VII. ADMINISTRATIVE PROCEDURES

A. Decisions and Appeals

1. De novo review and Appeal Board backlog. At present there is a two-tier structure for decision-making in contested cases within the Michigan workers' compensation system. Hearings are conducted by a single person whose official title is hearing referee, but who is informally and almost universally known as an administrative law judge ("ALJ"). For the past several years there have been approximately thirty ALJs, about equally divided between Detroit and the rest of the State. Ten additional ALJs have recently been appointed. ALJs are Civil Service personnel appointed by the Director of the Bureau of Workers' Disability Compensation.

Hearings before the ALJ are relatively formal, although they do not adhere strictly to the rules of evidence. The proceedings are stenographically reported, but a transcript is not prepared unless there is an appeal from the ALJ's decision. The ALJ issues a short-form award granting or denying benefits. Ordinarily there is no statement of reasons for the decision. For the past two decades the average time from application to hearing has ranged from about a year to fifteen months. The Bureau's "long range performance objective" is to process 90 percent of all contested cases within 270 days. A claimant granted benefits is entitled to 70 percent of the weekly amount awarded, pending review of the ALJ's decision.

Parties aggrieved by an ALJ's decision have a right of appeal to the Workers' Compensation Appeal Board. The Appeal Board in its discretion may hear the parties and allow them to submit additional evidence. In practice it almost invariably considers the case on the basis of the written record of the hearing before the ALJ and briefs submitted by the parties. The Appeal Board must announce in writing its finding of fact and conclusions of law. MCL § 418.859. In essence, this entitles the parties to a trial "de novo" (meaning anew) before the Appeal Board, albeit on the record rather than in person. From a final order of the Appeal Board discretionary judicial review is available in the Court of Appeals and the Supreme Court. In the absence of fraud, however, the findings of fact by the Appeal Board are conclusive and only questions of law are reviewable by the courts.

In the last two decades the membership of the Appeal Board has grown from five to seven (1965) to eleven (1973) to fifteen (1978). Of the current total membership of fifteen, five are designated as representatives of employee interests, five as representative of employer interests, and five as representative of the general public. Members are appointed by the Governor, with the advice and consent of the Senate, for a term of four years.

Table VII-1 sets forth the annual case load of the Workers' Compensation Bureau since 1968. The most significant fact revealed by these figures is that the rising tide of claims and contested cases, which continued right

