



1987

American Workers' Compensation - After the Crossroads

Donald T. DeCarlo

American Insurance Association

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>



Part of the [Workers' Compensation Law Commons](#)

Recommended Citation

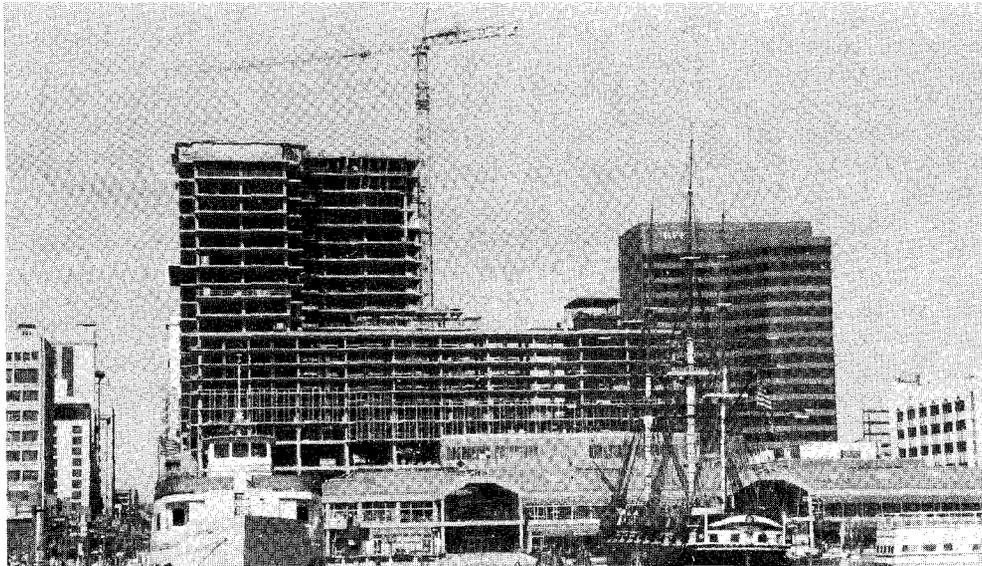
DeCarlo, Donald T. (1987) "American Workers' Compensation - After the Crossroads," *University of Baltimore Law Forum*: Vol. 17: No. 2, Article 4.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol17/iss2/4>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

American Workers' Compensation – After the Crossroads

by Donald T. DeCarlo, Esq.



American workers' compensation is a unique system of social justice. Within the United States, the system is legally distinct from the laws which govern recovery for non-industrial injuries. Looking outside the United States, the American system is legally distinct from the laws which govern compensation for work-related injuries in other industrial nations. A glance at the history of American workers' compensation reveals a trip down a unique path until 1972, when the American system reached a crossroads. One road available in 1972 would have brought the American system more in tune with its English and other European counterparts. But, in 1986, fourteen years after the crossroads, it seems clear that road has not been taken; rather, the American system chose to remain on a unique course, making a few improvements along the way.

Phase I: The Common Law – Prelude to American Workers' Compensation

With the onset of the industrial revolution, compensation for work-related accidents became a concern of society. Since

the American system of justice is built upon the foundation of the English common law, it is hardly surprising that 19th-Century American courts applied, for the most part, English precedents which precluded any recovery by workers in the vast majority of industrial accidents. American courts adopted the English "fellow servant" rule which created an exception to the vicarious liability imposed on a master for the acts of servants.¹ The exception foreclosed the imposition of liability on an employer for injuries to an employee caused by a co-employee. American courts also applied the doctrine of "assumption of risk," which also finds its roots in the English common law, to work-related injuries. It was often held that workers could not recover for injuries caused by hazardous working conditions because they were free to abstain from hazardous employment. Thus, they assumed the risk of any hazards to which they were exposed.² Finally, the defense of contributory negligence, also derived from England,³ served to preclude recovery in most cases, even where the negligence of the employer could be established.

