

THE EVOLUTION OF WORKERS' COMPENSATION POLICY IN CALIFORNIA, 1911–1990

GLENN MERRILL SHOR*

This chapter from Glenn Shor's Ph.D. dissertation (Public Policy, University of California, Berkeley, 1990) is presented here as part of a diverse group of previously unpublished dissertations chosen for inclusion in this volume of *California Legal History* (vol. 16, 2021) to give wider exposure to earlier research that remains valuable for the study of California's legal history. The complete work is available at <https://dissexpress.proquest.com/search.html>.

* Glenn Shor retired as Research and Policy Advisor at CAL-OSHA in 2019 and is currently Continuing Lecturer, UC Berkeley Center for Occupational and Environmental Health, and Lecturer, California State University–Sacramento, Department of Public Health.

Chapter 2

ORIGINS OF WORKERS' COMPENSATION IN CALIFORNIA

THE ROLE FOR HISTORY IN POLICY ANALYSIS

In this part of the dissertation, I discuss the historical evolution of workers' compensation¹ policy in California. Workers' compensation is a complex of problems. This leads to asking, if this institution is so problematic today, how did we first construct or devise it? An ability to identify the elements that first created the problem is an excellent starting point for any effort to ameliorate it.

The problems we see in today's workers' compensation system need to be analyzed through the lens of history. Armed with an understanding of the system's history, we can better explore the questions of what is possible to change. History allows us to question policy that we believe to be inevitable through examining thoroughly the factors that together led to what evolved.

Policy often starts with high hopes and ideals. Problems present real opportunities for achievement of progress, and improving how they are conceptualized and handled can lead to a reduction in the problem. But problems,

¹ Until 1974 in California, the system was known as "workmen's compensation."

especially ones that have become public, can also be extremely resistant to change. Legislative compromises, institutional rigidities, and administrative complexities often combine to limit the effect of policy goals.

Through an understanding of these limitations and how they affect outcomes, policy analysts can learn lessons from history. An historical focus allows analysts to look at an institution in tandem with looking at the conditions of its birth. The problems that the original institution was formed to deal with may be different than the problems existing today, yet the institution may be stuck in the past, attempting to handle new problems with old solutions. Studying history can help us see the evolution of problems as well as the programs set up to deal with them.

History can inform public policy analysis and decision making in many ways. History can help us analyze the past in ways that expand the range of choices available to decisionmakers. It can help give decisionmakers an accurate sense of what alternatives have previously surfaced. It can provide the context in which a present policy began, or conversely the context in which alternatives were not chosen. History can help to remove barriers to change by clarifying and exposing the political roles of the parties. Current policy gets some of its legitimacy from the notion that an institution or practice has always been with us and further that it will therefore always be with us. The study of history can demystify a subject by showing it was not always what it is now, and by showing that policy is fluid and thus not without hope for change. Thus, it is important to ask, "Did it have to turn out this way? How could it have been different?" Through a study of history as a comparative device, the pieces of the present system appear less determined and fixed. David Rothman and Stanton Wheeler note that historical inquiry challenges a source of legitimacy of current policy — the notion that since an institution or practice has always been with us that it must necessarily always be with us. Rather, by exposing the past record and showing that what goes into the present construct is not totally determined and fixed, the policymaker is freer to propose change. In their words, "an aura of inevitability gives way to sense of experimentation."²

² David Rothman and Stanton Wheeler, eds., *Social History and Social Policy* (New York: Academic Press, 1981), 7.

We look at the past not to copy it but to search it for possibilities that may again be relevant. Knowing that some things may have been possible in the past does not necessarily mean they are possible now; however, it is more informative than thinking that whatever is not present today was never possible. With this purpose in mind, we begin with the origins of workers' compensation.

ORIGINS OF WORKERS' COMPENSATION

In the late 1800s and the early 1900s, occupational injury and illness increased dramatically as a result of massive industrialization. Realization of the problem and a policy response to it began in many nations of Europe, with Germany being the first country to establish a governmental program.

In the United States, it took longer for the problem to be perceived as a social issue deserving of government action. However, between the turn of the century and the First World War, a broad-based social movement arose in the United States generally, and California particularly, to achieve a safer and more healthful work environment.³ The movement began with notions of employer liability as reflected in state laws defining negligence, and evolved into a complex structure of prevention and compensation with specified ways to ensure that the system operated efficiently — namely through regulated insurance that would spread the costs of work-related injury and illness.

This chapter describes the context in which workers' compensation was developed and then established in California in the early twentieth century. The chapter includes an articulation of the process by which policymakers became convinced of the need for governmental intervention into the problem; the major debates regarding what kind of intervention would be most appropriate and effective; how the problem was addressed elsewhere, and how the policy evolution that took place in California responded to the perceived problem.

³ David Rosner and Gerald Markowitz, "The Early Movement for Occupational Safety and Health, 1900–1917," in Judith Walzer Leavitt and Ronald L. Numbers, eds., *Sickness and Health in America: Readings in the History of Medicine and Public Health* (Madison: University of Wisconsin Press, 1985), 467–82.

HISTORICAL CONTEXT

Industrialization in the United States at the turn of the twentieth century was characterized by changes in the organization of work that had profound impact on worker health and safety. Work was increasingly mechanized, with much of the nation's employment shifting to big factories with high speed machinery powered by belts and pulleys running off steam-driven generators. The development of the elevator allowed larger construction projects. The chemical age was also beginning, as was widespread use of electrical power.

The physical hazards of mechanized work were complicated by what the Somers call the "impersonal corporate organization of industry" which separated employers physically and socially from their workers. Finally, the widespread use of low-paid immigrant labor reduced attention to health and safety on the job.⁴ In some Western states like California, beyond the hazards of factory work much of the workforce was engaged in agriculture and other inherently hazardous occupations related to resource exploitation, such as mining and logging, and railroad work.

The occupational injury rate in the United States probably peaked around 1907, the year the Interstate Commerce Commission reported 4,534 fatalities among railroad workers, and the federal Bureau of Mines counted 2,534 dead in bituminous mines.⁵ Frederick Hoffman, statistician of the Prudential Life Insurance Company, estimated there were approximately 17,500 work-related accidental fatalities among the 26 million men gainfully employed in 1908.⁶ Allegheny County, Pennsylvania, recorded a death a day among coal miners in 1909.⁷ In 1911 John Mitchell, vice president of the American Federation of Labor cited a statistic of the American Institute of Social Service "that 536,165 workmen are killed or injured

⁴ Herman and Anne Somers, *Workmen's Compensation* (New York: John Wiley and Sons, Inc., 1954), 7.

⁵ Interstate Commerce Commission, "Accident Bulletin 119" (1951), 112; U.S. Bureau of Mines, "Injury Experience in Coal Mining: 1948," Bulletin 509 (1952), 72.

⁶ Frederick L. Hoffman, "Industrial Accidents," *Bulletin of the Bureau of Labor* 78 (September 1908), 418. Cited in Anthony Bale, "Compensation Crisis: The Value and Meaning of Work-Related Injuries and Illnesses in the United States, 1842-1932" Ph.D. diss., Brandeis University, 1987), 141.

⁷ Crystal Eastman, *Work Accidents and the Law* (New York: Russell Sage Foundation, 1910).

every year in American industry.” The statistician of the Prudential Life Insurance Company estimated the annual number of industrial accidents at 2 million.⁸

While industrial injury was clearly a leading cause of death and disability among working men and women, there was little being done by employers to address the problem. Incentives to reduce the trend were largely nonexistent. In the first decade of the century, safety requirements or standards were minimal in most industries. In California, the political strength of the railroads even insulated that industry from state government controls.⁹ Legislation on factory inspections that did exist was vague and budgets for enforcement were meager. There were no state inspectors enforcing any minimum levels of worker protection, and no mechanisms in place allowing regulatory agencies to create standards.