TABLE VII-1

WORKERS' COMPENSATION BUREAU: ANNUAL CASELOAD STATISTICS

	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984*
REPORTS OF INJURY (Form 100)	59,483	63,581	71,981	72,437	69,045	69,204	69,847	62,786	70,397	76,934	85,078	97,088	88,307	77,203	66,676	67,450	74,832
CASES OPENED FOR PAYMENT (Form 101)	71,634	82,487	84,543	83,972	89,577	97,486	102,254	95,156	95,857	103,436	122,064	137,955	136,996	129,640	145,459	85,568	83,591
CASES CLOSED ('Payment Stopped') (Form 102)	68,963	77,273	78,830	77,748	82,402	89,594	94,324	86,312	86,358	101,723	114,439	128,175	127,857	120,458	104,751	93,906	96,720
CONTESTED CASES RCVD (Form 104)	20,451	22,347	21,563	23,769	26,336	25,982	28,187	28,776	29,681	29,782	30,636	37,865	40,232	44,054	32,674	28,605	23,183
'DECISIONS':	7,186	7,535	8,524	9,766	10,662	12,071	11,364	10,099	10,567	10,320	12,054	14,468	16,956	15,144	13,289	15,264	14,845
(Stipulated)	206	89	57	93	82	112	138	104	186	207	240	205	424	412	261	392	481
(Granted)	891	930	1,054	1,295	1,459	1,259	1,224	1,395	1,439	1,203	1,496	1,591	1,984	1,518	1,614	1,985	1,637
(Denied)	238	238	295	385	433	403	407	564	536	444	596	687	902	817	1,015	1,273	1,228
(Withdrawn/Dismiss)	4,937	5,190	6,186	7,076	7,714	9,229	7,720	6,437	6,760	6,706	8,356	10,547	11,330	10,255	9,012	9,899	9,883
(Voluntary Payment)	914	1,088	1,012	997	974	1,068	1,883	1,599	1,646	1,760	1,366	1,438	2,316	2,158	1,387	1,795	1,824
REDEMPTIONS GRANTED:	9,119	11,272	12,741	15,317	15,186	15,789	17,284	14,708	19,371	19,659	19,964	20,223	25,976	26,657	21,295	26,508	16,752
(With Form 104)	--	--	--	13,634	13,354	13,940	14,942	12,541	16,962	17,295	17,269	17,860	23,626	24,217	19,366	24,188	15,033
(Without Form 104)	--	--	--	1,683	1,832	1,849	2,342	2,167	2,409	2,364	2,695	3,163	2,350	2,440	1,929	2,320	1,719
REDEMPTIONS AS % OF DISPOSITIONS	55.9%	59.9%	62.3%	61.1%	58.8%	56.7%	60.3%	59.3%	64.7%	65.6%	62.4%	58.3%	60.5%	63.8%	61.6%	63.4%	54.4%
TOTAL DISPOSITIONS ('Decisions' & Redemptions)	16,305	18,807	20,265	25,083	25,848	27,860	28,648	24,807	29,938	29,979	32,018	34,691	42,932	41,801	34,584	41,772	30,797
REDEMPTION DENIED	145	129	84	199	219	254	269	247	243	297	280	354	147	162	98	63	42
BACKLOG OF CONTESTED CASES AS OF JANUARY 1	13,567	18,188	21,983	21,716	21,587	23,349	22,795	24,118	29,775	31,416	32,858	32,847	35,423	34,440	37,288	39,087	30,493 **
CHANGE FROM PRIOR JANUARY 1	N/A	4,541	3,875	(267)	(129)	1,762	(554)	1,323	5,657	1,641	1,442	(11)	2,576	(983)	2,848	1,799	(3,931)

*Projection based on actual data for first 9 months of 1984.
**Backlog of pending contested cases as of 10/1/84.

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TABLE VII-2

TRENDS IN WORKERS' COMPENSATION CASELOADS FOR 5-YEAR PERIODS FROM 1970-1985

	[January '70-January '75]		[January '75-January '80]		[January '80-January '85**]	
	% Change	(Change in Volume)	% Change	(Change in Volume)	% Change	(Change in Volume)
REPORTS OF INJURY*: (Form 100)	9.9%	(+ 6,266)	39.0%	(+27,241)	-23.7%	(-23,056)
CASES OPENED FOR PAYMENT: (Form 101)	24.0%	(+19,767)	34.9%	(+35,701)	-39.4%	(-54,364)
CASES CLOSED ('PAYMENT STOPPED'): (Form 102)	22.0%	(+17,051)	35.9%	(+33,851)	-24.5%	(-31,447)
CONTESTED CASES RCVD (Form 104)	25.8%	(+ 5,760)	34.7%	(+ 9,758)	-39.0%	(-14,762)
DISPOSITIONS: ('Decisions' and Redemptions)	52.3%	(+ 9,841)	21.1%	(+ 6,043)	-11.2%	(- 3,894)
REDEMPTIONS GRANTED:	53.3%	(+ 6,012)	17.0%	(+ 2,939)	-17.2%	(- 3,471)
BACKLOG OF PENDING CONTESTED CASES:	9.7%	(+2,135)	46.9%	(+11,305)	-13.9%	(- 4,930)

*Not all claims for compensation arise from an official 'Report of Injury' (Form 100).
**Estimate of year-end totals for 1984 is a projection using actual data from first nine months.

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TABLE VII-3

Percentage of Decisions Appealed to Appeal Board: 1968-84

	Decisions by Admin. Law Judges			Appeals Received by	
	Benefits Granted	Benefits Denied	Total	W.C. Appeal Board	% Appealed*
1968	891	238	1,129	694	61.5
1969	930	238	1,168	990	84.8
1970	1,054	295	1,349	1,131	83.8
1971	1,295	305	1,600	1,035	64.7
1972	1,459	433	1,892	1,285	67.9
1973	1,259	403	1,662	1,231	74.1
1974	1,224	407	1,631	1,215	74.5
1975	1,395	564	1,959	1,548	79.0
1976	1,439	536	1,975	1,450	73.4
1977	1,203	444	1,647	1,376	83.5
1978	1,496	596	2,092	1,629	77.9
1979	1,591	687	2,278	1,926	84.5
1980	1,984	902	2,886	2,337	81.0
1981	1,510	817	2,327	1,979	85.0
1982	1,614	1,015	2,629	2,229	84.8
1983	1,905	1,273	3,178	2,576	81.0
1984**	1,637	1,220	2,857	2,188	76.6

*Percentage of decisions appealed must be viewed as approximate because some decisions will be rendered in one calendar year, but appealed in the following calendar year.