There were piecemeal efforts to provide

an employer's liability remedy to specific classes of workers with statutory limitations on contributory negligence, assumption of risk and the fellow servant rule. An example is the Federal Employers' Liability Act of 1908 which still applies to railroad employees in interstate or foreign commerce.⁴

But American workers' compensation as it exists today began to take shape in the second decade of the 20th-century. While most early statutes were less than comprehensive, with only ultra-hazardous employments subject to coverage, and in many states only on an elective basis, it is noteworthy that the significant features which now distinguish American workers' compensation from its European counterparts were present from the outset. The early statutes, unlike the compensation schemes in Germany, did not require any contribution from the employee. The entire cost of compensation was placed on the employer. Moreover, with few exceptions, compensation was to be privately financed via insurance or self-insurance, in contrast to the state administered funds under the German and British systems. Thus, private insurers became, and remain today, an integral part of the American system.

Phase II: The Constitutional Hurdle – The Proliferation of State Systems

Imposition of liability on an employer without regard to fault was a radical concept in the early 20th-century and the first New York workers' compensation statute was held unconstitutional under both the New York and federal constitutions as a taking of property from employers without due process of law.⁵ However, following enactment of an amendment to the state constitution authorizing a compulsory workers' compensation law, the constitutionality of compulsory, privately funded workers' compensation was ultimately upheld by the United States Supreme Court in 1917.⁶

The foundation of constitutionality was the recognition of the *quid pro quo* which lies at the heart of American workers' compensation – the trade-off between employers and their employees in which workers are ensured a definite recovery at employers' expense without regard to fault, and employers are shielded from the unlimited and unpredictable liability which could exist under the common law. With constitutionality established, workers' compensation statutes quickly proliferated, and all but eight states had compensation statutes in place by 1920.⁷

Phase III: Era of Expansion (1920-1972)

The years 1920-1972 can be viewed as the formative years of American workers' compensation, in which statutory workers' compensation expanded to provide an exclusive remedy for an ever increasing percentage of workers' injuries and diseases whose roots could be traced to the workplace. Expansion of coverage ensured that nearly all classes of employers and employees would be subject to a workers' compensation statute. While many early statutes were elective, the vast majority of state workers' compensation laws became compulsory. While most early workers' compensation statutes applied to only "hazardous" or "ultra-hazardous" employments, gradual expansion, accomplished either by eliminating references to hazardous or ultra-hazardous employment, or by expanding the definition of those terms, brought nearly all employments within the mandatory scope of state workers' compensation statutes by 1972. The federal government acted occasionally to fill a gap where employees were beyond the jurisdictional reach of the states as in the 1927 Longshoremen's and Harbor Workers' Compensation Act, modeled after the

New York workers' compensation statute, and covering employees injured over the navigable waters of the United States.⁸

From the outset, most statutes provided coverage for accidental injuries arising out of and in the course of employment. But primarily as the result of judicial interpretation, the scope of both "accidental injury" and "arising out of and in the course of employment" (causation) broadened throughout the formative years of 1920-1972. Early decisions construed "accidental" as requiring that something unusual or unexpected occur in the workplace; thus, there could be no compensation where an injury resulted from the ordinary conditions of the workplace without any violent external event.⁹ But most states now look only to the result, *i.e.*, the injury, in determining what is accidental, and an accidental injury occurs anytime something unexpectedly goes wrong with the human frame.¹⁰

The concept of causation similarly expanded. The "arising out of employment" requirement, in the early history of workers' compensation, was interpreted to require that the harm causing the injury be unique to the employment, or at least result from a risk greater than that to which the overall population is exposed.¹¹ It is now generally sufficient if the work brings the employee in contact with the risk.¹² Moreover, the concept of "arising out of employment" is no longer limited to sole and direct causation; rather, compensability can be found where the workplace accelerates or aggravates a pre-existing condition or combines with conditions unrelated to work to cause an injury.¹³ In light of the fact that it was increasingly recognized that an employer takes an employee as is, including pre-existing injuries, conditions or susceptibilities, second-injury funds, usually financed by an assessment against all employers in the state, were instituted in most states to provide compensation where an employee's disability resulted in part from a work injury, but in part due to a pre-existing condition or prior injury. These funds were intended not only to provide equity to employers, but also to promote the broader societal objective of discouraging discrimination against the handicapped.

The interpretation of the other half of the causation standard, the "in the course of employment" requirement, also became broader during the formative years of workers' compensation. Both the time and space of employment have been expanded to encompass a reasonable amount of time and space incidental to the actual hours and locations of employment and under some circumstances, coverage during breaks,

workplace recreational activities, lunch hours and the trip to and from work.¹⁴

The scope of injuries which could be compensated also expanded during the formative years of workers' compensation. While American workers' compensation has always been formulated as a remedy for the loss of wage-earning capacity, there was increasing recognition that certain permanent injuries were worthy of compensation even though their effect on wage-earning capacity could not readily be observed or measured. In pursuit of this recognition, permanent partial disability schedules for the loss, or loss of use, of arms, legs, fingers, toes and other bodily parts, as well as loss of vision and hearing proliferated and expanded.