Compounding the problem, workers received little if any compensation for job-related injury and illness. Workers trying to recover damages against their employers for injuries faced many obstacles under common law. The law provided that if a person were injured on the job due to employer negligence, he or she could sue for all damages. But, under the “master-servant” structure of the common law, employers had three strong defenses that effectively shielded them against most such claims: 1) that the worker had assumed the risks of the employment by accepting wages for it (“assumption of risk”); 2) that the injury was due to the negligence of another worker and thus not of the employer (“fellow servant doctrine”); and 3) that the worker himself had contributed to the act (“contributory negligence”). Given the lack of job security, it was also difficult to convince co-workers to testify on behalf of injured workers. These realities together meant that workers had extremely limited chances of achieving compensation for a job related injury.

Under these liability rules, although employers bore indirect costs such as retraining, down time, and damage to machinery caused by accidents, they were able to externalize much of the cost of industrial injury by not having to pay full compensation for a worker’s losses, both economic and

⁸ John Mitchell, “Risks in Modern Industry: Burden of Industrial Accidents,” *Annals of the American Academy of Political and Social Science* 38, no. 1 (July 1911): 76.

⁹ See Walton Bean, *California: An Interpretive History* (New York: McGraw-Hill Book Co., 1968, 1973), especially Chapter 25.

social.¹⁰ The lack of regulation, compounded by insignificant compensation, meant employers had few incentives to prevent occupational injury and illness.

After 1900, muckraking journalists began to expose the extent and effects of the injury problem to the general public, creating sympathy for workplace injury victims. Further, the problem was seen as an indication that the capitalist system was insensitive and unable to correct itself without outside intervention. Academic reformers connected with the Progressive movement saw the problem as contributing to the erosion of the social fabric. The Knights of Labor adopted the slogan, "An injury to one is the concern of all," and organized a campaign of strikes and boycotts over the issue of control of working conditions, including abolition of child labor and limitations on hours of work.¹¹ As injuries mounted and victims were left to the responsibility of family or community care to compensate their losses, it gradually became clear that employers got most of the benefits while undercompensated workers assumed most of the risks.

Crystal Eastman, lawyer, sociologist and later secretary of the New York State Employers' Liability commission, first focused the debate in the U.S. on two questions in her 1910 Russell Sage Foundation Report:¹² Who was responsible for work injuries, and what were the economic consequences? If workers were the cause of most injuries, then there would be little sympathy to their plight after injury. If employers were guilty of subjecting employees to excess danger, then they should be punished and made to pay damages. But if the work itself was dangerous and could not easily be made safer, then Eastman concluded that the loss should be distributed. "Equity

¹⁰ Under the economic theory of hazard pay, one would expect workers in more dangerous jobs to have higher pay, either before or after an injury to compensate for the extra risk. But dual labor market theorists posit the existence of two parallel labor markets, a primary sector of privileged workers one in which people work for high wages in relatively good working conditions, with job security and the administrative mechanisms to back up rules, and a secondary sector of poor working conditions, low wages, high turnover and frequent job changes by individuals. There is also very little mobility between the two tracks.

¹¹ Sidney Lens, *The Labor Wars: From the Molly MacGuires to the Sitdowns* (Garden City, N.Y.: Anchor Press, 1974), 65.

¹² Crystal Eastman, *Work Accidents and the Law* (New York: Russell Sage Foundation 1910), volume 6 of *The Pittsburgh Survey*, edited by Paul Kellogg.

demanded that the economic loss (or part of it) be transferred from the worker to the employer and, ultimately, to the consumer.”¹³

In the interest of preserving the social fabric, analyses like Eastman’s study of the Pennsylvania coal mining districts documented the costs of industrial injury, and showed that the burden of disability lay “directly, almost wholly, and in likelihood finally, upon the injured workmen and their dependents.” In a majority of cases, she found, employers assumed no losses after injuries. Thus, to the employer, the economic costs of avoiding injury exceeded any economic benefits. In an earlier era, employers had direct contact with their workers and might have felt social and political benefits of assisting their injured “servants.” But Eastman argued that with competitive pressures, the primary motivations were “economy and rapidity of production.” Only by instituting a “uniform and inescapable penalty” against each accident, she believed, could “one economic motive be set off against another.” Thus workers’ compensation was perceived by one of its earliest American theoreticians as an injury tax.

Increasing outrage about industrial working conditions and increasing numbers of disabling work injuries had led to the enactment of safety requirements and regulations both at state and national levels. Violation of these statutes was presumed as employer negligence and created liability on their part. These laws also began to tighten loopholes. For example, under the “safety appliance” act affecting interstate railroad workers, the U.S. Supreme Court found that employers were under an absolute duty not only to install specified safety appliances, but also to keep them in working order.¹⁴

The employers’ liability statutes, however, were based upon negligence or violation of statutory duty, and thus would not cover those accidents not traceable to legal fault. The alternative principle of workers’ compensation was that industry in general should bear the financial burden of all industrial injuries, regardless of fault.

¹³ Roy Lubove, *The Struggle for Social Security* (Cambridge: Harvard University Press, 1968), 48.

¹⁴ American Federation of Labor and The National Civic Federation (AFL-NCF), *Workmen’s Compensation: Report Upon Operation of State Laws* (Washington, GPO, 1914), 14.

COMPENSATION IN THE UNITED STATES

Introduction

In the late 19th and early 20th centuries, there was increasing perception of the problem of work-related injury and illness in the United States and a gradual shift toward replacing laissez-faire individualism with a new ethic of social responsibility. The evolution of this early attempt at problem-solving went through several stages. First, beginning in the 1880s and 1890s, there was a focus on employer liability for these injuries and to what increased degree employers were to be responsible. Through legislative enactment and court decisions, employer defenses against negligence lawsuits were reduced. For example, some states made unlawful the practice of allowing workers to sign away their rights to compensation as a condition of employment. While these changes helped a few workers, the changes were inadequate for most.

Next, in the first decade of this century, reformers began systematically analyzing these employer liability systems and found numerous shortcomings. The laws were found to be based on anachronistic assumptions that were not consistent with realities of industrial society. (The narrow liability rulings assumed that workers had knowledge of all the hazards they were facing and could therefore assume the risks of the job knowing full well the tradeoff between risk and compensation. They assumed that if a worker had in any way contributed to the causation of an injury, the company was not to blame because if it were not for the fault of the worker, the accident would not have happened. The rulings further assumed unless the actual employer had caused the injury directly, the worker could not recover against him or her. Thus, employers would be off the hook if injuries had been caused by the acts of a “fellow servant” to the master.) Great majorities of injured workers received little if any compensation, and there was inconsistency between awards made. The systems were wasteful, slow, and inefficient. The systems of lawsuits inevitably aroused antagonism between labor and management. For most employers, the systems involved minimal financial incentive to practice prevention, and because they did, left many injured workers without compensation and created a burden on the public welfare.¹⁵

¹⁵ Herman Somers and Anne Somers, *Workmen's Compensation* (New York: John Wiley and Sons, 1954), 22-26.

Having generated public indignation against existing plans, the next step involved efforts to develop and pass state legislation that would address many of these inadequacies. Progressive reformers looked to the European experiences and settled on the concept of assessing liability without fault, and allocating the costs of industrial accidents to employers as legitimate costs of production. Early attempts in several states confronted state constitutional barriers, but beginning around 1911, most states found ways to adopt workers' compensation systems that could withstand legal challenges.

In designing the new compensation systems, most reformers chose to rely more on the English experience of private insurance companies, court administration, elective coverage, and no inherent injury prevention program, than on the German model of mutual insurance associations, collective responsibility of the industry with self-governing administration, mandatory coverage, and accident prevention and enforcement in the hands of the associations themselves.¹⁶

Employers' Liability

The English common law served as precedent for liability for negligence in the United States in the late nineteenth century. In some states, factory inspection laws of the 1880s and 1890s had provided a foot in the door for those seeking restitution for workplace injuries by specifying what conditions would constitute employer negligence. Juries had begun making awards that reflected their sympathy to the plight of the industrially disabled. The outcome, however, was generally not large monetary awards to injured workers, but rather more litigation and delay as employers and insurers appealed decisions.