**Projection based on actual data for first 9 months of 1984. This is a conservative estimate because a recent shortage of clerical staff at the Appeal Board has resulted in fewer appeals being acknowledged as "Received" by the Board.

Appeals of Decisions Over 5-Year Periods

	Total Decisions	Appeals Received	% Appealed
1970-74	8,134	5,897	72.5
1975-79	9,951	7,929	79.7
1980-84	13,877	11,309	81.5

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November 7, 1984

through the early '80s, has at last begun to ebb. The backlog of pending contested cases is also now declining. A summary of the trends over five-year periods since 1970 is contained in Table VII-2. Perhaps the most important conclusion to be drawn from these data is that the addition of the ten new ALJs may well result in bringing the case-load problem at the trial stage under control. The Bureau's announced aim is to have ALJs decide 90 percent of all contested cases within nine months of the application for hearing. I consider that feasible and reasonably satisfactory. Four to six months should be the target in the more ordinary case. At least I see no reason at this time for major structural changes at the ALJ level.

The situation at the Appeal Board is very different. Table VII-3 indicates the number and percentages of ALJ decisions being carried to the Appeal Board. As can be seen, **during the past decade between 75 and 85 percent of all ALJ awards were appealed.** That alone is a distressing commentary on the lack of finality in decision-making at what should be a much more dispositive step in the administrative process. Even worse, as Table VII-4 reveals, **the accelerating rate and number of appeals in recent years have caused the Board's backlog to mushroom from a mere 2,000 cases in 1976 to almost 7,000 as of November 1984.** That is the equivalent of about five or six years' output by the Appeal Board. Such delay in any administrative system is simply intolerable. It is hurtful financially and even psychologically to both employees and employers whose rights and liabilities remain in a state of suspension and uncertainty for many months. Long delays are also hurtful to the system itself. Confidence in it is eroded, and additional administrative expenses are imposed on the Bureau and the parties.

TABLE VII-4

Decisions, Affirmances, and Backlog of Appeal Board,

1975-1984

	Decisions	Affirmances	% Affirmances	Backlog
1975	---	---	77	2104
1976	704	545	77	2081
1977	---	---	--	2219
1978	607	422	70	2695
1979	685	483	71	3220
1980	839	586	70	4042
1981	1047	715	68	4294
1982	1072	761	71	4773
1983	614	474	77	5977
1984	---	---	--	6800+*

* November 1984 estimate

The extraordinarily high rate of appeals, especially in recent years, and the corresponding build-up in case backlog at the Appeal Board, have several causes. First, the very notion of de novo review, which means in essence that a whole fresh look is taken at both the facts and the law by the appellate body, is an open invitation to disappointed litigants and their lawyers to seek to retry the case from scratch. Second, whenever the law seems unsettled, there will be a natural tendency to pursue clarification by appeal to higher authority. Uncertainty in the law can be created by major substantive changes in the statute itself, such as occurred in 1980 and 1981. Uncertainty can also result from the failure of a key decision-maker to speak with a single voice. The current fifteen-member Appeal Board sits in rotating panels of three persons each. This undoubtedly constitutes a fractionating element in the appellate process, and the effect is to encourage losers below to seek review.

The degree of consistency between the thinking of the ALJs and the Appeal Board is reflected in the affirmance rate of ALJ decisions by the Board (see Table VII-4). Since 1970 that has ranged from a high of 84 percent in 1971 (when there were seven Appeal Board members) to 77 percent in the mid '70s (when there were eleven Board members) to 68-71 percent in the late '70s and early '80s (when there were fifteen members). It should be noted, however, that the affirmance rate returned to a healthier 77 percent in 1983. Over the years the Appeal Board has reversed ALJs on questions of law about one-third of the time but has reversed them on issues of fact only about one-sixth of the time.