It should be noted that statutory schedules providing for a definite period of compensation without regard to whether wages decreased, were not, at least at the outset, an abrogation of the American system's reliance on wage-earning capacity; rather, a scheduled award was viewed as providing compensation for the future loss of wage-earning capacity which could reasonably be presumed to result from the loss of a body part or function.

Finally, the formative years saw an expansion that provided coverage for occupational diseases. Workers' compensation statutes were plainly enacted with traumatic injuries in mind, but as causal relationships were established between diseases of gradual onset and the workplace, some states enacted separate Occupational Disease Acts within their workers' compensation statutes. Other states simply amended the definition of compensable injury to include occupational diseases, while in other states, the inclusion of occupational diseases was brought about simply by construing "accidental injury" broadly to include gradually developing diseases.

Phase IV: The 1972 Crossroads – Refinement or Revolution?

The year 1972 was perhaps the most eventful year in the history of American workers' compensation. And while it may not have been obvious at the time, it is apparent that in 1972 the American system reached a crossroads, with the 1972 Report of the Commission on State Workmen's Compensation Laws (the "1972 Report") leading in one direction, and 1972 amendments to the two most significant private federal workers' compensation programs, the Longshoremen's and Harbor Workers' Compensation Act (LHWCA)¹⁵ and the Federal Coal Mine Health and Safety Act (FCMHS) ¹⁶ pushing workers' compensation in quite another direction. The

1972 Report can be viewed as an attempt to preserve the unique American system by making necessary improvements and refinements. In contrast, the 1972 amendments to the federal laws can be viewed as a departure from the traditional American system and indeed, in many respects, a movement toward the kind of workers' compensation system which prevails in England.

Notwithstanding the expansion of workers' compensation during its formative years, there remained a perception that statutory workers' compensation did not provide an adequate remedy for all work-related injuries. Part of the problem was the remaining gaps in coverage, e.g., the few states which retained elective laws, the few states which continued to distinguish between hazardous and non-hazardous employment, common exclusions for agricultural workers, domestic workers and small employers, as well as limitations on the scope of compensable diseases, and restrictive schedules of occupational diseases. But most of the shortcomings as of 1972 related to the adequacy of benefits, both compensation and medical care/rehabilitation benefits.

The National Commission was created by the Occupational Health and Safety Act of 1970 and released its critique of American workers' compensation in 1972 after a year of intensive hearings and studies. The 1972 Report contained nineteen essential recommendations which can be divided into three categories: 1) full mandatory coverage for all work-related injuries and diseases, 2) adequate levels of benefit compensation, and 3) full medical care and rehabilitation.

It is noteworthy that the 1972 recommendations all involve *refinements* of the unique American system; none of the recommendations would have tampered with the private state-by-state character of the American system. The 1972 Report recommendations can be viewed as suggesting a tune-up, but certainly not an overhaul.

On the other hand, the 1972 amendments to the LHWCA and FCMHSA showed that there was another road available to American workers' compensation; a road which would bring the American system closer to its European counterparts.

In 1972, LHWCA jurisdiction, which had previously applied only over the navigable waters of the United States, moved landward to cover maritime workers employed adjacent to the navigable waters.¹⁷ While this application of federal law to workers traditionally covered only under state compensation laws can be viewed as a small step toward the federalization of compensation, the LHWCA, while fed-

erally administered, involves private liability and is actually quite similar to most state workers' compensation acts. The 1972 amendments to the FCMHSA represented a far more dramatic step away from traditional notions of American workers' compensation.

The Black Lung Benefits Act of the FCMHSA provides benefits and medical care to miners who are totally disabled or die due to pneumoconiosis (black lung) arising out of coal-mine employment.¹⁸ This compensation scheme bears little resemblance to workers' compensation in the United States, though it does share many characteristics of the English system for compensation of work-related injuries. By American standards, the black-lung program is a hybrid of workers' compensation, social insurance and a pension.