Different strategies of intervention were posed. For example, some tried to curb or remove common law defenses through legislation. They contended that making employers responsible for the costs of workplace injuries would gradually drive down the number of injuries; when

¹⁶ Theoretically, the merging of individual risks with others in the same trade led to a "direct and obvious interest of the employers in each trade to keep down the mutual premiums, and they can only do that by making their mills and factories safer working places." Durand Van Doren, *Workmen's Compensation* (New York: Moffat, Yard, and Co. for Department of Political Science, Williams College, 1918), 139.

prevention became less costly than compensation, it would be practiced. But the objective of making employers responsible conflicted with an objective of keeping firms solvent. Many small and medium size businesses would be unable to pay any significant settlements to an injured worker. Any series of injuries, intentional or accidental, could easily lead to financial ruin without some kind of insurance.

Thus, as the law for employer negligence broadened, so did the market for insurance. The first employers' liability policy in the U.S. was issued in 1886 by the London-based Employers' liability Assurance Corp. Ltd, and the first domestic company (Travelers Insurance Company) entered the market in 1889.¹⁷ Nationwide, employers' liability insurance premiums rose from about \$150,000 in 1887 to \$14.7 million in 1904 to \$35 million in 1912.¹⁸

Among employers, the liability policies were generally popular because they offered protection from employee lawsuits. Private insurance companies took over the defense of the claim from the first determination of whether there was employer negligence to the final judgement. If the injured employee filed a claim, insurers handled the settlement and claims adjustment process, generally pitting their lawyers against unrepresented plaintiffs. If the adjustment process did not resolve the claim, workers could take their case to court. If workers could prove employer negligence by a preponderance of the evidence, relying on their fellow workers for testimony, they could win a jury judgement against the employer. In the extremely improbable scenario that an injured worker won his or her case, and the judgment was not appealed, policyholders would be indemnified by the insurance carrier up to the policy limits.

By 1905, however, there was growing dissatisfaction with the system from all quarters. Some employers were dissatisfied with the liability system because insurance policies, which limited coverage to damages of \$5,000 per person or \$10,000 per accident, only covered some of their potential losses.¹⁹ Juries were less reluctant to award damages against large

¹⁷ W. F. Moore, "Liability Insurance," *Annals of the American Academy of Political and Social Science* 26, no. 2 (September 1905): 499; Edson Lott, *Pioneers of American Liability Insurance* (New York: United States Casualty Company, 1938), 103, 35.

¹⁸ Lubove, *Struggle for Social Security*, 51.

¹⁹ *Ibid.*, 52.

employers, and appellate courts increasingly were upholding the decisions.²⁰ The cost and efficiency of the policies were also being criticized; high commission fees and administrative overhead meant that private insurers paid losses amounting to 40 percent or less of premiums.²¹

From the employee's viewpoint, the ability to take one's employer to court, even under liberalized conditions, was of little value. The delays and uncertainty of cases usually weighed against the injured claimant, forcing the injured worker into a low settlement. Where studies were done, it was clear that while some workers were beginning to win large judgements, the vast majority of injured workers received inadequate compensation for their injuries.²²

Employers' liability laws were a stopgap measure that eventually pleased no one. The next stage was to design a social welfare system under which the needs of injured workers could be balanced against the resources of business.

Movement for Social Welfare

Sensing an opportunity to use the public indignation and rising value of injured workers claims to mobilize for change, some reformers proposed a broad platform of social welfare initiatives, including universal health insurance, prohibition of child labor, and unemployment relief, as had already been done in many European nations. The American Association for Labor Legislation (AALL) was formed in 1906 by a small group of academic economists, including John Commons and Richard Ely of the University of Wisconsin, and Henry Seager of Columbia University. After factfinding trips to Europe, they became among the first Americans to lobby for introduction of a no-fault industrial injury compensation plan.

In 1908, during the Progressive-era administration of Theodore Roosevelt, the first limited workers' compensation act for federal civilian employees was passed. It applied only to federal civilian employees in hazardous occupations, excluded injuries due to the negligence or misconduct of the worker, and provided for the payment of full wages during

²⁰ Bale, "Compensation Crisis," p. 127–28.

²¹ Moore, "Liability Insurance."

²² See discussion on "Financial Recoveries" in Bale, "Compensation Crisis," 166–76.

disability.²³ While the plan applied to relatively few workers, it put the federal government in the position of advocating compensation mechanisms, and allocated federal resources to the study, design, and dissemination of plans.

Throughout the first part of the century, many individual states had become aware of the social upheaval caused by work accidents and began to study workers' compensation schemes as methods of protecting the welfare of private sector workers injured on the job. Generally, attempts to legislate compensation systems applied to specific dangerous occupations, in which injuries were seen less as preventable accidents than simply as expected outcomes of the work. The fact of injury, rather than the determination of negligence, was the gateway to benefits. In some jurisdictions, the system of workers' compensation was an added, rather than a replacement remedy, as modeled on the British system. That is, injured workers would have the choice of whether to pursue a tort remedy for employer negligence, or choose limited benefits under compensation.

Constitutional Issues

The principles of liability without fault, and the nonexclusivity of remedy were to confront serious challenges of constitutionality. A short description of some state proposals illustrates this.

In Maryland, an act passed in 1902 applied to specified dangerous occupations, such as mining, quarrying, transportation, municipal, and construction work. It paid a death benefit of \$1,000 to dependent families and was financed by a public Employers and Employees Cooperative Insurance Fund created with equal contributions from workers and employers. The law abolished the fellow servant doctrine and made the employer defense of contributory negligence only useful in reducing damages paid. The act was declared unconstitutional on the grounds that it deprived employers and employees of trial by jury, and that it vested judicial power in an executive office.

In Montana, a 1909 compensation act applying to coal mine employment was passed but then also struck down on Constitutional issues in 1911. The Act provided for a co-operative fund, with employers contributing based on their production, and employees on their gross earnings.

²³ 35 U.S. Statutes at Large, 556; noted in Van Doren, *Workmen's Compensation*, 52.

The act set up a State-administered system, with fixed sums payable to injured persons in case of disability. While the law was obligatory in requiring contributions from both employers and workers, injured miners and their dependents could ignore the provisions of the compensation law and choose to sue for damages under common law. The Montana Supreme Court found that “in reserving to the employee his right to an action at law, the act denies to the mine operator the equal protection of the laws [A]fter full compliance with the terms of the act, the employer is not exonerated from liability. He may still be sued and compelled to pay damages in a proper case.”²⁴ The court cited other state acts as examples of what it might accept. Washington State had traversed the “equal protection” problem by abolishing all actions for negligence, and the early Maryland act allowed employers to deduct settlement costs in lawsuits from required contributions to the compensation fund.²⁵

Because of its economic prominence, the struggle over New York State’s compensation law attracted national attention. The law, passed in 1910, was mandatory for eight especially dangerous occupations.²⁶ Under the act, employees were covered by a compensation act for accidents in which no negligence of the employer could be shown, while workers retained the right to sue for all accidents due to the fault or negligence of the employer.²⁷ The law struck down the “fellow-servant,” “contributory negligence,” and “assumption of risk” defenses, retained all existing liabilities based on negligence against the employer, and permitted the injured

²⁴ *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 108, 119 Pac. 554, quoted in James Harrington Boyd, *Workmen’s Compensation and Industrial Insurance Under Modern Conditions* (Indianapolis: Bobbs-Merrill Co., 1913), vol. 1, 141–42.

