DETROIT REVOLUTIONARY MOVEMENT RECORDS

BOX 5 OF 16

FOLDER 26

WORKMENS COMPENSATION

MTLA SEMINAR

PRESENTATION 2 OF 2

SOCIAL SECURITY DISABILITY BENEFITS

I propose here to discuss briefly, social security disability benefits. It is my hope that the discussion will be beneficial to both attorneys who handle these cases at the hearing level and above and to laymen who deal with claimants at the early stages of their case. Limitations of time and space will permit only a brief discussion as the most important aspects of this topic. I would suggest a couple of references for more thorough analysis.

The Social Security Administration publishes a Social Security Handbook. This is available from the Administration or from the Government Printing Office. This provides a quick answer to most of the less complicated problems that one is likely to encounter. It is also useful in that it usually informs you of the position that the Administration is likely to take on any particular issue. I submit, however, that at least some of the positions taken in the handbook are subject to challenge in the courts. Beyond this, one must go to one of the loose-leaf services published in this area. Commerce Clearing House puts out one that is very good. It provides a discussion of the law in virtually all areas relating to social security, useful indices, digests of most of the important cases and complete reports of all current cases. Like most loose-leaf services, it takes some getting used to before one is comfortable using it.

THE IMPORTANCE OF SOCIAL SECURITY DISABILITY BENEFITS

Many people have a tendency to downplay the importance of social security disability benefits. I think this is based on the

assumptions that the amount of the benefits is insubstantial and that the determination of disability is a matter of routine. I submit that, except in the case of older workers, in the long run, social security cases are likely to be more beneficial than even a large workmen's compensation settlement or a good size tort judgment. Furthermore, I believe the following discussion will demonstrate that the determination of entitlement is far from automatic.

INITIAL PROCEDURE

Basically speaking, an individual is entitled to social security disability benefits if he is disabled from any kind of work (the definition of disability will be discussed in more detail later) and he has worked half of the time for the 10 years preceeding the onset of his disability. An individual who became disabled before reaching the age of 18 may be entitled to benefits even though he has never worked. Widows or widowers of wage-earners are also entitled to disability benefits. Their disability, however, is measured by a different more stringent standard. They must fall within certain specified categories. Since, of course, people and their medical problems never fit into neatly defined categories, this results in an horrendous situation and one too complicated for discussion here.

An individual begins his claim by making application at his local social security office. It is my experience that the people in the local offices are very helpful and cooperative. There is no need for an attorney to be present at this stage.

Generally speaking, it is the responsibility of the claimant to provide medical information which will establish that he is disabled. In some cases, this is accomplished by the claimant's requesting his treating doctors to send information to the social security office. In other cases, the social security office will write to the doctors requesting information. It should be pointed out that this work is not actually done by the social security administration, but by a state office, in Michigan the Department of Education, Disability Determination Service.

If an attorney has been representing the claimant with respect to any kind of personal injury litigation, he should, of course, provide copies of any good medical reports. In some cases, the Disability Determination Service will arrange and pay for an examination of the claimant by a doctor of their choice.

After all of the evidence has been accumulated and reviewed, the Social Security Administration will issue a "Determination." If the claimant disagrees with this, he may request a "Reconsideration Determination" within six months. Again, this is a relatively automatic procedure and no attorney is necessary. At this point, the claimant might wish to submit additional reports from his doctor and in some cases, the Administration will arrange for an exam by their doctor. If the claimant is dissatisfied with the Reconsideration Determination, he may request a hearing before an Administrative Law Judge (formerly Hearing Examiner) within six months.

THE HEARING

The hearing before the Administrative Law Judge is the critical stage in social security proceedings. I feel that it is of the greatest importance that the claimant be represented by an attorney at this stage. Of course, since the attorney must have time to prepare for the hearing, it is equally important that the attorney be consulted as soon as an adverse Reconsideration Determination is issued.

Although it is stated that these proceedings are informal, there are many important evidentiary questions which can come up at a hearing. Furthermore, the accumulation and presentation of evidence at such a hearing must be handled by an expert litigator if it is to be effective. Finally, once the hearing is closed, the factual setting of a case is virtually fixed. Accordingly, it is an almost impossible task for an attorney to handle an appeal if he has not participated in the hearing.

APPEALS

After the hearing, there is a right to review by the Social Security Appeals Council. In most cases, review is simply denied and even in cases in which there is some review, they rarely order a transcript of the hearing. In some cases, however, a pursuasive memorandum carefully outlining the facts and applying the pertinent law will pursuade the Appeals Council to either reverse a judge's decision or to remand the case for further hearing.

Once the Appeals Council has either reviewed or refused to review a case, there is an appeal to Federal District Court and

eventually to the Court of Appeals. On issues of fact, judicial review is limited to the question of whether or not there was substantial evidence to support the administrative decision.

