling No. 100, CALIF. INS. COMM'R, 91ST ANNUAL REPORT 47, 48 (1959).

[93] STATE OF CALIF., DIV. OF LABOR STATISTICS AND RESEARCH, DEP'T OF INDUSTRIAL RELATIONS, HANDBOOK OF CALIFORNIA LABOR STATISTICS 1955–1956, table 66 (1957).

The good agreement between the figures for the average percentage of premiums written during the eleven-year period and for the average percentage of losses incurred during the same interval permits the conclusion that the insurance written by the Fund shows neither a particularly favorable nor particularly adverse risk selection in comparison with the private carriers. This seems to hold true although the State Compensation Fund has a statutory monopoly on workmen's compensation insurance carried by the State and every kind of political subdivision of the State. In view of the considerable size of the Fund's business an analysis of its operating overhead seems to permit valid generalizations, bearing in mind that the Fund is exempt from all federal taxes.

As can be gathered from the next table, the apparent average portion of the employers' annual premium dollars used by the State Fund between 1948 and 1958 for operations amounted to 12.45 per cent. The table, of course, shows only the income from the underwriting experience and does not disclose or account for additional income from investment and reserves, which is likewise a source of the dividend payments. Nevertheless, this omission has no bearing on the fact that to the employers insured with the State Fund the apparent average annual overhead connected with the insurance of their compensation liability is represented by the indicated figure.

TABLE 7

APPARENT EXPENSE RATIO OF INSURANCE WITH CALIFORNIA STATE FUND 1948–1958

Year	Premiums Written	Incurred Losses	Dividend Paid	Apparent Overhead (2)–(3)–(4)	Apparent Expense Ratio (5):(2)
1948	$ 26,402,009	$ 14,518,148	$ 8,028,703	$ 3,855,158	14.60%
1949	25,957,590	16,578,117	8,795,107	584,366	2.25
1950	26,370,847	17,649,575	7,175,097	1,546,175	5.86
1951	30,385,818	19,663,977	6,804,839	3,917,002	12.89
1952	35,000,918	23,234,003	6,457,806	5,309,109	15.17
1953	41,071,776	23,758,065	7,449,420	9,864,291	24.02
1954	40,861,063	20,011,541	11,944,510	8,905,012	21.79
1955	42,944,521	25,660,038	13,821,973	3,462,410	8.63
1956	45,986,356	25,773,930	13,389,489	6,822,937	14.84
1957	47,679,383	27,111,961	15,499,167	5,068,255	10.63
1958	51,277,335	32,120,552	15,964,743	3,192,040	6.23
Total	$413,937,516	$246,079,907	$115,330,854	$52,526,755	
				Annual Avg.	12.45%
				Cumulative Avg.	12.69%

The next table shows equivalent data for California employers insured with private carriers.

TABLE 8

APPARENT EXPENSE RATIO OF INSURANCE OF CALIFORNIA PAYROLLS WITH PRIVATE CARRIERS 1948–1958

Year	Premiums Written	Incurred Losses	Dividends Paid	Apparent Overhead to Industry (2)-(3)-(4)	Apparent Expense Ratio (5):(2)
1948	$ 76,616,129	$ 39,575,523	$ 8,899,318	$ 28,141,288	36.73%
1949	71,849,226	38,032,183	8,619,362	25,197,681	35.07
1950	70,724,700	40,529,294	8,765,241	21,430,165	30.30
1951	86,440,531	57,442,801	4,720,412	24,277,318	28.07
1952	106,232,848	61,932,878	3,857,395	40,442,575	38.07
1953	121,103,829	66,878,435	5,801,989	48,423,405	39.99
1954	114,866,533	60,461,023	9,383,160	45,022,350	39.20
1955	116,844,827	60,146,738	9,951,924	46,746,165	40.01
1956	128,136,265	68,905,827	10,827,277	48,397,161	37.77
1957	137,152,973	81,328,141	12,144,262	43,680,570	31.85
1958	141,094,241	88,647,726	10,999,157	41,447,358	29.38
Total	$1,171,056,102	$663,880,569	$93,969,497	$413,206,036	
				Annual Avg.	35.13%
				Cumulative Avg.	35.29%

The figures contained in the preceding two tables show that the apparent average annual overhead to the employers from insurance with private carriers amounted to 35.13 per cent of the premium costs and thus was nearly three times as high as the equivalent percentage in the case of insurance with the State Fund. Incidentally, the figure of 35.13 per cent, although computed without segregating participating and non-participating carriers, is in good agreement with the amount which the loading formula proposed by the National Council intends to allow for overhead (eliminating the 2.5 per cent profit and contingencies factor, which is not recognized in California).