²⁵ Chapter 74, Session Laws, Washington, 1911; Laws of Maryland, 1910, chapter 153; quoted in Boyd, vol. 1, 143–44.

²⁶ Erection or demolition work involving iron or steel framework; operation of elevators or hoisting devices for conveyance of materials in iron or steel erection or demolition; work on scaffolds greater than twenty feet high; construction, operation, alteration or repair of wires or cables charged with electricity; work close to blasting or involving explosives; operation, construction or repair on railroads; construction of tunnels and subways; and all work carried out under compressed air. Boyd, *Workmen’s Compensation and Industrial Insurance*, vol. 1, 84–85. The number of trades is counted as twelve in Harry Alvin Millis and Royal Ewert Montgomery, *Labor’s Risks and Social Insurance* (New York: McGraw-Hill Book Company, 1938), 194.

²⁷ AFL/NCF, *Workmen’s Compensation*, 15.

employee to elect *after an accident* which remedy — employers' liability or workers' compensation — he or she would pursue.

The legislative commission writing the bill feared the consequences of a continuing high injury rate without victim relief. "Not the least of the motives moving us is the hope that by these means a source of antagonism between employer and employed, pregnant with danger for the State, may be eliminated."²⁸ But, the New York statute had been modelled on the system adapted by the British parliament, and failed to consider what one commentator called the "rigidity" of a written constitution: It "may at times prove to be a hindrance to the march of progress." On March 24, 1911, the act was labelled "plainly revolutionary" and declared unconstitutional by the New York Court of Appeals.²⁹

In its decision, the New York Court declared that making an employer liable to pay compensation for an injury due in no part to the fault or neglect of law by the employer violated due process. While supporting the "public good" theory of compensation, the Justices wrote that they could not justify it under the law. "Courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided. If such economic and sociological arguments as are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe." Without this protection from the Legislature, "the guarantees of the Constitution are a mere waste of words."³⁰

In a disastrous coincidence, on the day following the appeals court declaration that the New York statute was unconstitutional, a major fire at the Triangle Shirtwaist Manufacturing Co. in New York City killed 145 of the 500 trapped employees.³¹ Ironically, garment workers were not among the eight dangerous trades in the New York Act. The disaster fueled demands for better workplace safety and health regulation, and led to calls for universal compensation coverage

²⁸ Ibid., 95.

²⁹ *Ives v. South Buffalo Railway Company*, 201 N.Y. 271, 94 N.E. 431.

³⁰ Ibid.; decision quoted in Boyd, *Workmen's Compensation and Industrial Insurance*, 104-5.

³¹ Under the New York law, the garment trade was not considered a hazardous occupation, and workers were not covered under the workers' compensation act.

WORKERS' COMPENSATION IN CALIFORNIA

Context

In the first decade of the 1900s, California's state government was under the control of narrow private interests, primarily the Southern Pacific Railroad. The urban districts of the state were also confronted by an intense struggle between organized labor and organized business. By the end of the decade, however, a massive political upheaval put Republican Progressive reformers in control of the governor's chair and the Legislature. The Progressives' broad platform for change included measures to increase political democracy through direct action like the initiative, referendum and recall, and to mediate the struggles between labor and capital through social reform by instituting government measures that strengthened the state in relation to any private interest.

Conditions of Work in the Early 1900s

Under factory inspection laws enacted in 1889 and amended in 1901, 1903, and 1909, California employers of more than five workers were expected to keep their workplaces clean, with sufficient water-closets within reasonable access and separated for the sexes, and ventilated sufficiently so that the air would not become injurious to health.³² Yet according to a report of the State Bureau of Labor Statistics in 1912, these provisions were "practically of no value." "Its provisions were too indefinite, there were no precise standards erected by law and the Bureau's authority to insist upon rigid regulations was limited."³³

The Law of Employers' Liability Before 1911

Before 1911 in California, there had been no widespread agitation for compensation, except a statement in the founding platform of the new Progressive faction. Professor Ira Cross, the first secretary to the California Industrial Accident Board, wrote that prior to the Progressive administration, "the state had been rather backward in legislating for the welfare of

³² California Statutes 1889, 3. Amended Statutes 1901, 571; 1903, 16; and 1909, 43.

³³ Earl C. Crockett, "The History of California Labor Legislation, 1910-1930," Ph.D. diss., University of California, 1931), 195.

its workers.”³⁴ Even the Aetna Insurance Company, a national leader in employers’ liability insurance coverage, agreed that pre-1911 conditions in California “have been such as to permit remarkably few recoveries by injured employees, for damages arising out of injuries sustained within the course of their employment, as compared with many other States. This is clearly evidenced by the [premium] rates chargeable for Employers’ Liability insurance by the various companies operating in California. The State as a whole has been rated lower than practically any other State in America.”³⁵

While backward, California had not been totally insulated from liberalizing its treatment of injured workers. The state’s first legislative limitations on employers’ common law defenses appeared in 1907. Employers were made responsible for the negligence of employees supervising injured workers, and the fellow servant doctrine could not be applied to employees working in different departments or on machines or appliances than the one on which the injured worker was working.³⁶ Furthermore, court decisions began to reduce the burden of proof for claimants by restricting the defenses. In 1910, the California Appellate Court declared that employers had the burden of proof in cases alleging contributory negligence. Decisions also clarified that once the employee gave notice to the employer that machinery might be defective and the employer promised to fix it, the employer thereby assumed the risk of injuries caused by the defect. The court found that a person could not assume risk for working in hazardous environment if they hadn’t been warned, and that without evidence that a worker knew of dangers, there was no implied assumption of risk. Thus, employers were found to have an active responsibility to warn of hazards and instruct workers in safe work methods. Finally, the level of court awards began to have some impact. Employers faced \$5,000 verdicts in one death case, one case of the loss of a right arm, and one case

³⁴ Ira Cross, “Workmen’s Compensation in California,” *American Economic Review* 4 (June 1914): 454.

³⁵ Aetna Life Insurance Co. (Western Branch), *Employers’ Liability and Workmen’s Compensation in California: The Roseberry Law* (1911; 32 pages). The authors compare the “manual” rate for machine shops as twenty-five cents (per \$100 payroll) in California compared to sixty cents in Illinois.

³⁶ Cal. Stats. 1907, 119–20.

of scalding burns from steam; each award was upheld as appropriate and not excessive.

The combination of broadened legislative and judicial decisions had begun to shift the balance in industrial injury cases even before the Progressives came to power in California in 1911. As employers began to feel the burden of industrial injuries, they also began to see the problem as a social issue worthy of government intervention.

The Progressives and Workers' Compensation in California

On May 21, 1907, a small group of "Lincoln Republicans" met in Los Angeles to announce the objective of "emancipating" the state Republican Party "from domination by the Political Bureau of the Southern Pacific Railroad Company and allied interests." The reform platform of what was to become the California Progressives included: a direct primary; initiative, referendum and recall; effective regulation of railroad tariffs and other utility rates; outlawing racetrack gambling; conservation of forests; women's suffrage; a minimum wage for women; and a workers' compensation act for California.³⁷ Just over three years later, the Progressives won the Governor's office and were given the chance to set policy in many of these areas.

The middle-class California Progressives viewed human nature through "an Emersonian optimism about man's innate capacity for good, with strong faith in the political abilities of 'the people.'" ³⁸ But this group of "small independent free enterprisers and professional men"³⁹ were distrustful and critical of the power of organized capital and organized labor. They "wanted to preserve the fundamental pattern of Twentieth Century industrial society at the same time [they] sought to blot out the rising clash of economic groups," but to do it all without profound economic reform.⁴⁰ The workers' compensation ideal closely followed this philosophy.

³⁷ Bean, *California: An Interpretive History*, 323.

³⁸ Telegram. Harris Weinstock to Governor Hiram Johnson, October 28, 1911; in Hiram Johnson papers (Bancroft Library, University of California).