DEFINITION OF DISABILITY

The vast majority of all the problems in social security cases stem from the unbelievably restrictive definition of disability found in the Social Security Act. Section 223(d) provides that "disability" means:

> "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months;"

The act goes on to say, however:

> "an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy., regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceeding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country." (Emphasis added)

Thus, an individual is not considered disabled if there are a substantial number of jobs anywhere in the country that he could perform, and this is true regardless of whether or not he would be hired for such jobs. (There is a separate definition of disability

for widows or widowers as pointed out above and also for blindness).

As we all know, one of the biggest factors in disability is the restrictive hiring practices of employers. In Muskegon, for example, no person with anything wrong with his back, can be hired by any of the major industries. Yet, the Social Security Act specifically provides that this is not to be considered in determining disability. It thus seems to me, quite clear, that a person may for all practical purposes be totally disabled and yet ineligible for social security disability benefits. The courts have, to a very large degree, upheld the Administration in applying this restrictive definition to social security disability claims.

I regularly read the advanced sheets in social security cases, fully expecting, some day, to find a decision that goes something like this:

> "Mr. X does indeed have degenerative disc disease in his back, and we concede that he has been paralyzed on one side as a result of his stroke. It also appears clear that he suffers from emphyzema, yet there is no doubt that he could sell apples on the street. We take judicial notice of the fact that there are substantial number of street corners in numerous regions of the country. Accordingly, we must find that Mr. X is not disabled within the meaning of the Social Security Act."

I submit, that there is a tremendous need for legislative action in this area. Those of us who have any regular contact with our Senators or Congressmen should repeatedly call their attention to this very restrictive definition in the midst of what many people consider to be a hallmark of social legislation.

I also submit the possibility that the restriction is so severe that if it were applied literally, no court could ever review a determination by the Administration. This may be an unconstitutional denial of Due Process.

PROVING DISABILITY

As restrictive as the definition may be, there are ways that a good attorney can prove disability. In fact, a very large number of adverse decisions are reversed at the hearing level and a significant number are reversed at the District Court level.

MEDICAL EVIDENCE

Of course, the attorney must start with the medical evidence. It is important to obtain a report from every doctor that has treated the patient. A minor hand injury that was overlooked in a workmen's compensation case might be just enough to disqualify a man from fine work which his much more serious back injury would permit him to do. If the treating doctors are reluctant or uncooperative, a personal visit from the attorney can often make the difference.

The attorney must also review the medical evidence in the claimant's file. The administrative law judge will provide this to the attorney on the day of hearing. However, this is often too late. By writing to the administration as soon as the case comes into the attorney's office, he may obtain either a copy of the medical reports contained in the file or the opportunity to go to the local Social Security office and review the medical reports. I submit that this is an absolutely essential step since without it

you have no idea where you stand.

Finally, in amny cases, if an attorney is to do a good job, he must be willing to arrange and pay for an examination of his client by a medical specialist.

RULES OF EVIDENCE

The United States Supreme Court has held that written reports of doctors are admissable into evidence and not subject to the hearsay objection. Secretary v Perales 42 US 389 (1971) (Any attorney experienced in personal injury litigation will find it amusing to note that the court based its decision in part upon the assumption that the statements of medical professionals are somehow inherently reliable and that it is not necessary to be able to cross-examine them.)

The holding in Parales has some important effects on the trial of social security cases. First of all, one need not depose nor call as a witness the claimant's doctors. Their reports are admissible. The same, however, is true for reports obtained by the Administration. The Supreme Court has clearly held that these are admissible into evidence. This does not completely forclose you, however, from cross-examining the Administration's doctors. Perales relies in part on the fact that there are administrative procedures whereby a claimant may request that any witness be subpoenaed to appear at the hearing. Thus, if the attorney feels that it is important to his case to cross-examine the administration's doctors, he may obtain this right by requesting a subpoena. (Before doing this, however, one should carefully consult the regulations in that there are certain procedures to be

followed and certain time limits to be observed.

In practice, I find that things work out better if I first demand that the doctor be subpoenaed and then suggest that in the alternative, I will be willing to cross-examine him by deposition. In some cases, the Administrative Law Judge will come to the deposition with his reporter. In other cases, he will allow you to take the deposition as one might do in Circuit Court. In the latter situation, there is a distinct advantage since the U.S. Attorney never appears to represent the Secretary and you are free to cross-examine your opponent's doctor without your opponent being represented by counsel!

Another peculiar problem concerning medical reports grows out of reviews of the evidence made by doctors hired by either the Social Security Administration, or the State Disability Determination Service. These are, of course, double hearsay since not only is the doctor not present to be cross-examined, but he has never seen the patient and his comments are based on other reports which he has reviewed. I believe that this evidence is excludable under the hearsay objection and under the Supreme Court's holding in Pareles. Most Administrative Law Judges agree with this position. It should be pointed out that virtually every case, there will be two sets of such comments contained on the "Disability Determination Transmittals" which are in every file. The Administrative Law Judges will not remove these from the file since they are necessary to prove that prior determinations have been made and to establish jurisdiction. However, ordinarily they will agree that the medical opinion

contained in these documents is not admissible into evidence.