Like British compensation for occupational diseases, and unlike American workers' compensation, benefits are not related to wage-earning capacity; rather a flat rate augmented for dependents is paid to all eligible miners.¹⁹ While in theory the black-lung program applies only to an occupational disease, pneumoconiosis, that disease is defined broadly to include any pulmonary or respiratory impairment arising out of coal-mine employment.²⁰ Also included are presumptions of entitlement which, in effect, allow compensation for non-work-related diseases such as cigarette-induced lung cancer or emphysema unrelated to coal-mine employment.²¹ Again, the dilution of the distinction between occupational and non-occupational causes of disability resembles the English system of social insurance more than the American system of workers' compensation. The black-lung program was originally instituted as a governmental liability, but is now a private liability administered by the federal government. Many claims, however, are the responsibility of the Black Lung Disability Trust Fund, funded by a tax on coal and borrowing from government revenues, for which the Department of Labor acts as custodian—not unlike the state-administered fund in Britain.

So beginning in 1972, more American workers than ever before were covered by a federal compensation law, and for one American occupation—coal miners—a compensation scheme was in place which, if applied to other occupations, would radically transform the character of American workers' compensation. On the one hand, the 1972 Report provided motivation to improve the unique American system from within. On the other hand, the increased federal activity in workers' compensation was a precedent for moving towards a system of compensation more like that of

England and other European countries. It is now 1986—which road was taken and where is the system heading?

It is clear that the proponents of the 1972 Report prevailed with improvements in the system from within rather than movement toward the kind of federalized social insurance approach exemplified by the Black Lung Act. The recommendations of the 1972 Report have, for the most part, been implemented. Full coverage for all medical benefits and the dramatic increase in benefit levels are the most significant areas of improvement.

Of course, there have been additional refinements in American workers' compensation, mandated by practical considerations rather than the 1972 Report. In particular, the growing problem of occupational disease, more specifically the surfacing of asbestos-related diseases in the 1970's, demonstrated that the workers' compensation statutes of many states were ill equipped to judge the merits of gradual diseases with long latency periods.

Statutes of limitations and notice requirements which ran from the date of last exposure often barred a worthy claim because the time limits ran out prior to the onset of the disease. When a claim could be compensated, it was often at the benefit levels existing at the time of last exposure, e.g., the 1942 earnings of a shipbuilder exposed to asbestos during World War II who did not become disabled due to asbestos until the 1970's. Some states had restrictive lists of compensable occupational diseases, drafted in the 1920's or 1930's, which did not include diseases subsequently identified. Moreover, many states did not provide clear guidelines as to which of several employers was liable for compensation where exposure occurred gradually over the course of several employments.

The incongruities in the compensation of occupational diseases worked hardship not only on deserving claimants but created problems for employers and their insurance carriers as well. In cases where these incongruities effectively precluded compensation, many courts bent over backwards to create exceptions to the exclusive remedy doctrine of workers' compensation so that injured workers could pursue a tort remedy against their employers. Plainly, both ends of the *quid pro quo* of workers' compensation were being violated.

Refinements by judicial interpretation, or by legislative revision have now rectified these problems in most states. Revised statutes of limitation begin to run in occupational disease cases only from the time that claimant is aware of the disease or disability. Benefits are generally paid at the levels existing at the time of disablement.

Most restrictive schedules of occupational diseases have been eliminated or at least amended to include catch-all coverage for any unlisted diseases. Most states now impose liability uniformly on the last employer who injuriously exposes claimant to the harmful exposure. This process of refinement is continuing. The 1985 report of the National Association of Insurance Commissioners (NAIC) Occupational Disease Advisory Committee endorses all of these refinements and urges the few remaining states where problems exist to follow the trend. Most observers now agree that workers' compensation, when used, does offer an adequate remedy for the compensation of occupational diseases. If a pervasive problem remains, it is that many claimants choose to eschew the workers' compensation system for the more generous, albeit uncertain, awards that are possible in the tort system.

Another area of recent refinement is the wage-loss approach, adopted in two states²² and being considered in several others, in which most permanent partial-disability schedules are replaced with awards based on actual loss of wages. Wage-loss can be viewed not as a revolution, but as a return to the principle that American workers' compensation provides replacement for lost wage-earning capacity, not recovery for physical loss in the abstract. While permanent partial-disability schedules, in theory, are consistent with this approach in providing payment for presumed future lost wage-earning capacity, in fact, many states now view their schedules as providing payment for anatomic loss without regard to effect on wages. Like the refinements in the occupational disease area and the refinements motivated by the 1972 Report, wage-loss is a refinement within the unique American system, and not a movement towards a new system.