³⁹ There is an entry for "woman's suffrage" but none for "women" in the index of George Mowry's respected work on the California Progressives. I am unaware of any women in leadership positions of the Progressives during in California during the Johnson era.

⁴⁰ Bean, *California: An Interpretive History*, 327.

In December 1910, after being elected on a platform supporting “an Employers’ Liability act which shall put on industry the charges of its risks to human life and limb along the lines recommended by Theodore Roosevelt,” California Governor-elect Hiram Johnson appointed a committee “to investigate and report upon the need of considering human beings as more entitled to help than broken machines.”⁴¹ In his 1911 inaugural address, the governor said that “in this State all parties stand committed to a just and adequate law whereby the risk of the employment shall be placed not upon the employee alone, but upon the employment itself. Some new legal questions will be required to be solved in this connection, and the fellow servant now in vogue in this State will probably be abrogated and the doctrine of contributory negligence abridged.”⁴²

One of the measures intended to reduce the increasing tensions between the laboring and employing classes was a system of workers’ compensation with the primary goals of adequately compensating workers for injuries at work and creating incentives to prevent further injuries. The reformers assigned to design and implement California’s workers’ compensation system had the advantage of coming to power at a time when the public was ready for reform, and when others around the country had already done much of the groundwork and analysis of alternative arrangements, and had tested arrangements in the courts. Given a mandate and the opportunity to assess already extensive experiences elsewhere, the California Progressives were able to put together a system that could withstand Constitutional challenges, be relevant to the needs of both employers and workers, and follow the lead of Progressive leaders elsewhere in the nation.

The program that emerged in California had four major goals. It was meant to: 1) Create a mixed system of social regulation and economic incentives to reduce hazards at work and prevent injuries on the job; 2) Provide injured workers and their families with a living wage during times of disability and cover their medical and rehabilitative expenses; 3) Create a model mixed system of public and private insurance to efficiently and effectively raise the capital needed for compensation, and distribute the

⁴¹ Franklin Hichborn, *The Story of the California Legislature of 1911* (San Francisco: Press of the James H. Barry Company, 1911), 236. The commission was chaired by Meyer Lissner, a future commissioner of the Industrial Accident Commission.

⁴² Address quoted in full in Hichborn, *Story of the California Legislature of 1911*, iii.

benefits in a timely and nonadversarial manner; 4) Establish and maintain a management information system to continually evaluate the nature of the problem of occupational injury and its economic consequences, and to assess the progress toward meeting the other three goals.

The Roseberry Employers' Liability Act

When the 1911 session of the Legislature convened, there was general agreement that the state's liability law needed liberalization, but no consensus over specific changes. Organized labor and their Progressive supporters from the San Francisco delegation to the Legislature wanted a liability law that would abolish the "assumption of risk," "fellow servant," and "contributory negligence" defenses. More conservative Progressive legislators from Los Angeles and mid-state, however, hesitated over abrogating the employers' common law defenses.⁴³ In the context of important national events and a sense that the state constitution could not support radical change, a compromise bill written by Senator Louis H. Roseberry (Santa Barbara) and supported by the governor gave employers the choice of remaining under common law, or of choosing to be covered under the new compensation principle.⁴⁴

The first part of the Roseberry bill covered employers wishing to remain under a liability system. The bill abrogated the defenses of assumed risk and the fellow servant rule, provisions that even conservative legislators

⁴³ George E. Mowry, *The California Progressives* (Berkeley and Los Angeles: University of California Press, 1951; Chicago: Encounter Paperbacks, 1963), 145.

⁴⁴ The bill was actually the third draft of a pending measure in Wisconsin. Ex-President Theodore Roosevelt's 1910 Labor Day address had mentioned the Wisconsin study that preceded the bill:

The United States still proceeds on an outworn and curiously improper principle, in accordance with which it has too often been held by the courts that the frightful burden of the accident shall be borne in its entirety by the very person least able to bear it. Fortunately, in a number of states — in Wisconsin and in New York, for instance — these defects in our industrial life are either being remedied or else are being made a subject of intelligent study, with a view to their remedy.

Quoted in Hichborn, *The Story of the California Legislature of 1911*, xv. Harris Weinstock had given the governor a copy of the New York state statute, later declared unconstitutional, in December 1910, but Roseberry took the lead on the issue in the Legislature and no variations on the New York law were introduced.

could not justify in the modern context of work. But, in early versions of the bill, the doctrine of “contributory negligence” was left intact; thus, if the injured employee could be shown to have been even slightly negligent leading to the injury, the employer would be absolved of all responsibility. If not eliminated completely, labor at least wanted a shift to a system of comparative negligence which would let a jury decide the balance of fault in the case and determine the level of benefits appropriately.⁴⁵ In the final compromise, workers could recover damages under the liability section of the bill if their contributory negligence was minor, relative to that of the employer.

By limiting employers’ defenses against liability lawsuits, Roseberry hoped to encourage participation in the voluntary system of workers’ (then workmen’s) compensation. Employers could relieve themselves from liability if they elected a no-fault compensation system and agreed to pay a fixed schedule of benefits in injury cases. As a voluntary act in which employees would, in most cases, choose their remedy before injuries took place, the bill hoped to sidestep the constitutional barriers that had befallen Montana and would negate New York’s system.

While the California Legislature was considering the measure, New York State’s mandatory act was declared unconstitutional, giving labor pause in pushing for a compulsory statute. Then, coincidentally, a series of industrial tragedies shocked the country. On March 25, 146 workers were trapped and killed in the Triangle Factory Fire in New York. During the first week of April, more than 75 miners died in a mine cave-in in Scranton, Pennsylvania and 150 convicts were killed in a coal mine explosion in Alabama.⁴⁶ Florence Kelly, general secretary of the National Consumers League, while cautious about implying a cause-and-effect character of the events, noted that in elections during the two-week period prior to April 7, twenty-six Socialist mayors were elected in the U.S.⁴⁷ On April 8,

⁴⁵ California State Federation of Labor, *Proceedings — 12th Annual Convention* (Oct. 2–6, 1911), 94.

⁴⁶ The tragedies occurred while the American Academy of Political and Social Science was holding a conference on “Risks in Modern Industry” in Philadelphia. See speech of John Mitchell, “Burden of Industrial Accidents,” *Annals of the American Academy of Political and Social Science* 38, no. 1 (July 1911): 77.

⁴⁷ Florence Kelly, “Risks in Modern Industry: Our Lack of Statistics,” *Annals of the American Academy of Political and Social Science* 38, no. 1 (July 1911): 94–97.

seventeen days after the Triangle fire, the Roseberry Act was accepted by labor as a practical interim solution and approved unanimously in the Senate and Assembly.

Benefits Under the Compensation Alternative

The benefit package for those covered under the compensation system included both employer-paid medical care and adequate levels of lost income indemnification. Employers were required to furnish “such medical and surgical treatment, medicines, medical and surgical supplies, [and] crutches and apparatus, as may be reasonably required at the time of the injury and thereafter during the disability.” Medical benefits were, however, subject to a cutoff after ninety days or \$100. Income replacement benefits for most industrial accident victims were limited to approximately \$21 per week, with total aggregate benefits in any single injury not exceeding three times the average annual earnings of the employee or \$5,000, whichever was lower.⁴⁸ (The average weekly wage at the time was about \$18.) As an acknowledgement that disability often meant more than just lost wages and included its own extra costs, the act provided that totally incapacitated injured workers requiring the services of a nurse would receive weekly benefits of 100 percent of lost earnings, rather than the 65 percent awarded to all others.