THE BURDEN OF PROOF AND THE VOCATIONAL EXPERT

One of the most helpful bits of law in social security disability claims has been a holding by numerous Courts of Appeals including the 6th Circuit that once the claimant has established that he is disabled from his last job, the burden of proof shifts to the Administration. The Administration must then prove that jobs exist in the national economy in significant numbers which the claimant could perform. Garrett v Finch 436 F2d 15 (1970). In most cases, the Administration attempts to carry this burden of proof by the testimony of the "vocational expert". (They used to refer to him as an "impartial" vocational expert but in view of his obvious reason for being there, they seem to have dropped this recently). This is usually a person, often a PhD, experienced in the rehabilitation of handicapped individuals. Like expert witnesses in any other field, they run the entire range from those who think it is a game to beat the claimant, to those who carefully and literally answer the questions presented, to those who are genuinely concerned with the practical possibilities of rehabilitating the human being before them.

Most often, they are given an assumed set of facts concerning the extent of the claimant's physical disability. Their testimony is usually based on some survey or other of jobs in a particular area. In a typical case, they testify that in spite of the man's bad back and emphyzema, he could work as a night watchman or as an assembler of small parts or passing out tickets in a municipal

parking lot, etc., etc.

Cross-examination of these experts must be tailored to fit the claimant and the expert. Some experts will concede that as a practical matter, an illiterate cannot find much work in our society. Others will point out that literacy may be a hiring requirement but does not affect performance on the job and thus, should not be considered under the statutory definition. Some will concede that employers reserve jobs requiring a high degree of manual dexterity for women because it is their experience that women do these jobs better. Others say there is no factual basis for this position. Some will suggest the job of "filer of small hand tools" but on cross-examination, admit that this job is usually reserved for the owner's cousin or the thirty year seniority man. The list could go on and on.

In the appropriate case, the attorney might consider hiring his own vocational experts to interview his client, perhaps administer some psychological tests and testify on his behalf. As with the physician, I believe his written report would be admissible into evidence. However, if the Administration has a live witness, the attorney might wish to do the same.

In many cases, you may find your self with a built-in vocational expert already on your side. When a man is denied social security disability benefits in the early stages, he is automatically referred to the Division of Vocational Rehabilitation. In many cases, you will find that he has made significant contacts with them, that they have evaluated him and they may have determined that there is no practical chance of rehabilitating him to

gainful employment. If this is true, one can obtain a report from the vocational counselor and submit it into evidence. The vocational expert testifying for the Administration, will usually admit that a vocational counselor who has interviewed the man on numerous occasions, possibly tried him out in work situations, and administered psychological tests, is in a much better position to evaluate his ability to work than an expert simply making observations during a trial.

PREPARATION

Thus, I believe that these are cases which require very careful and thorough preparation by the attorney. If this is done, however, I believe that many of them can be won.

A WORD ABOUT ATTORNEY FEES

I believe that Section 206 of the Social Security Act contemplates representation on the basis of a contingent percentage fee of up to 25%. Further it is my understanding that when a claimant appears before an Administrative Law Judge without counsel, he is informed of his right to obtain counsel and if he tells the judge he cannot afford an attorney, he is informed that he can obtain an attorney on the basis of a contingent percentage fee. In a case in which an attorney has filed an appearance and in which benefits are granted, the Administration will withhold 25% of the accrued benefits.

They require, however, that before these benefits are paid to the attorney, he submit to them an accounting of his time and effort. Frequently, they reduce the fee! Furthermore, the 6th Circuit has

recently said "routine approval of the statutory maximum allowable fee should be avoided in all cases" Webb v Richardson, _____ F2d _____, CCH Section 17.001 (6th Cir, 12/20/72).

It seems to this practitioner that the foregoing discussion should clearly point out that it is of the greatest value to the claimant to have an expert attorney represent him. On the basis of 25% of the accrued benefits, even a busy practitioner can handle social security cases on a reasonably profitable basis. If the fees are regularly reduced, however, claimants will be left with attorneys who are not expert litigators and who will not invest the necessary costs or with busy trial lawyers who will not devote an appropriate amount of time to their case.

Accordingly, I respectfully disagree with the above quoted comment of Judge McCree. He has been involved in a number of social security cases before the 6th Circuit and should be well aware of the complexity of these cases and of the value to the claimant of a good attorney. I submit that where the claimant has previously agreed with the attorney to pay him a contingent percentage fee, that fee should be routinely approved.

CONCLUSION

In conclusion, I would emphasize the following points: (1) Anyone who is seriously disabled should apply for social security disability benefits. Through the Determination and Reconsideration Determination stages, representation by an attorney is not necessary, but if an individual has an attorney who has any medical reports

concerning him, he should ask the attorney to send these to the social security office. (2) After an adverse Reconsideration Determination, any serious claimant should consult an attorney immediately. (3) These are difficult, complex cases and should be treated as such by attorneys who handle them. (4) With careful preparation, a good trial lawyer can win a large number of these cases.