De novo review makes most sense when an administrative agency that is handling a relatively light case load, especially an agency in its formative years, is attempting to have every decision in its entirety be the product of "the agency." In such a context the hearing officer is essentially the compiler of the agency's official record rather than a true decision-maker. When an agency has matured and has established a large body of precedent, however, and particularly when it has become overburdened with work, **it is fair to ask whether de novo review is any longer a luxury that can be afforded, or a procedure that is needed.**

It is true that de novo review of initial determinations at the trial level remains the norm of the country's workers' compensation systems -- most of which are also struggling with serious substantive and administrative problems. But there is prestigious authority for a different model. For example, Congress in 1972 amended the Federal Longshoremen's and Harbor Workers' Compensation Act to provide that "findings of fact in the [ALJ's] decision under review by the [Benefits Review] Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3). A similar approach is followed in three states, Pennsylvania, Florida, and Arizona. 3 A. Larson, **Workmen's Compensation Law** § 80.12(c). In addition, some states, notably Wisconsin, defer to the hearing referee's findings of fact when witnesses' credibility is at issue. **Id.** § 80.12(d).

A major study entitled **Social Security Hearings and Appeals** was published by Professor Jerry L. Mashaw of Yale Law School and associates in 1978. It concentrated on ALJ determinations in Social Security disability cases and subsequent review by the Appeals Council. Under existing regulations, the ALJ's findings of fact were to stand if supported by substantial evidence. De novo review was permitted, however, upon the submission of "new and material" evidence. The authors commented (p. 103):

> We can discover no persuasive basis for this provision. If the claimant has new and material evidence, he should be permitted to petition to reopen the hearing. The decisions as to whether to reopen the case and how the case is affected by the new evidence could then be rendered by the person most familiar with the case, the ALJ....
>
> **The only rationale for de novo review is that the reviewer is in a better position than the original decider.** As previously stated, there is no reason to believe that the Appeals Council can perform this function better than ALJs. (Emphasis supplied.)

Although the provisions of the Michigan Administrative Procedures Act dealing with contested cases do not apply to hearings and appeals in the workers' compensation system, the elimination of de novo review by the Appeal Board would be compatible with the APA. Thus, section 81(3) provides: "On appeal from or review of a proposal of decision the agency, **except as it may limit the issue upon notice or by rule**, shall have all the powers which it would have if it had presided at the hearing." MCL § 24.281(3) (emphasis supplied). A number of State agencies have in fact opted to proceed in the usual case on the basis of the record before the hearing referee, without granting full de novo review. These include the Employment Security Commission (in practice; cf. Michigan Administrative Code, R 421.1303 (1979)), the Public Service Commission (e.g., Consumers Power Co., PSC Case No. U-6923, Jan. 20, 1982, regarding interlocutory appeals), licensing boards under the Public Health Code (MCL § 333.16233(4)) and the Occupational Code (MCL §§ 339.513(1), 339.514(1), and the Tax Tribunal (in practice).

It can be argued that eliminating de novo review and sharpening the distinction between the responsibilities of the ALJs and the Appeal Board would further increase the legalistic nature of what ideally should be a simple administrative process, in keeping with the original "no-fault" concept of workers' compensation. Regrettable or not, however, the reality is that at least in contested cases, workers' compensation law and practice is an immensely complicated affair, navigable only by skilled specialists, for the most part legally trained. We would be well advised to accept that reality and to work within its constraints. Here that means, specifically, creating an administrative structure where particular functions are performed at particular levels, and where we abandon the extravagance of duplication of effort. The primary responsibility of the Appeal Board should be the orderly

development of a coherent, uniform body of law.

2. **Recommendation of substantial evidence review.** Drawing upon the analogous standards for decision and review contained in the Administrative Procedures Act, therefore, **I would recommend that findings of fact by ALJs in workers' compensation proceedings be conclusive if "supported by competent, material, and substantial evidence on the whole record."** See, e.g., MCL §§ 24.285, 24.306. Errors of law, of course, would still remain entirely subject to correction at the Appeal Board level. In my judgment, the "substantial evidence" standard would nonetheless allow the Appeal Board to remedy any serious misstep by an ALJ in assessing the evidence and making factual findings. The great advantage is that the Appeal Board would not be required to take the time in every case to familiarize itself with the whole record and to prepare its independent findings of fact. Instead, it could focus on the appealing party's contentions that particular findings were not supported by substantial evidence, thus confining its perusal of the record to those portions that the parties said supported their respective positions.