Exclusive Remedy

In most cases, workers covered under the compensation statute traded off their rights to sue employers for the expectation of quick, sure and adequate benefits. Yet, following the lead of British compensation legislation, the Roseberry Act recognized an additional remedy was appropriate “when the injury was caused by the personal gross negligence or willful personal misconduct of the employer, or by reason of his violation of any statute designed for the protection of employees from bodily injury.” Under such egregious circumstances, injured workers had the option to either claim compensation under the act, or “maintain an action for damages therefor.”⁴⁹

⁴⁸ Note by Industrial Accident Board (IAB) to accompany Section 1, Chapter 399, Laws of California, 1911, hereafter Roseberry Act.

⁴⁹ Roseberry Act, Sections 12, 9, 8(1). As a comparison, the act provided for an annual salary for IAB members of \$3,600, or about \$72 per week.

Coverage

As a voluntary measure, the Roseberry Act applied only to those employers who elected coverage, and only if the employees at the workplace affirmed the decision. While initial hopes were that the voluntary system of liability without fault would attract significant numbers of employers, experience proved otherwise.

To encourage their enrollment, employers were told that the limited benefits of the compensation option offered them economic security and certainty, in contrast to the volatile liability system where awards were exceeding insurance coverage limits.⁵⁰ A New York State commission had found that 2.1 percent of fatal industrial injury cases had exceeded the insurance limit, and that larger sums still were being paid in cases of permanent disability. There had been a \$92,000 liability judgement against a California employer. "These instances plainly show that insurance under the old system of employers' liability is wholly inadequate, and that only through compensation, with its limited risks, can the employer be fully protected."⁵¹

Despite these inducements, the voluntary law failed to catch on. The compensation provision only enrolled a small percentage of workers. The Roseberry Act became effective in September 1911, but by December 1912 only about 45,000 of the 750,000 workers in the state came under its coverage, and most of these worked for large employers.⁵² There had been no provisions in the law to regulate insurance premium rates and many employers found the private insurers' rates for workers' compensation coverage to be prohibitive. Premiums for employers' liability coverage averaged \$1.71 per \$100 payroll, while premiums for workers' compensation were triple that amount. Many of the large employers who did enroll in the compensation plan did so after self-insuring their risk, and others sought

⁵⁰ "In determining whether or not he will elect compensation, a prudent employer will take into consideration his increased liability, the present tendency of the courts and juries to allow heavy damages for personal injuries, and the fact that the ordinary indemnity insurance is limited to \$5,000 for a single injury, and to \$10,000 where more than one person is hurt through a single accident."

⁵¹ Hichborn, *Story of the California Legislature of 1911*, 236-45.

⁵² While the average workplace in 1912 employed less than four workers, employers electing coverage under the Roseberry Act had, on average, 100 workers.

to set up mutual inter-insurance funds.⁵³ In any event, the disappointing levels of voluntary signup were due in part to exorbitant and unregulated insurance rates, and in part to fear of the unknown and ignorance about the new program.

The Industrial Accident Board

An important feature of the statute was the introduction of a new principle of administration in the form of an Industrial Accident Board (IAB) independent of the courts, with power to adjudicate any disputes or controversies. It was given no other official duties, but the three Progressive activist members appointed by the governor saw the IAB's role as broader than simply judging cases. These Progressives believed in professional administration, divorced from politics and run by specialists. Arthur Judson (A. J.) Pillsbury, Will J. French, and Willis Morrison each took on informal representation of a separate constituency — the public interest, organized labor, and employer — and they used the IAB as on-the-job training for their specialties.

Progressives generally believed that problems of government could be addressed intellectually; by collecting data, studying an issue and thinking it through, one could come to the right solutions.⁵⁴ In 1912, during a special legislative session, Senator Roseberry sought to strengthen the IAB's power by carrying legislation requiring employer recordkeeping on injuries and giving the IAB the authority to gather and disseminate statistical information regarding industrial accidents and their probable causes, and to investigate methods and devices for the prevention of accidents. It also authorized study of alternative systems of industrial accident insurance. Small employers and farmers, growers, and poultry raisers opposed the IAB's authority to enforce these statutes, and after a long fight, the Legislature exempted many of these farm and small employers from having to comply with the act. Nevertheless, the Board went to work gathering data wherever it was available.

⁵³ Industrial Accident Board of California, "First Report to Governor — September 1, 1911 to December 31, 1912" (hereafter IAB, 1912).

⁵⁴ See Discussion of the importance of governmental organization in Richard Hofstadter, *The Age of Reform* (New York: Vintage Books, 1955), 257–71.

Economic Outcomes of Disability

The statistics generated by the new law helped to define the problem of industrial injury and risks of work, and more importantly, to highlight the differences in economic outcomes between those covered under the employers' liability and those opting for workers' compensation. The data showed that those whose disabilities occurred while under workers' compensation were more likely to receive compensation without a dispute and lengthy court battle, and got substantially larger settlements as well.

According to the IAB, during 1912, 10,385 Californians suffered disability on the job, with 412 injuries resulting in death. Of 9,627 that were disabled for more than one week, 4,311 (45 percent) received financial assistance from their employers; 912 of the injured workers were in employments covered under the compensation provision of the Roseberry Act, and were paid according to the schedule of benefits. Only 10 of the 912 required a hearing before the IAB. Of 8,715 cases under the existing liability system, however, only 3,399 were able to negotiate settlements, and these were at low levels. "Settlements were made for losses of thumbs at the rate of \$66.94 per thumb, index fingers went at \$114.02, left arms for average of \$586.66 and right arms for \$1,577.65. Feet brought \$624.73 each and eyes brought \$649.09."⁵⁵ Settlements in death claims averaged \$989; the average age of those killed was 33 years and the average wage was \$19 per week. The IAB publicized the outrageously low sums that were the outcomes of liability law and asked: "Is California so rich in men that it can afford to sell them to insurance companies, in their very prime of life and heyday of earning power, at less than \$1,000 per head." They estimated that only 10 percent of the total wage loss of injured persons was borne by employers and insurance carriers under the liability provisions, with the rest "thrown upon those least able to bear the burden, the injured workers and their families."⁵⁶

As had the German autocracy in 1884, and the New York commission in 1910, the Progressives perceived the industrial injury problem as creating conflict that threatened the "social fabric." "When the State enacts a

⁵⁵ Letter from Harris Weinstock to Hiram Johnson, February 13, 1910. In Harris Weinstock papers, C-B 581, Part 1 (Bancroft Library, University of California, Berkeley).

⁵⁶ IAB, "First Report to Governor," 4.

compensation law, it does so, not primarily to establish justice between an employer and his injured employee, but to safeguard itself against a prolific source of poverty which may become a burden to the State.” They declared that “industrial accident ranks third among the causes of poverty in the world” and that there was an obligation to attack it at its roots. They argued that if tort remedies only paid 10 percent of lost wages, the State would be left with a significant problem of “pauperism” that could not be handled by any private insurance scheme.⁵⁷

The Next Round: Proposals for a Mandatory Compensation Act

The Roseberry Act had been passed as an interim measure as the Progressives, supported by organized labor, recognized that defects in the State Constitution made a strong mandatory act impossible. They accepted the need to pass a Constitutional amendment before attempting a more comprehensive system.⁵⁸ Senate Constitutional Amendment 32 created that authorization.⁵⁹ Even with its limited success, however, the implementation of the Roseberry Act could be seen as a dry run for a more comprehensive statute. The act provided experience in administration, time for investigation and analysis of other states’ and nations’ policies toward injured workers, and data for policy analysis activities to design and evaluate alternatives.

⁵⁷ 22 million American workers held industrial accident insurance policies, but their “only purpose is to furnish the holder with his narrow six feet of earth outside the Potter’s field, and a decent funeral without passing the hat.” One funeral in every ten was a pauper funeral.

⁵⁸ California State Federation of Labor, *Proceedings — 12th Annual Convention* (Oct. 2–6, 1911), 94.