The greater economy of the operating cost of the State Fund in comparison with the private carriers is in a large measure due to the facts that the Fund is exempt from all federal taxes and that it does not operate under the American Agency System.[94] Its business comes over the counters of its offices or through the mail. However, as will be pointed out in the next section, this is not the whole story.

It has been argued that the services supplied by agents and brokers are needed and merit the charge therefor which corresponds to a theoretical loading of the effective premium rate of 14.2 per cent.[95] Obviously, this

[94] See the comments on these facts in Ruling No. 83, CALIF. INS. COMM'R, 88TH ANNUAL REPORT 52, 61 (1956).

[95] St. Clair, *The Case for Private Insurance of Workmen's Compensation*, 31 ROCKY MT. L. REV. 397, 412–15 (1958).

assertion is debatable, at least for California, and not capable of definite proof. It also might be argued that the great disparity in overhead costs between compensation insurance with private carriers and compensation insurance with a competitive State Fund should be of no public concern, since employers have the opportunity to seek the cheaper services of the State Fund if they so choose. Actually, however, that is not always the case. An employer who incurs risks which fall simultaneously under the compensation laws of California and other states cannot resort to insurance with the State Fund but must take out insurance with a private carrier that is licensed to write compensation insurance in all of the states involved.

3. Failure to Account in the Loading Formula for Income From Investment and Unutilized reserves

The great disparity between the apparent average annual expense ratios of insurance with the State Fund and of insurance with private carriers furnishes a clue to another important aspect of the cost question. The startlingly low *apparent* average annual overhead of insurance with the State Fund is not the true average annual overhead[96] and is produced by the fact that the source of the dividend payments to policy holders consists not only in income from the annual underwriting experience but also in income from investment and unutilized reserves. Obviously, in the last analysis this type of income stemmed, in the main, also from payments made by the employers. Accordingly, there is good reason to ask whether an equitable share thereof should not be applied toward minimizing the expenses of current business. So far, however, investment income is not considered in the determination of the loading factor.

The amounts involved are by no means insubstantial. To be sure, an exact determination of them is well-nigh impossible in the case of multiline/multi-state carriers. However, the data available for the competitive State Funds of New York and California, being one-line/one-state carriers, furnish useful quantitative insights.

The following table lists earned premiums, underwriting expenses, net income from underwriting business, income from investment, and dividends

[96] The actual average annual operating cost of the California State Compensation Insurance Fund (ratio of expenses incurred to net premiums written) is slightly less than 15%. In 1957 the operating cost was 15.1% on the basis of the data given in BEST, INSURANCE REPORTS (FIRE & CASUALTY) 653B (1958). For the average expense ratios of the other state funds see the table in St. Clair, *supra* note 94, at 427. The average expense ratios of the monopolistic state funds are even lower, ranging from 10.3 (North Dakota) to 5.0% (Ohio). However, in 1948 the Director of the Washington Department of Labor and Industries complained emphatically that the imposed low expense ratio of the state fund (7.16%) resulted in services of lower quality and efficiency than those rendered by competitive state funds or private carriers. STATE OF WASHINGTON, ELEVENTH REPORT OF THE DEPARTMENT OF LABOR AND INDUSTRIES (1946–47) 32 (1948).

paid to policyholders for the New York State Fund in the years 1951–1956. The data are culled from the annual reports of the New York Superintendent of Insurance.