Currently ALJs do not prepare written findings of facts and conclusions of law in the ordinary case. Nonetheless, if they have performed their function in a rational manner, they have gone through the process mentally. It should take only a slight amount of additional time to spell out their findings and conclusions in short, numbered paragraphs. It is imperative that the inordinate delay that has plagued the Appeal Board not be transferred to the ALJ stage. To prevent that will require self-restraint by the ALJs, and an understanding that they are not being asked for elaborate, artistic opinions. What is needed is a crisp, concise statement of the case, which will enable a losing party to determine more intelligently than heretofore whether an appeal is justified, and which may serve in the event of an appeal as the basis for Board review. Furthermore, when the Board affirms the ALJ's decision without modification, it should be entitled to adopt the decision as its own. That would further conserve the Board's energies for the significant task of interpreting and applying the statute in the more novel and unprecedented cases.

In the comprehensive 1980 report on the results of the Workers' Compensation Adjudication Project (the "Lesinski Report"), it was similarly concluded that ALJs should be required to support their decisions with findings of fact and conclusions of law (pp. 155-158). The Lesinski Report would then have the ALJs' findings of fact be binding on the Appeal Board "unless they are contrary to the great weight of the evidence" (p. 157). My own suggested standard of "substantial...evidence on the whole record" is deliberately designed to allow the Appeal Board a bit more latitude; the wording is also more in accordance with existing language in the Administrative Procedures Act. Otherwise, I agree entirely with Judge Lesinski that fact findings are better made at the trial level where witness demeanor can be observed; that written ALJ decisions would inform losing parties why they lost, which alone might obviate one reason for appeals; that

eliminating de novo review should also reduce the number of appeals, especially those aimed at relitigating the facts; and that the Appeal Board ought to be able to act without a formal opinion in those cases where it can simply adopt the ALJs' findings.

The requirement of written findings of fact and conclusions of law should only be imposed for cases in which hearings have not begun when the amendatory legislation becomes effective. ALJs undoubtedly differ in the extent to which they take notes at a hearing. Since they will not have the transcript available when preparing their decisions, they should have due forewarning of the need for adequate material on which to base their findings and conclusions.

In perfecting an appeal, the appealing party should be required to specify those portions of the transcript on which it is relying in disputing the soundness of the ALJ's findings of fact. Theoretically, this might seem to place the appealing party in the awkward position of trying to "prove a negative"; the party might conceivably argue that the record is totally devoid of any supporting evidence. In practice, there will rarely be a problem. Both parties will have submitted opposing testimony and exhibits. At the same time, however, some reviewing courts, cognizant of the appellant's potential quandary, formally require the appellee to cite those portions of the record that arguably constitute the substantial evidence supporting the findings of the ALJ. That would seem a sensible way to proceed here. The practical consequence is that the parties, between them, will have narrowed the Appeal Board's inquiry and substantially reduced its work load. One might also hope that the very process of having to get the testimony transcribed and exceptions taken to the ALJ's findings through references to particular portions of the record, in the course of perfecting the appeal, will itself serve to discourage the less meritorious appeals.

An anticipated objection to the elimination of de novo review is that too much power will then be reposed in the hands of individual ALJs. Some ALJs are regarded in certain quarters as deficient in objectivity and impartiality of judgment. My own examination of the decisional records of the present group of ALJs suggests that the claims of bias are exaggerated. Naturally, there is a range of attitude reflected in ALJ awards granting or denying benefits, but human beings are not calculating machines and some inclination toward liberality on the one hand or strictness on the other must be expected in a certain number of any group of reasonable people. Since 1978, the overall performance of ALJs in Michigan in granting benefits has been as follows:

TABLE VII-5

ALJ Awards of Benefits, 1978-1984

	Total Decisions			% Granted		
	Detroit	Outstate	Total	Detroit	Outstate	Total
1978	661	1462	2092	71	72	72
1979	782	1606	2388	68	70	70
1980	1288	1598	2886	71	67	69
1981	837	1490	2327	66	64	65
1982	680	1949	2626	61	61	61
1983	759	2419	3178	61	60	60
1984	648	1495	2143	62	55	57
Totals	5660	11,983	17,643	66	64	65