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SEMINAR PRESENTATION

SUPPLEMENTAL BENEFITS AND WORKMEN'S COMPENSATION

MICHIGAN TRIAL LAWYERS ASSOCIATION

January 12, 1973

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INTRODUCTION

THE OVERALL PERSPECTIVE

There is an annual gross national product in the United States. Everything we consume and all the services we enjoy are produced by the labor of persons in the work force.

Except for the using up of capital accumulated from the past and present capital investment in each fiscal year, our entire population, old and young, employed and unemployed, rich and poor, are supported by the efforts of those who are gainfully employed or producing socially useful services (such as homemakers).

The gross national product includes governmental activities--even the defense budget. For the purpose of this discussion, I wish to lump all the cost of living and all activities and all the effort of delivering it into one great generalization. We actually live upon what we produce now!

How what we produce is divided is what politics are all about. Who lives a life of ease and who does all the work is what most legislation is all about.

The methods of distributing and redistributing income are growing more and more complex. It is not simple and requires study.

Workmen's compensation benefits represent one form of income to members of the work force who are injured. There are other sources of income for persons not working due to injury and the picture is becoming a complex one with employers and government claiming over-lap and duplication.

Legislative proposals, collective bargaining proposals, and court cases and private insurance are four ways income distribution is affected.

It is most important for an organization such as the Michigan Trial Lawyers which prides itself on its skill in representing the injured to establish the closest possible contacts with the organizations representing our clients at their place of employment so that we may learn from them, learn their problems, learn the differences of opinions and the conditions of their work which produce these opinions. It is only by working closely, too, with unions that we can fulfill in the legislative halls what we have learned to do with some success in court.

SUPPLEMENTAL BENEFITS

Blue Cross-Blue Shield.

Medical Insurance other than Blue Cross and Blue Shield.

Sickness and Accident Benefits (U.A.W.).

Extended Disability Benefits (U.A.W.).

Pension Benefits (U.A.W.).

Group insurance, U.A.W.-G.M. - Metropolitan.

Social Security.

Veteran's Administration.

Welfare and Medicaid.

Benefits such as unemployment compensation and supplemental unemployment compensation under some union contracts are not discussed as these benefits are for those who are available for work and are not disabled.

BLUE CROSS - BLUE SHIELD

Upon interviewing a compensation claimant, the past medical expense is an important factor. Sometimes medical expense may be the important financial item. Many conditions, when the illness is borderline due to etiological factors and the reluctance of initial treating physicians to link the illness with the work, the client's claim may be solely medical. These bills are often paid by Blue Cross-Blue Shield.

Get all the Blue Cross-Blue Shield identification data. Write to the Subrogation Department at 441 East Jefferson Avenue in Detroit. Tell them what you're trying to do, give them an authorization, and ask them to send you a list of all of their hospital and medical payments during the time period you are interested in. Confirm your entitlement to a 30% fee with them.

Regarding attorney fees: Leonard Woodcock's statement before the National Commission, dated January 25, 1972, says Michigan allows "30% in decisional awards, exclusive of medical and hospital costs recovered."

Rule 408.44, Rule 14 -- (1) --

> "Attorneys shall deduct reasonable expenses from the accrued compensation, including reimbursement for hospital, surgical, medical and statutory burial expense which have been incurred by the plaintiff and may charge a fee not in excess of 30% of the remainder."

I respectfully submit that Mr. Woodcock's construction is in error, induced by the very poor wording and punctuation in the rule.

In some cases you may wish a copy of the physician's certificate of services rendered. Usually the defendant is satisfied by a statement from the physician as to services rendered. Often these are services which the patient is not even aware were billed, such as hospital consultants, x-rays and in compiling a list of medical expenses, Blue Cross-Blue Shield can be a big help. They are, however, very slow and the request should be made early. A list of medical expenses prepared chronologically is a great help in ordering the case for presentation. A complete set of copies of the medical bills attached to the list should be furnished in advance to the other side with a request that they be stipulated as incurred and reasonable. The only issue is then causation. The original list with attachments is given to the hearing referee.

Mr. Fletcher at Blue Cross-Blue Shield is available to assist in delivery of these records--call him at 1-800-552-6776.

Treating physicians are pressured by the economics of their practice to ignore of bury evidence of work connection of the results of trauma and industrial disease. Blue Cross-Blue Shield is operating a substantial recovery activity. Its medical expense recovery activity is not a burden on the claimant. The 30% fee makes it attractive to lawyers. Its social utility is that the illness or disease are determined to be work related. The client's rights are protected and the general subscribers to Blue Cross-Blue Shield do not carry an improper burden.

Upon a redemption, the existence of Blue Cross and Blue Shield like the existence of medical care for a veteran is an important factor that may resolve a case in favor of redemption settlement. In such

cases, Blue Cross-Blue Shield should be approached and an understanding reached as to ~~past~~ future medical. The redemption hearing record should contain protection for the claimant such as an acknowledgment that its more than likely the company is correct and future trouble will not be work-related.