TABLE 9

INCOME AND EXPENSES OF NEW YORK STATE FUND*

Year	Earned Premiums	Underwriting Expenses	Net Income from Underwriting	Income from Investment	Dividends Paid to Policyholders
1951	$51,879,800	$ 9,818,361	$—3,127,808	$3,828,004	$2,046,459
1952	60,877,587	12,532,843	—756,264	5,536,839	2,571,972
1953	69,615,194	14,206,580	5,337,099	5,619,437	3,365,500
1954	69,834,806	13,697,902	11,287,893	6,528,133	5,448,280
1955	64,754,817	13,556,115	6,050,979	7,280,054	6,195,454
1956	62,190,210	13,880,137	2,663,738	7,838,457	5,111,031

* Source: Annual Reports of the Superintendent of Insurance, State of New York, for the years 1951–1956.

As may be seen from these data the income from the investment equals a substantial portion of the expenses of the underwriting business and is a major source of the dividends paid to policyholders.

In California the situation is similar. A summary of the operations of the California State Fund during the first 40 years of its existence (1914–1953) indicates that during that period it incurred underwriting expenses totaling $61,346,635 and received income from investment amounting to $19,011,711.[97]

A related potential source for latent income to carriers, not directly reflected in the immediate underwriting experience, is the long run difference between "losses incurred" and "losses paid." Of course, theoretically this quantity expresses the reserve that must be set aside for the making of subsequent payments on accrued liabilities plus undistributed profits. Nevertheless, there is no guarantee against the possibility that a conservative estimate of incurred losses turns subsequently into a hidden source of revenue. The following table shows the losses incurred and losses paid by the private carriers on California compensation risks for the year 1932–1958.

The difference between the aggregates of losses incurred and losses paid totals $116,400,549. Whether this sum is actually held as reserve for the payment of outstanding compensation liability and undistributed profits or whether portions of it have been absorbed as revenue must unfortunately remain an unsolved problem.

It would seem that the whole question of expense loading needs re-

[97] In 1957 the State Fund received $47,365,040 in premiums and $2,131,877 in income from investment; the incurred expenses totalled $7,160,172; the underwriting gain was $13,043,330. The Fund declared a dividend of $15,499,107. BEST, INSURANCE REPORTS (FIRE AND CASUALTY) 653B (1958).

appraisal with due regard for a more equitable allocation of the income from investment and distribution of dividends.[98]

TABLE 10

LOSSES INCURRED AND LOSSES PAID IN CALIFORNIA, 1932–1958*

Year	Losses Incurred	Losses Paid	Year	Losses Incurred	Losses Paid
1932	$ 6,715,048	$ 7,303,022	1946	$ 27,506,463	$ 28,196,898
1933	6,265,148	6,089,396	1947	34,776,889	31,178,099
1934	7,359,788	6,391,193	1948	39,575,524	33,920,631
1935	8,424,725	7,075,728	1949	38,032,183	35,301,247
1936	10,014,003	7,883,364	1950	40,529,293	37,908,809
1937	11,547,615	9,040,666	1951	57,442,801	44,368,651
1938	9,828,850	8,829,312	1952	61,932,778	49,536,270
1939	9,939,670	8,890,527	1953	66,878,935	53,659,823
1940	10,081,393	10,379,308	1954	60,461,018	55,880,759
1941	15,930,038	12,493,978	1955	60,146,738	59,110,890
1942	25,277,423	25,799,312	1956	68,905,827	64,363,413
1943	37,835,718	21,557,355	1957	81,328,141	71,375,960
1944	32,590,684	26,453,180	1958	88,647,726	79,069,789
1945	28,596,887	28,112,877	Total	$946,570,806	$830,170,257

* Source: Annual Reports of the Insurance Comm'r, State of California.

4. Excessive Litigiousness of the System

The charge has been made that workmen's compensation in the United States is unduly litigious and that the reliance on insurance with private carriers that have a business interest in minimizing disbursements to claimants plays an important role in that situation. Unfortunately, it is well nigh impossible to isolate and assess all effects of private insurance on the operation and total costs of workmen's compensation, since the actual aggregate claim costs in a particular jurisdiction are the composite result of a broad spectrum of factors, such as benefit levels, observance of safety rules, manner of claim settlement, interpretation and application of legal standards, and general human attitudes and inclinations.[99] A study made in 1956 by the Chief Actuary of the New York Insurance Department of the compar-

[98] Analogous conclusions were reached by Judge Callahan as Moreland Commissioner, appointed to "study, examine and investigate the cost of workmen's compensation under the Workmen's Compensation Law of the State of New York and the operations and procedures of state departments, boards and agencies relating thereto" in *Costs, Operations and Procedures Under the Workmen's Compensation Law of the State of New York, Second Report* 31, especially at 42 (1958).