⁵⁹ The complete text of Section 21, Article XX, as quoted by Hichborn, *Story of the California Legislature of 1911*, 244n280 reads:

The Legislature may by appropriate legislation create and enforce a liability on the part of all employers compensate their employees for any injury incurred by the said employees in the course of their employment irrespective of the fault of either party. The Legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section, by arbitration, by an industrial accident board, and by the courts, or either of these agencies, anything in this Constitution to the contrary notwithstanding.

In November 1911, the voters of the state approved the amendment 147,567 to 65,255. Industrial Accident Board, “Program for Workmen’s Compensation Legislation” (1913), 1.

The Workmen's Compensation, Insurance and Safety Act of 1913

To weaken support for employers' liability insurance in California, the IAB published reports both to shock the public with stories of the low indemnity payments paid under liability, and to cajole employers with assurances of improved labor-management relations if they adopted compensation coverage. While labor and employers took little initiative on their own, the IAB proposed a new type of compensation law, broad in scope and addressing not only the aftereffects of injuries, but a system of state regulation of insurance and industrial hazards as well, all concentrated in a single professionally administered commission.

Their proposal for an integrated system of compensation, insurance, and safety law was introduced by Senator Boynton in 1913.⁶⁰ Under the proposal, the Industrial Accident Commissioners would: 1) design and administer a statistical system designed to quantify the problem and structure of the problem of industrial injury; 2) coordinate a safety department through promulgating rules ("safety orders"), and assessing penalties for noncompliance; 3) provide oversight and direction to a state-run public enterprise insurance company; and 4) sit as judge and jury in the adjudication of disputed work injury cases. The proposals laid out by the Industrial Accident Board in 1913 still constitute the basis for California's system of injury compensation and regulation.

Benefits

The Progressives saw workers' compensation as a first step toward a comprehensive social welfare system, and always expected that health and medical care insurance was soon to come. Thus, their suggestion to remove the \$100 medical care coverage maximum of the Roseberry Act, and furnish "full medical and surgical relief" is not out of line. Cost and utilization containment was taken care of by giving control of medical care to the employer or insurer, by restricting the pool of physicians eligible to provide service, and by instituting a fee schedule for participating physicians.

Under the Roseberry Act, injuries lasting at least one week were compensable, but as a move to shift benefits to more severely disabled workers, the IAB proposed lengthening the "waiting period" for temporary total

⁶⁰ California Legislature, Senate Bill 905, Session of 1913.

disability benefits to 2 weeks, in effect reducing the number of compensable injuries by 30–36 percent.⁶¹ Organized labor opposed the lengthening of the waiting period but accepted the rationale, hoping that in time it would be remedied in their favor.⁶² The provision of the 1911 Act that gave those requiring full-time nursing care a higher level of replacement income was dropped without apparent opposition.

Insuring the Risk

As the IAB proposal was being formulated, the insurance market seemed untrustworthy. In California, many insurers had gone bankrupt in the aftermath of the San Francisco earthquake and fire of 1906. Those insurers that survived were shielded from Federal anti-trust action, and through rate-fixing cartels could force up prices, especially in a new market with little claims experience.⁶³ Insurers had shown this propensity with the high rates charged for compensation coverage under the 1911 act. Policymakers were faced with the knowledge that mandating compensation would require stricter insurance regulation or other means of assuring an adequate market with both available and affordable insurance coverage.

In an early exercise in policy analysis, the IAB studied various systems of insurance oversight and decided to attempt regulation through public enterprise competition.⁶⁴ Seeing private insurers as an obstacle to successful

⁶¹ The higher figure came from estimates prepared for the National Civic Federation by the IAC, and covered the first ten months of 1913. AFL/NCF Report (1914), 198.

⁶² Paul Scharrenberg (secretary, California State Federation of Labor), “Labor Legislation,” in *Labor Clarion*, Feb. 21, 1913, 5.

⁶³ Insurers maintained their cartels by subscribing to and adopting “advisory” rates of insurance premium rating bureaus. Insurers were protected from federal antitrust action before 1944 by Supreme Court rulings that insurance was not interstate commerce and thus not subject to federal antitrust law. After 1944, antitrust exemption was granted through the McCarran-Ferguson Act.

⁶⁴ Industrial Accident Board of California, “Program for Workmen’s Compensation Legislation, 1913.” The board laid out four policy alternatives in the area of insurance regulation: 1) the *status quo* — leaving the question of rate setting to the competition of the private marketplace. According to their research, such a policy existed in Great Britain, Russia, Spain and Greece but the members stated that it resulted in extortionate rates or “a savagery of competition” that drove hard bargains with injured persons or threatened the carriers’ solvency. 2) *Compulsory state insurance* had been seriously

implementation of the compensation law, the Board cited examples in Wisconsin, where a mutual insurance association was organized under the laws of the state, and in Michigan, where a "tentative, optional" state insurance fund was set up. The Board concluded that competition with private insurance carriers could equalize rates for compensation and liability coverage; a state-run insurance carrier would stand "ready to accept all risks brought to it at what it costs the State to do the business, leaving the field free to other responsible carriers to operate with so much of profit as they may be able to make by doing the business more efficiently and at less cost than the State can do it."⁶⁵ The IAB stressed that "the State should invade the sphere of private enterprise" in order to secure "just rates for employers and just treatment for injured workers."

The proposed State Compensation Insurance Fund (SCIF) would be assisted by a State Workmen's Compensation Insurance Rating Bureau (WCIRB) to provide advisory rates, with the intent "that the insurance rates shall be the most effective police force for making places of employment safe." Instead of a large bureaucracy, SCIF would be small, with an annual budget of \$68,000, and a 25-person staff. The WCIRB would operate with little additional staff (four clerks and two stenographers) on a \$12,500 annual budget.

Safety

The third element of the IAB proposal gave the Industrial Accident Commission power to make and enforce safety rules and regulations, to prescribe safety devices, to fix safety standards, and to order the reporting of industrial accidents. Such safety orders would be subject to review by the

attempted in Norway and Washington state, but the IAB said neither of these systems included coverage of all workers, and to do so would require "an army of officials" to administer. "To make a state monopoly inclusive of all employments would create a bureaucracy of intolerable proportions and high cost, while not to include under the protection of a compensation law all who labor is to fail of safeguarding the state from poverty due to industrial accident." 3) *State Control of Insurance Carriers* was dismissed by the IAB as "unworkable," a scheme which was abandoned by those jurisdictions that had attempted it. Instead, the IAB proposed 4) *Competitive State Insurance*, an idea borrowed from New Zealand (where Board member Will French was born) and other states of continental Europe.

⁶⁵ IAB, "First Report to Governor," 1912, 14.

courts. In addition, the IAB sought funding to set up safety museums in San Francisco and Los Angeles, “in order to show employers how to make their employments safe and make then show employees how and why they must help in saving themselves from harm.” Standards were intended to have the force of law, “without being as inflexible and difficult to change and adapt to experience as legislative enactments necessarily might be.”⁶⁶ With unbridled optimism, the Board expected that by instituting safety procedures, the injury rate could be cut in half.

Interest Group Response

Private Insurance Carriers. The proposed State Insurance Fund brought out significant opposition to the IAB plan, led by insurance companies wishing to protect themselves against attacks on their growing and profitable industrial insurance business. Premiums for employers’ liability insurance nearly quintupled from 1906 to 1913, and paid losses never exceeded 50 percent of premiums collected.⁶⁷

Large insurers tried to scuttle the State Insurance idea before it had a chance to prevail. Soon after the release of the IAB proposal, the Aetna Life Insurance Company (the state’s second largest liability insurer in 1912) sent letters to agents and other insurers urging vigorous opposition to the measures. “If you are selling casualty insurance, do you intend to sit idly by and allow the State to establish a business which eventually will abolish this source of income for you?”⁶⁸ Aetna raised the specter that successful encroachment in the compensation area would eventually lead to State insurance in all other areas as well. Aetna predicted that if the 100,000 people “interested” in the insurance business in California were to unite,

⁶⁶ Industrial Accident Board of California, “Program for Workmen’s Compensation Legislation, 1913.”