MEDICAL PAY - OTHER THAN BLUE CROSS - BLUE SHIELD

Many medical pay provisions in auto policies do not cover workmen's compensation benefits. Unless this language is in the policy, then all work injuries occurring in connection with an auto accident would give rise to a claim for medical benefits under a contract and this would not be a third-party claim and would be free of any comp carrier reimbursement claim (on all persons so injured, this should be checked).

Without exception, group medical insurance policies exclude workmen's compensation injuries. This is probably because they usually represent an employment fringe benefit and the employer does not want to duplicate coverage. Groups often have a deductible. This may be an area of dispute. If there were no deductible, the claimant would not care. Sometimes, the simultaneous need for treatment of an occupational and non-occupational condition creates conflict.

Individual policies may not exclude workmen's comp injuries. They should be reviewed.

SICKNESS AND ACCIDENT BENEFITS

In Flint where over half the work force works for General Motors, the Metropolitan Life Insurance Company is the administration of the UAW-GM sickness and accident benefits. The availability of these benefits for up to 52 weeks in cases of non-work connected disabilities is a very great factor in the fact that many work connected disabilities are never classified as workmen's compensation cases. The S & A benefits are greater than the compensation rate. If the injured employee receives S & A benefits for what is actually work incurred disability and has his medical paid by Blue Cross-Blue Shield, he usually feels no incentive to file a compensation claim. These cases usually come in to the lawyer's office at the end of the S & A period, when the sick benefits have run out.

Often out-patient medical care not covered by Blue Cross-Blue Shield is what drives the person to see a lawyer. If the disability period is short, the client is likely not desirous of pressing the claim as he must repay the S & A benefits received. He definitely is not interested if he had to pay a 30% attorney fee to repay sick benefits. If the health recovery is completed without expected future disability, frequently the worker chooses not to press his claim. However, it should be borne in mind that during periods of sick leave one does not accrue seniority or accredited time for pensions. During periods of compensable leave under the UAW contract, seniority continues and pension accredited time is built up.

It is particularly the young worker with low seniority who needs his sick leave time properly assigned to a compensable leave as this may make all the difference as to whether or not he keeps his job.

Another group who have a real concern are those who are approaching vesting for retirement pensions.

EXTENDED DISABILITY BENEFITS

In Flint, this is called EDB. It is a continuation of payments after S & A expires. Application for EDB also requires application for Social Security. EDB payments for a period covered by Social Security are repayable and are normally collected. The employee is instructed to deliver a copy of the Social Security determination to the Plant's insurance office. If Social Security is not granted, the EDB continues under conditions of eligibility . If Social Security is granted, EDB is reduced. Currently, EDB is payable for a period equal to the seniority of the employee. These benefits are obtained administratively through the plant insurance department and through union efforts. A claimant's lawyer may affect the course of the decision by his workmen's compensation representation. EDB is incompatible with workmen's compensation and is ordinarily paid in a contested comp case only upon an agreement to reimburse the EDB if comp eligibility is established.

A further refinement of the administrative problem is a practice now used in General Motors of making a disability payment from a special fund which is neither comp nor sick benefits which alleviates hardship and postpones the decision as to whether the disability is work related or not.

418.821 Payments unassignable; judgment proof; lien. [M.S.A. 17.237(821)]

Sec. 821. (1) No payment under this act shall be assignable or subject to attachment or garnishment or be held liable in any way for any debts. In case of insolvency every liability for compensation under this act shall constitute a first lien upon all the property of the employer liable therefor, paramount to all other claims or liens except for wages and taxes which lien shall be enforced by order of the court.

Assignment to insurer; attorney fees.

(2) This section shall not apply to or affect the validity of any assignment made to an insurance company making an advance or payment to an employee under any group disability or group hospitalization insurance policy which provides that no benefits shall be payable thereunder for any period of disability or hospitalization resulting from accidental bodily injury or sickness arising out of or in the course of employment. Whenever a group disability or hospitalization insurance company enforces an assignment given to it as provided in this section, it shall pay, pursuant to rules established by the director, a portion of the attorney fees of the attorney who secured the workmen's compensation recovery. For purposes of this section a self-insured employer shall be deemed to be an insurance company. Where an insurance company insures both workmen's compensation and group disability or group hospitalization, it shall be permitted the adjustment provided in this section.

PENSION BENEFITS - (UAW-CIO)

The established entitlement to workmen's compensation even for a protracted period is no guarantee that a disability pension is forthcoming. First of all, ten years of accredited service must be had. Second, the disability pension is tied to payroll status and if granted is granted only at termination. For all G.M. workers, this is crucial to the redemption practice for employees with a serious disability which may be found to be totally and permanently disabling and with ten years of service must apply for and obtain the pension before a redemption which requires a voluntary quit.