As can be seen, **there has been a rather sharp decline in the rate at which benefits have been granted, especially in the years 1981 and 1982.** Altogether, 65 percent of the decisions of ALJs during the period of 1978-1984 granted benefits. I examined the "grant rate" of each individual ALJ who had more than three years' service. There were 26 such persons out of the then-total complement of 29. Fifteen of the 26 had a "grant rate" that did not deviate by more than ten percentage points from the "standard" of 65 percent. I then concentrated upon the remaining 11, to see how their decisions had fared on appeal. The results were as follows:

TABLE VII-6

ALJ Awards of Benefits and Affirmances

ALJ	% Granted, 1978-1984	% Affirmances, 1978-84
A	80	71
B	78	79
C	78	63
D	77	68
E	77	64
	* * *	
F	54	77
G	50	77
H	50	69
I	49	74
J	48	74
K	48	68

Note: The affirmance rate for all ALJ decisions in 1978-84 was 72 percent.

While there was a considerable range in the percentages of decisions granting benefits by the 11 ALJs at either end of the spectrum, the affirmance rate hardly suggests that this group was any more prone to error, as evidenced by Appeal Board reversals, than their colleagues who were closer to the average grant rate. The affirmance rate for all ALJ decisions since 1978 has been 72 percent. The affirmance rate for this particular group ranges from 63 percent to 79 percent, with the average of their affirmance rates being 71 percent, almost identical to their colleagues'.

Another way to test the soundness of ALJs' decisions is to compare their affirmance rate with that of federal district judges or federal administrative agencies in the federal courts of appeals. In 1980 the courts of appeals reversed district judges in 19 percent of all civil cases and reversed administrative agencies in 22.4 percent of their cases. **Annual Report of the Director of the Administrative Office of the United States Courts**, p. 212 (1980). **The reversal rate for Michigan ALJs in workers' compensation cases was a comparable 16-23 percent in 1970-77 and again a comparable 23 percent in 1983.** Even the overall reversal rate for ALJs of 28 percent in 1978-84 does not look bad, especially when one considers that their fact findings were subject to de novo review, while federal district courts are reversed on fact findings only if they are "clearly erroneous" and

federal administrative agencies are reversed on facts only if their findings are not supported by substantial evidence.

Although I do not find that the hard data provide significant support for accusations of bias against ALJs, I concede that a perception of bias or of political favoritism in their appointment can be almost as damaging to the acceptability of their awards. In view of the spotlight that has been focused upon this particular group, **I would strongly urge the Legislature or the Civil Service Commission to establish a bipartisan ALJ Qualifications Advisory Committee to interview and evaluate prospective candidates,** with ratings to be transmitted confidentially to the appointing authority. My model for this proposal is the Judicial Qualifications Committee of the State Bar, which has functioned effectively for a number of years in advising the Governor on the qualifications of candidates for appointment to fill vacancies in the State judiciary. Like the Governor, the appointing authority in the case of ALJs would not be bound by the Advisory Committee's evaluations, but experience has demonstrated that such assessments are given significant weight. I should add that I have not closely examined the question of whether the Bureau Director is the most appropriate person to appoint ALJs.

A further step that might be considered to enhance the independence of the ALJs would be to remove them physically from the rest of the Bureau's offices and to provide them with a Chief ALJ and a Deputy Chief to handle their assignments and to provide administrative support. But this would insert another layer of bureaucracy and could reduce efficiency. I myself have not seen evidence that such action is necessary.

3. **Streamlining the Appeal Board. My last major recommendation for restructuring the administrative system is to create a new five-member, or possibly seven-member, Appeal Board to replace the current fifteen-member body.** An enlarged membership does not necessarily lead to increased output, and it certainly does not contribute to unified decision-making, especially when the members operate in three-person panels. My belief is that a streamlined Appeal Board can be even more effective in providing a consistent interpretation of the law, and that a smaller body should be able to cope with a future case load where it has only limited responsibility for findings of fact. My preference would be to start with just five members and move to seven only if that proves necessary.