⁶⁷ Premiums had grown from \$500,000 in 1906 to \$1.27 million in 1911, and passed the \$2 million mark the next year, rising to \$2.3 million in 1913. Paid losses fluctuated between 23 and 34 percent of premiums between 1906 and 1912, but jumped to nearly 48 percent of premiums in 1913 as more liability claims were won under the liberalized measures of the Roseberry Act. In 1906, fourteen companies wrote liability coverage in California, with only one company, Pacific Coast Casualty, headquartered in the state. The number of companies doubled by 1912, with all but two located outside California. Reports of Insurance Commissioner of California, 1906–1913.

⁶⁸ Quoted in San Francisco Labor Council, *Labor Clarion*, February 21, 1913, 8.

that state insurance could be defeated. Insurer representatives sought to ally themselves with employers by charging that the employees' interest in the workers' compensation area was to see "how much he can get out of the industries of California."⁶⁹

Employers Response. Perhaps spurred by the accident insurers, the California Employers Federation was set up in early 1913 by large employer to "pull the teeth" from the compensation act and other labor bills pending in the Legislature.⁷⁰ Among other amendments to the compensation provision, the employers proposed that indemnity benefits pay 50 percent rather than 65 percent of lost wages. Several conservative newspapers around the state kept up an attack on the Boynton bill after its introduction. The San Diego Union called it "a sop to the Labor Unions."⁷¹ The Los Angeles Times said the bill would "paralyze production in California and perpetuate the stranglehold of the State political machine."⁷² And the *San Francisco Chronicle* criticized the plan as a dangerous scheme to centralize power in the proposed Industrial Accident Commission.

Labor Response. Labor was extremely pleased by several parts of the IAB proposal, particularly those concerning insurance and safety regulation. In arguing for an alternative source of compensation insurance coverage, the San Francisco Labor Council charged that the private casualty insurers had dictated employment practices for employers, frequently calling upon them "to discharge workers who refused to allow the insurance adjusters to defraud them out of compensation." The inclusion of a state fund would allow employers to take out insurance at fair rates. The establishment of the safety department, moreover, would be "tantamount to the passage of hundreds of minor safety acts," enabling the IAC "to regulate industries as effectually as the Railroad Commission regulates public utilities."⁷³ For this and other reasons, organized labor, represented by the State Federation of Labor, saw the Boynton bill as the "greatest achievement" of the 1913 session.

⁶⁹ Quoted in *Labor Clarion*, March 28, 1913, 10.

⁷⁰ *Labor Clarion*, March 28, 1913, 10.

⁷¹ *Labor Clarion*, May 14, 1913.

⁷² *Labor Clarion*, April 17, 1913.

⁷³ Paul Scharrenberg, "Labor View of Legislature," *Labor Clarion*, May 16, 1913, 4.

The Legislative Process

The IAB Proposal (Senate Bill 905) was introduced by Senator Boynton on January 28 and referred to the Committee on Labor and Capital. On April 8, after the “get-together” stage of the legislative process,⁷⁴ and many hearings, the bill was reported out of committee, with a majority recommendation of “do pass” and a minority report attached to a substitute bill authored by Senator Wright. The bill was returned to committee April 18 for further amendment, emerging on April 21. During Senate debate beginning on April 23, opponents first tried to make the bill elective, then tried to strike the provision for state insurance, and finally attempted to strike out the safety provisions, but were able to muster at most six votes for these amendments. During final Senate debate on April 28, opponents tried to exempt farmers and stock raisers from the Act, and to allow these employers the defenses in force before the 1911 law. This was rejected by a 9–25 vote. A measure to ensure that no more than two of the three IAC commissioners could belong to the same party was rejected 7–27. The Senate then approved the compensation, insurance, and safety package by a 30–5 margin.

In the more conservative Assembly, opponents were somewhat more successful. Farm employers won exemption from the Act just as they had convinced the Assembly to absolve them from injury reporting the previous year, leaving farmers to elect coverage if desired. Household domestics were also exempted. The Assembly consented to removing the \$100 maximum on medical assistance, but the 90-day limit on medical benefits remained. Labor continued to oppose, but was unable to stop, the elongation of the waiting period on benefits to two weeks after injury, during which only medical care, and no indemnity benefits would be paid. Three days before adjournment, the bill passed 55–13. By final passage, it had changed little from the plan written by the IAB. Temporary total disability

⁷⁴ *Labor Clarion*, March 28, 1913. “On many subjects different bills have been introduced, entirely irreconcilable as to aims and means to accomplish them. The authors and other persons behind such bills are advised by the solons to get together and settle their differences out of court, that is, before pressing them for action by a committee. . . . Many a measure thus concocted will be but a miserable compromise, satisfying neither side, but exempting the representatives of the people from going on record either for or against a clean-cut policy.”

would be compensated at 65 percent of average weekly earnings, subject to a maximum aggregate of three times average annual earnings, and extending for no more than 240 weeks; 40 weeks of benefits would be payable for each 10 percent of permanent disability, with life pensions of 10-40 percent for those above 70 percent disability. Unlike other states, there was no list of benefits for specific injuries, such as loss of a member (finger, hand, etc.); rather, all payment would be related to disability level under a schedule to be promulgated by the IAC. Death benefits payable to dependents ranged from \$1,000 to \$5,000, with only burial expenses paid in cases where the decedent had no dependents.⁷⁵ As in the earlier Roseberry Act, compensation was the exclusive remedy available to injured workers, except when the employer was guilty of gross negligence or willful misconduct. In those cases, the employee had the option to claim compensation or sue at law for damages. Insurance carriers were prohibited from offering insurance against such gross negligence.

A year after the law was passed, some IAC officials boasted that the workers' compensation law's safety regulations had reduced the number of industrial accidents by 50 percent.⁷⁶

CONCLUSION

Between 1907 and 1913, the burden of job-related injuries began to shift, slowly but perceptively, from workers to employers until both parties saw common interest in developing a new order. A major shift occurred in the way in which California workers were compensated for injuries occurring on the job. As industrialization changed the systems of work, the courts began to adapt laws to follow new circumstances. Constitutional problems were at first sidestepped, then dealt with through the direct Constitutional amendment process made possible by other Progressive reforms. Policy

⁷⁵ By pocket veto, the governor rejected a bill (SB 1519) "to protect married men under new compensation law." The bill would have required employers to pay the death benefits incurred on account of death to an unmarried employee into the state Accident Prevention Fund. The bill was designed to prevent discrimination against married workers "as it is feared that employers will prefer to employ unmarried men so as to save the cost of death benefits." State Federation of Labor, Summary of Legislation, 1913.

⁷⁶ "Millions paid to injured workmen," *Insurance and Investment News* 15, no. 3 (January 1915): 83.

analysis was used to identify and clarify program objectives, evaluate criteria and alternative institutional structures. A new system of social insurance was launched with high hopes and expectations. The passage of the Roseberry Act in 1911 and the Boynton Act in 1913 gave California the tools to begin implementing a comprehensive system of workers' compensation, insurance, and safety. While it has been through many changes, the basic structure remains even today.

With roots in Germany and in British common law, the laws were reformist measures with several objectives, but committed the state to ameliorating the problems of industrial injury for both injured workers and their employers. In passing the 1913 Act, the state also undertook to establish a state enterprise that would try, through example and competition, to change the structure of insurance coverage. As had been the case in Germany, the planners saw workers' compensation as a first step in a comprehensive state system of welfare for its people; its expectation was that other parts would follow. It was intended to help reduce the number of injuries, as well as their after-the-fact compensation. But passage of the law was only the beginning; the complex problem of implementation was to follow.

★ ★ ★