Since the pension benefit is compatible with the receipt of weekly disability comp benefits, the entire practice of redemptions in the area of UAW employees who are still on the payroll is subject to close scrutiny. Mr. Woodcock, President of the UAW, in his testimony before the National Commission asked that redemptions be abolished. It is understandable that the manifold, over-laping benefits for G.M. workers and UAW members do create a situation where redemptions of employed persons are frequently considered against the interest of the worker.

This may not be true where a worker has been fired and his grievance has been dropped, lost, or is hopeless. The question of whether a grievance is pending and its disposition and chances must be verified with the union representatives along with the employee's pension status.

The various trade unions also have pension plans. As part of the representation of the worker, this plan should be obtained, the benefits varified and their relationship to workmen's compensation established.

Redemptions may cut off pension entitlements which are ripening. When a case is redeemed for a worker with eight or nine years of seniority under a pension plan that vests retirement pension rights at ten years, the attorney may be selling future pension rights rather than future workmen's compensation benefits.

EXAMPLES:

I. An employee who appears emotionally upset to the point her judgment is impaired and you cannot rationally discuss with her her case which has been redeemed. She had discharged her lawyers and redeemed the case on her own. She had adjourned the redemption hearing once to establish her right to EDB after drawing out her one year of S & A benefits. She then redeemed her case for $15,000.00 of which all but $5,000.00 it is agreed is to in part repay the past non-occupational benefits given her on a reimbursement agreement with the balance to be credited by the employer to future EDB which is interrupted for a period sufficient to offset the payment. In all actuality, she received $5,000.00 by redeeming her workmen's comp case and quitting her job. She never applied for a total and permanent disability pension and was ignorant of these benefits. A T & P pension is compatible with workmen's compensation; EDB and S & A are not.

The advice given was that if she would agree to have a guardian appointed, her guardian could bring an action in an effort to have the

redemption set aside.

II. See Attached.

The denial of GM disability pension benefits through corporate decisions and impartial medical decisions has not been subject to any reported court decision. The pension proceedings are not subject to the grievance procedure. At the same time, the General Motors Corporation claims courts have no jurisdiction to review unless all contract procedures are exhausted. There is a serious question as to whether or not this is so due to state laws regarding the effect of arbitration statutes and the common law. This area will only be clarified by court suits for disability pensions when wrongfully denied.

Example II

September 22, 1972

Dear Client

You have consulted me regarding your General Motors total and permanent disability pension. I have made an investigation and wish to report what I have found and tell you the basis upon which this office would continue your representation and attempt to obtain your pension for you.

First of all, on October 26, 1971, your workmen's compensation case was redeemed while you were represented by At that time, the corporation apparently recognized that you were eligible for extended disability benefits from the Metropolitan Life Insurance Company through the General Motors Group plan for a period equal to your credited service of slightly in excess of fourteen years. I have been informed by Union representatives that the E.D.B. pays $350.00 per month, but takes against it as set-off any Social Security, workmen's compensation or pension benefits received by the worker. In view of the lump sum settlement of your workmen's compensation case, the $13,000 will be applied at the rate of $350.00 as a set-off against extended disability benefits. This means that you will not again be eligible for extended disability bnaefits from the Metropolitan until about three years and three months has elapsed from the time of the settlement, or approximately, March of 1975. Whether or not you can draw EDB in March of 1975 will depend upon your physical condition at that time.

At the time you settled your workmen's compensation case, your application for total and permanent disability pension was pending. It was understood and agreed between you and the corporation that your voluntary quit which was a condition of your workmen's compensation redemption would not affect the pendency of your pension application. On December 1, 1971 the corporation denied your pension, and notified you by mail and the notification arrived at your home to your wife while you were at the Veterans Hospital in Allen Park on December 2, 1971. At the same time, a copy of the denial was sent to the union member of the pension committee, but apparently, as a result of my conversation with Mr. ——an, union representative. along with another representative on September 20, 1972, the notification was not personally handed to Mr.

Mr. states that he found the notification about January 1st, 1972 in your file at the plant. You, of course, have related to me that your wife at your instruction called the Union on the Monday after December 2, 1971 and that you also talked to Mr. by telephone and that you talked to him a number of times and also talked to Mr. and Mr. \ ion of management concerning your Blue Cross-Blue Shield problem.

On December 1, 1971, management mailed you a letter notifying you that your Blue Cross-Blue Shield coverage had terminated November 30.

I believe it is frankly conceded that the union had knowledge that your pension had been denied and that the union member of the pension committee, being Mr. n or Mr. should have notified the corporation of your desire to be sent to an impartial clinic, within thirty days from the denial by the corporation which was made December 1.