In sum, there has been considerable fine tuning of the system since 1972. The decision has been made not to take the other road—the federal approach which would bring the system closer to its European counterparts. Indeed, there has been a considerable contraction in the federal area since 1972. In 1981, the FCMHSA was amended. Most of the causal presumptions which allowed entitlement based on the number of years of employment, without definite proof of a work-related impairment, were eliminated.²³ Thus, the black-lung program is now less like social insurance or a pension and more like traditional American workers' compensation.

Recent amendments to the LHWCA (which changed the Act's title to the "Longshore and Harbor Workers' Act") narrowed jurisdiction to exclude certain employees

in occupations which are not traditionally maritime when such employees are subject to a state compensation law.²⁴ While the amendments also break with tradition in some respects, most notably by providing benefits to workers who suffer anatomical impairment after retirement (without loss of wage-earning capacity before retirement) due to an occupational disease,²⁵ the amendments' elimination of unlimited death benefits and benefits for deaths unrelated to employment²⁶ demonstrate that the overall intent of the amendments was to make the LHWCA more consistent with traditional state compensation systems.

Finally, while the initial reaction to the occupational disease crisis was to propose a federal law providing compensation for all occupational diseases,²⁷ a law with many of the characteristics of the black-lung law, this law was not enacted and similar legislative efforts will, in all likelihood, not succeed. While there have

“Why has society decided to refine the system from within and reject attempts to move toward a federal system . . . ?”

been more recent proposals to enact a federal statute providing uniform compensation for asbestos-related diseases, jointly financed by employers and the government,²⁸ these proposals would retain the preeminence of state workers' compensation, and simply supplement state awards with an additional recovery designed to approximate the average tort award in asbestos personal injury actions.

Why has society decided to refine the system from within and rejected attempts to move toward a federal system with similarities to the European counterparts? Part of the answer is that federal initiatives have too often overlooked the central role of mandatory private insurance in American workers' compensation. For example, prior to its reform in 1981, the black-lung program imposed retroactive liability on private employers even in claims where exposure, disability and the filing of the claim all preceded the enactment creating the liability—an uninsurable liability under any conventional insurance approach.

But to understand the broader reason for

the road we have taken since 1972, it is important to recognize that the 1972 influences, while pointing in opposite directions, were not entirely independent. The 1972 Report recommended refining the system from within, but also recommended consideration of a uniform federal compensation law if the states did not promptly act to cure the deficiencies of the American system. The black-lung program came about, in part, due to a recognition that the states did not adequately provide compensation for the occupational disease pneumoconiosis. Because the 1972 Report's recommendations have been largely implemented and because the state systems have been refined to provide compensation in new kinds of claims, the other road has now become unnecessary. Surely the past fourteen years have demonstrated that there is nothing inherently wrong with the privately insured, state-by-state American system of workers' compensation, and therefore there is no reason to abandon a system which has served society well for seventy-five years.

Phase V: The Future — Interactions

It is likely that the next several years will see less questioning of whether the states have the right kind of workers' compensation system, but increased scrutiny of the interaction of workers' compensation with other American social institutions. One such interaction was President Reagan's 1985 proposal to tax workers' compensation benefits, which have historically been exempt from federal and state taxation. This proposal was rejected by the House of Representatives Ways and Means Committee in October 1985.²⁹ The exclusive-remedy doctrine, which is the wall between workers' compensation and tort, will continue to be a controversial topic, particularly if the size of American civil jury awards and the scope of damages includable in tort cases continue to expand at an ever increasing rate. It is important to recognize that even where attempts to evade the exclusive remedy are ultimately defeated, either by judicial decisions or legislative corrections, the persistence of the attacks in and of itself is a problem. Employers must expend considerable resources defending against these attacks and, win or lose, are exposed to uncertainty which the *quid pro quo* underlying workers' compensation should prevent. It is unlikely attacks on exclusivity will abate. Indeed, an Occupational Health Legal Rights Foundation was formed in 1984 with the express purpose of encouraging such attacks. While it does not seem that a coordinated system

of occupational and non-occupational benefits like that in England will evolve, more scrutiny will be placed on coordinating the total amount of benefits available from the disparate American social programs—workers' compensation, private health insurance, private pensions, unemployment benefits and social security. As Professor Larson has recently pointed out, coordination of benefits has become a much greater concern to the workers' compensation system, given the substantial benefit level increases since 1972.³⁰

But there are no signs of abandonment of the unique characteristics of the American system—its state-by-state, privately funded and insured nature. The crossroads have been passed, and American workers' compensation will continue to go its own way.