[99] About the effects of possible variances in milieu and attending "compensation consciousness" of workers on number, amounts, and mode of settlement of compensation claims for permanent partial disability, see especially BERKOWITZ, WORKMEN'S COMPENSATION; THE NEW JERSEY EXPERIENCE 25–32 (1960).

ative costs of workmen's compensation in New York and Wisconsin[100] revealed that the aggregate experience for 45 significant classifications demonstrated that the claim costs in New York were more than twice those in Wisconsin despite the fact that the law of the latter state provided for more liberal benefits in terms of both frequency and amounts. The author argued that the greater costs in New York should not be labelled excessive since the analysis indicated that they were produced by actual benefits afforded to the injured workmen. A different appraisal of the situation, however, was reached in a recent investigation by Judge Callahan of the *Costs, Operations and Procedures Under the Workmen's Compensation Law of the State of New York.* This report leveled the charge that "New York's approach was forensic rather than clinical" and blamed in that connection particularly the compulsory "hearing system" followed in that state in the disposition of claims and the attendant overemphasis on claims of compensation for minor permanent partial disabilities.[101]

The situation in most of the other states, including California, seems to be much less subject to criticism on that score. At any rate a certain measure of judicial control over the administrative determination of disputed claims seems to be indispensable under the American notion of administration of justice. Whether private carriers tend to promote unwarranted litigation and thereby increase the overhead of the system and saddle the injured worker with unjustified expenses can be determined only by a comparison of the adjustment expenses of the private carriers with those of the state funds coupled with an examination of a representative sample of actual files. Such study must be left to another occasion.

IV

Re-alignment of Workmen's Compensation with OASDI and Re-orientation of the Benefit Structure

Undoubtedly, the main problems that must be faced by the architects of modern workmen's compensation systems stem from the need for a re-alignment of workmen's compensation with survivors' and disability insurance under the federal social security program and for the resulting re-orientation of the benefit structure. The federal system has become the basic floor of protection for permanently and totally disabled workers and

[100] Harwayne, *A Review and Comparison of Workmen's Compensation Experience in New York State and Wisconsin,* 43 Proceedings of the Casualty Actuarial Society 8 (1956).

[101] *Op. cit. supra* note 98, at 27–31. It should be noted, however, that perplexing and disproportionate rises in permanent partial disability cases have occurred also in jurisdictions not adhering to the hearing system. See Berkowitz, *op. cit. supra* note 99, at 25–32.

the families of deceased or permanently and totally disabled workers, regardless of whether or not the death or the disability is employment-connected. Since one-half of the cost of the federal insurance is borne by the employers, a case could be made for the proposition that in cases where the injured worker or his family receive benefits under OASDI some *partial* credit should be given to such payments. Amounts that would be saved in this manner should be used to remedy existing shortcomings and inequities, such as insufficient provisions for rehabilitation, excessive waiting periods, and inadequate benefit levels.

Even if a system of partial credit for OASDI benefits should prove to be unworkable, the whole benefit structure of workmen's compensation needs a thorough re-examination taking account of the fact that the system, while by no means obsolete or unnecessary, increasingly has been relegated to a subsidiary role.

Conclusion

The foregoing discussion shows that, in the opinion of the writer, the time has come to re-orient and modernize the existing systems of workmen's compensation. In their present form they are beset with many shortcomings, inequities, and social and economic wastes. Compensation insurance with private carriers, in particular, if it be retained, should be pruned of all "gimmicks" that tend to increase the overhead of the arrangement and made to give the employers a fairer and more equitably distributed share in the profits. Since workmen's compensation is an important system of social protection and since insurance is compulsory, any unwarranted or inequitably distributed costs are legitimately a matter of public concern.