On page 79 of the supplemental agreement covering pensions, for 1970, in subparagraph two it states, "If the union member of the local pension committee disagrees with the corporation's determination, he may appeal such determination in writing with the local personnel department within thirty days after his receipt of form HRP-22. The local pension committee shall

then designate a clinic in the area which is on the approved list (Appendix A) to examine the employee and determine whether he is totally and permanently disabled pursuant to the following definition:'

> 'An employee shall be deemed to be totally and permanently disabled when on the basis of medical evidence satisfactory to the corporation, the employee is found to be wholly and permanently prevented from engaging in any occupation or employment for wage or profit as a result of bodily injury or disease, either occupational or non-occupational in cause.'"

You have requested whether we would be willing to undertake your representation to force the General Motors Corporation to abide by the pension agreement and to agree with the union to send you to the impartial clinic. Impartial clinics in this area are the Institute of Environmental and Industrial Health, University of Michigah Hospital in Ann Arbor, the HenrytFord Hospital in Detroit, Harper Hospital in Detroit, and William Beaumont Hospital in Royal Oak.

In the alternative, you have asked me whether or not the union would be responsible to you in damages for its failure to make a timely appeal to obtain the examination by the impartial clinic which you believe would have resulted in a finding that you are totally and permanently disabled under the terms of the pension agreement.

According to the union representatives who I discussed this matter with, you are entitled to extended disability until about 1985, if the Metropolitan Insurance Company determines that you are disabled and eligible during that period. The Metropolitan Insurance Company is entitled to take a set-off as they are presently doing from your lump sum workmen's compensation payment and would also be able to set-off against EDB any Social Security benefits that you might receive, and I understand that you have a pending application for Social Security benefits. In addition, when and if you become eligible for your total and permanent disability pension

from General Motors, which is the subject of the dispute which you have consulted us about, the EDB would also be reduced to that amount by $105.00.

Therefore, if we were successful in getting you sent to an impartial clinic under the contract and if you were found totally and permanently disabled under the terms of that pension agreement, you would be entitled to a pension at the rate of $105.00 per month. The payment of this pension, however, would not take place because it would be used as a set-off against extended disability benefits. It is possible that you would not, even though you were eligible for extended disability benefits and the pension, receive any pension benefits until after 1985.

It is my legal opinion that the facts which have been turned up in my investigation reveal that the union was informed of your desire to appeal the corporation's denial of your application for total and permanent disability pension. It is also revealed that the union failed to do this in a timely manner. A legal action in Circuit Court to compel the corporation to send you to an impartial clinic might be successful. I believe it would have more chance of success than would a suit against the union for damages. In the damage suit, you would have to prove that had you had the examination you would have been determined totally and permanently disabled. There are also very serious legal questions involved in both of these actions.

The legal matter which you have asked us to undertake is involved and complicated, and would require a substantial amount of work. The benefits to you would not be apparent until about 1985. It would, therefore, be necessary that a firm financial arrangement be made before we would undertake the matter.

Please be advised that we would be willing to undertake your representation on a regular hourly rate basis. This case does not seem to lend itself to a contingent fee arrangement. Please telephone me upon receipt of this letter and we will discuss the fee arrangement.

Very truly yours,

MAX DEAN

PENSION BENEFITS - TRADE UNIONS

Amalgamated Meat Cutters and Butcher Workmen's Union and Industry Pension Fund.

The retirement benefits have a ten year vesting feature.

Disability benefits are defined as T & P and are payable after six months waiting period of disability in the sole and absolute judgment of the trustees. There is no set-off or reduction because of the receipt of workmen's compensation benefits or social security.

The fringe benefit fund of a union like the millwrights is contributed to by the employers but is administered by the union. In a recent case for comp filed by our office, the totally and permanently disabled welder had 72 employers in his working career. It provides for a $75.00 week benefit for 26 weeks for all wage loss and also T & P benefits along with many others. These benefits are usually obtained with the local union representatives assistance. Some plans exclude disabilities due to alcoholism; others do not. Some exclude disabilities due to use of narcotics or brought on by felonious enterprises or by an intentional self-inflicted injury. Some plans limit medical benefits due to pregnancy and also limit wage loss benefits due to pregnancy.

METROPOLITAN GROUP LIFE INSURANCE (UAW-GM)

This fringe benefit for UAW workers at GM may be lost at termination of employment. This is a factor to consider in any redemption involving an employee still on the payroll.

There is a right of conversion under the GM-UAW contract.

There is also an option providing that on showing total and permanent disability payments may be received monthly for 50 months and a minimal insurance retained. This is not the same as a GM pension but can be collected at the same time. Like the pension, it is compatible with the receipt of workmen's compensation disability benefits.

In the event of death whether on or off the job, the benefits are paid. Since a workmen's comp death claim involves the issue of accidental injury, there would be a claim for the extra accidental death benefit.

There is also a dependency monthly benefit for 24 months in case of death.

The benefits under this group insurance are enforceable in the courts and lawyers do have a role to play--death claims especially should be scrutinized for the accidental death benefits. With the new decisions on childrens rights even when illigitimate requires careful attention to clauses defining who is a dependent.