As shown in Table VII-1, contested case filings are now back down below 24,000 a year, in the range that prevailed from 1969 through 1971. Those years produced about 1200 to 1600 contested ALJ decisions annually. Even assuming that three-quarters of such a number would still be appealed, I am satisfied that 900-1200 cases a year are a manageable workload for a five- or seven-member Appeal Board, given substantially reduced record-reading and fact-finding responsibilities, the use of legal assistants, and the authority to adopt ALJs' decisions as the Board's. Although the seven-member Appeal Board of the early '70s was having trouble with the caseload of that period,

I envisage a markedly less onerous assignment for the Board in the future. (The five-member National Labor Relations Board, operating with a large legal staff but with considerably broader statutory responsibilities, decides about 2,000 contested cases a year.)

To promote stability and continuity on the Appeal Board, I believe the length of terms should be increased from the current four years to six or seven years. These of course should be staggered terms. The interest-group designations of Appeal Board members ought to be abolished. To ensure acceptability, the Board's membership should continue to be representative of business, labor, and other interests throughout the State. But to assign the actual label of "employer," "employee," or other such representative is too likely to convey the notion that each individual member has an ongoing obligation to promote the interests of a particular constituency in handling every individual case. That is unseemly, and detracts from the higher public role that each Board member should be entitled to feel he or she is playing. To enhance the stature of Appeal Board members still further, I would also urge that the Governor make use of a bipartisan Advisory Committee to assist in the evaluation of candidates. This could be either the same body as, or a body similar to, the ALJ Qualifications Advisory Committee I discussed earlier.

At present Appeal Board members need not be lawyers, and they are paid less than the ALJs whose decisions they review. (All new ALJs must be attorneys.) That is anomalous under any set of conditions, and it will be even more so if the Appeal Board becomes substantially less involved in factfinding and concentrates instead on legal rulings. I would therefore recommend that only attorneys at law be eligible for membership on the new Appeal Board, and that their rate of compensation be substantially increased. With an eventual reduction in the total membership of the Appeal Board from fifteen to five, or at most seven, a considerable raise could be granted without an addition to the total budget. It would also be considerably more economical to provide law clerks for each Board member to assist in legal research and decision drafting than to maintain the existing complement of fifteen members.

Streamlining the Appeal Board should produce some financial savings for the State directly. But I anticipate that the elimination of de novo review and the consequent reduction in the number and complexity of appeals will have the most pronounced and beneficial effect on the costs incurred by litigants.

There remains for discussion the appalling problem of the five-year backlog of cases at the Appeal Board. The maxim that justice delayed is justice denied is especially cruel in its application to disabled workers. There seems a consensus among labor, management, and other interested groups across the State that drastic measures must be taken if necessary to remedy the situation. One proposal has been to have ad hoc tripartite arbitration panels replace both the ALJs and the Appeal Board. Under this arrangement

the employer and the employee would each designate one arbitrator and the latter two would then select a third person as the impartial chair.

I see at least two major flaws in this suggestion. First, it would eliminate the element of administrative expertise from the decisional process, and prevent the systematic development of any coherent, unified body of law, except through costly and time-consuming court litigation. Second, as an occasional labor arbitrator myself, I am more than a little skeptical about the availability of an adequate number of persons capable of serving in the critical role of impartial chair. The law of workers' compensation is far more technical and complex, and takes far more time to master, than the sort of issue presented in the usual labor arbitration case. Experience under the Michigan Medical Arbitration Program is not at all comparable. From the inception of medical arbitration in 1976 through August 1984 there had been only 95 arbitral awards. By contrast, from 1978 (I start with 1978 for comparison purposes because that is the year the Medical Arbitration Program could fairly be said to have swung into full operation) through September 1984, ALJs issued 17,643 decisions granting or denying benefits. Needless to say, even if arbitration is not made a formal part of the workers' compensation system, it could always be encouraged for voluntary adoption by the parties in any given case as a final and binding method of resolving their dispute.

My recommendation is to retain the existing fifteen-member Appeal Board on a temporary basis, probably for three or four years, and have it devote its efforts solely to the elimination of the backlog. In other words, there should be a complete break with the past, and the new five- or seven-member Board should start with a clean slate. Its jurisdiction should attach only to those cases in which ALJs had not yet begun trials on the effective date of the amendatory legislation or on some specified subsequent date. That also means that the members of the new Board might not have to be appointed immediately, since presumably there would be some lapse of time before appeals from post-amendment ALJ decisions would reach the Board in any volume.