Notes

- ¹See *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49 (Mass. 1842).
- ²See, e.g., *Russell v. Minneapolis & St. Louis Ry.*, 32 Minn. 230, 20 N.W. 147 (1884).
- ³*Butterfield v. Forrester*, 11 East 60 (K.B. 1809).
- ⁴45 U.S.C. § 51-60.
- ⁵*Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911).
- ⁶*New York Central R.R. v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L. Ed. 667 (1917).
- ⁷Larson, A., *Workers' Compensation Law: Cases, Materials and Text*, 28 (1984).
- ⁸33 U.S.C. § 901 *et seq.*
- ⁹Larson, A., *The Law of Workmen's Compensation*, § 37.00-37.30 (1982).
- ¹⁰*Id.* at § 38.00-38.64; § 39.00-39.60.
- ¹¹*Id.* at § 6.00.
- ¹²*Id.*
- ¹³*Id.* at §§ 77.40; 12.20.
- ¹⁴See, e.g., *O'Leary v. Brown-Pacific-Maxon Inc.*, 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed.2d 483 (1951).
- ¹⁵33 U.S.C. § 901 *et seq.*
- ¹⁶30 U.S.C. § 801 *et seq.*

- ¹⁷33 U.S.C. § 902(3); § 903(a).
- ¹⁸30 U.S.C. § 901 *et seq.*
- ¹⁹30 U.S.C. § 922.
- ²⁰30 U.S.C. § 902(b).
- ²¹30 U.S.C. § 921(c)(1-5).
- ²²Florida and Louisiana.
- ²³Black Lung Benefits Revenue Act of 1981, Title II, § 202(b)(1) and (2), 95 Stat. 1635, 1643 (1981) (current version at 30 U.S.C. § 921(c)(2), (c)(4) and (c)(5)).
- ²⁴33 U.S.C. § 901 *et seq.*, as amended by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub.L. No. 98-426, 98 Stat. 1639 (1984).
- ²⁵*Id.* at § 910(d)(2).
- ²⁶*Id.* at § 906(b)(1); § 909.
- ²⁷H.R. 3175, 98th Cong., 1st Sess. (1983).
- ²⁸See, e.g., H.R. 1626, 99th Cong., 1st Sess. (1985); S.B. 1265, 99th Cong., 1st Sess. (1985).
- ²⁹See, Vagley, *The President's Tax Proposal: An Additional Injury to Injured Workers*, *Legal Insight*, November-December 1985, at 2-3, 31.
- ³⁰Larson, *Tensions of the Next Decade*, *Legal Insight*, November-December 1985, at 27-28.

Donald T. DeCarlo is Special Counsel at the American Insurance Association, a trade association for property and casualty insurers. He was formerly General Counsel of the National Council on Compensation Insurance, a statistical and ratemaking association for workers compensation insurance. This article is based on a speech presented by Mr. DeCarlo at the July 15, 1985 Annual Meeting of the American Bar Association's Workers Compensation Committee in London. Ronald Herzfeld, Esq. assisted in the preparation of this article.

WE HAVE ONLY GOOD THINGS TO SAY ABOUT CANCER OF THE COLON.

If detected early, the cure rate for colorectal cancer is very high.

It can be as high as 75%.

Because we now know how to detect it early. And we know how to fight it once we detect it.

There are three simple checkup guidelines for men and women without symptoms.

One, get a digital exam every year. This is recommended for everyone over 40.

Two, get a stool blood test every year if you are over 50.

Three, after two initial negative tests one year apart, get a procto exam every three to five years if you are over 50.

These guidelines are the best protection against colorectal cancer you can have.

If you're not over 50, please give this information to friends and loved ones who are.

In any case, please help spread the word.

Good news doesn't always travel fast.



Get a checkup. Life is worth it.