SOCIAL SECURITY

The National Commission on State Workmen's Compensation recommends (R3.18, p 66):

> " . . . provided our other recommendations for permanent total disability benefits are adopted by the States, the Disability Insurance program of Social Security continue to reduce payments for those workers receiving workmen's compensation benefits."

It also recommends (R 3.27, p 73):

> "That workmen's compensation death benefits be reduced by the amount of any payments received from Social Security by the deceased worker's family."

Present practice under the Social Security law is for Social Security to reduce its benefits where disability or death benefits are paid under a state workmen's compensation act. The maximum amount payable from combined benefits may not exceed 80% of the average weekly wage of the injured or deceased worker. To the extend the combined benefits exceed 80%, Social Security is reduced (42 U.S.C.A. 424 a).

This has been assailed. Jerome Kelman filed for certiorari to the US Sup. Court on the injustice of the reduction of Social Security death benefits from $269.80 per month to $25.80 per month because of the presence of workmen's comp, in Lofty v Richardson of HEW from a sixth circuit decision of March 4, 1971. Cert was denied 12/7/71 with J. Douglas stating it should be granted.

While agreeing with the report in the main, Prof. Horovitz, acknowledged as the premier workmen's compensation expert in the

country, registered dissent in two areas:

'The one important backward step recommended by a majority of our commission is to take away, by offset, the widow's and orphan's rights to workmen's compensation payments when they receive Social Security owed because of lifetime payments by the deceased husband (50% paid by the husband.

'Every workmen's compensation act today takes away her common law rights to sue a negligent employer. This is constitutional as long as she receives workmen's compensation payments as a quid pro quo. But a complete offset of workmen's compensation payments gives her nothing, and in most cases will throw the family on welfare. This is unjust as well as unconstitutional, in my opinion.'

Prof. Horovitz also argued that the present Congress, and not a future one in 1975, should enact the bill necessary to make the corrections. 'A 1975 Congress may not have the same interest and may be too late,' he said." (Trial Magazine, Sept-Oct 1972)

In the case of Belcher v Richardson, 317 F Supp 1294 (S.D.W. Va. 1970) the Court held that workmen's compensation benefits were not "public" benefits as they were paid by the employer and the idea of avoiding duplication was not tenable. It also recognized that the worker had contributed to obtain Social Security Benefits. Unfortunatelythe Belcher case was reversed on HEW;s appeal direct to the Supreme Court in 92 S ct 254 (1971).

VETERANS BENEFITS

The VA furnishes hospital care to veterans. The VA is eager to be reimbursed the reasonable value of its services furnished. It is most cooperative, but slow in producing copies of records and statements of services. Usually when you request records from the individual hospital for the specified purpose of a comp case, you will receive a response from the VA attorney. Again, presenting medical bills which are a proper item is an excellent way of financing a case which might not be feasible or attractive for the lawyer to bring.

The presence of eligibility for Veterans medical benefits is a factor which may make a workmen's comp redemption of a doubtful liability case possible. The fear of future medical needs is alleviated when a Veteran is involved.

WELFARE

During the pendancy of a disputed claim file, your client is disabled and without reserves. Welfare and Aid to Dependent Children is available.

If the client's benefit rate is low, it may be supplemented by Aid to Dependent Children.

Medicaid is also available. Getting the medical bills from Medicaid is slow. One contacts the Department of Social Services and currently ends up dealing with Seth A. Whitmarsh, Liability Supervisor, Medicaid Fiscal Management Division at the State Department of Social Services, 300 S. Capitol Avenue, Lansing, Michigan. Medicaid is eager to have their subrogation interests protected and will secure and furnish medical bills.

Welfare often asks for a reimbursement agreement. The clients usually feel a moral obligation to repay welfare but realistically is in no financial condition to do so.

M.C.L. 418.821 provides workmen's compensation proceeds are not assignable for debt. This would include assignments to Welfare.

Lawyers generally urge them to pay "later on" when a possible change of fortune might make it possible without hardship.

Since welfare is a governmental right, the applicant must be treated fairly and equally under the law. Recourse to Court may be had. Legal Aid societies and Legal Services programs have started to prevent arbitrary and capricious administration of these benefits.

SUMMARY

We will see changes in this area of income through supplemental benefits. Laws will change. Collective bargaining agreements will change. Court decisions will be made.

There will be movements to extend and expand benefits by workers' organizations to all workers.

There will be resistance by employer groups.

There will be advocates of Federalization.

There will be advocates of state programs.

There will be moves to avoid duplication and overlays and to insure as employers say that the hard whip of poverty is the greatest rehabilitation of the sick and injured.

In this continual battle and at every level of it, I urge that the Michigan Trial Lawyers Association and its members identify with and work with the working people of this state and their representatives to make sure that the changes which will be made are changes which increase the employees real income. We must look to the substance of this issue every time it comes up. We must educate ourselves and understand that 30 and out, and 30 hours work for 40 hours pay are proper, just demands.

The technology and industrial plant of this country can produce these goods and services. The people are ready to produce it and if the employers and government can't deliver, we need new managers.