I would also suggest that the old Board consider establishing some type of expedited process for handling the more routine cases caught in the backlog. It would seem senseless to make the parties in such cases await their turn in the multiyear mass when a relatively short time spent with their file could result in a quick disposition. Perhaps one or two three-person panels could be given the special assignment of sifting through the entire backlog to identify and decide those cases susceptible of summary treatment.

It is probably inevitable that members of the old Appeal Board will begin to leave for other positions as the Board nears its termination date. Rather than have the process of cleaning up the last of the backlog slowed down, I would recommend that ALJs be made eligible to serve temporarily (perhaps for a maximum period of one year) on the old Board. There is precedent for such

an approach in the 1984 amendments to the Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 921(b)(5). As another emergency measure, the Legislature may wish to authorize the appointment of retired Board members, members of the "new" Board during its expectably slow start-up period, ALJs, or similarly qualified personnel to serve on a temporarily enlarged Appeal Board to enable an even swifter liquidation of the backlog.

B. Miscellaneous

1. Evidence, including medical testimony. Several decisions of the Michigan Court of Appeals have indicated that the rules of evidence in workers' compensation cases are less rigorous than those applicable in courts of general jurisdiction. Specifically, for example, an ALJ is entitled to admit hearsay of the sort that would probably be excluded in a court of law. Nonetheless, workers' compensation hearings before an ALJ are relatively formal, and it is clear that the reviewing courts expect the proceedings to comply generally with the Michigan Rules of Evidence. See, e.g., Holford v. General Motors Corp., 116 Mich. App. 488 (1982).

As a practical matter, perhaps the most significant evidentiary problem in the processing of workers' compensation cases is the treatment of medical evidence. Once much emphasis was placed upon obtaining the personal testimony of medical witnesses for both the claimant and the defendant at the trial before the ALJ. That inevitably produced many frustrating postponements, since it required the simultaneous appearance of several extremely busy people. Gradually it became customary to take medical evidence by deposition, i.e., sworn testimony on the record outside the actual hearing. In Detroit, this is ordinarily done after the trial, while in the rest of the State, it is done before the trial. One can understand the Detroit procedure if the ALJ is essentially just a compiler of the official record, but the outstate approach makes much more sense if the ALJ is a true decision-maker.

One further step away from live testimony should be taken in the usual case. Although depositions mean that the physician or other medical witness does not have to appear before the ALJ, there will still be a need ordinarily for a joint session involving the doctor, the two lawyers, and a court reporter. It is surely time to ask whether a simple (perhaps notarized) medical report would not be adequate prima facie evidence, with the opposing party entitled (at its own expense) to seek a deposition or to submit interrogatories in clarification or rebuttal. My own experience as an arbitrator suggests that **a good, extensive medical report, which can be read over at leisure, will often serve as well as live testimony.**

With regard to occupational diseases, the National Commission on State Workmen's Compensation Laws declared (**Report** at 51):

> R2.15. We recommend that the etiology of a disease, being a medical question, be determined by a disability evaluation unit

under the control and supervision of the workmen's compensation agency.

R2.16. We further recommend for deaths and impairments apparently caused by a combination of work-related and nonwork-related sources, issues of causation be determined by the disability evaluation unit.

The Michigan workers' compensation system of course has nothing akin to a disability evaluation unit, and the functions envisaged for it by the National Commission are performed in this State by the ALJs. See, **e.g.**, Dation v. Ford Motor Co., 314 Mich. 152 (1946). The National Commission's proposals run counter to the American tradition of resolving medical questions, like other factual questions, through the adversarial process. There are strongly vested interests favoring the practice of letting imaginative lawyers and their supporting casts of paid medical witnesses fight out the issues of etiology and causation. Furthermore, it cannot be gainsaid that in some individual cases greater justice will be achieved by a hard-hitting, creative adversarial presentation. Nonetheless, for the system as a whole, it is all very costly and time-consuming. In light of the intrinsic imponderables of occupational diseases, as discussed earlier in this report, the adversarial approach to medical determinations is probably in net effect quite meaningless. The ALJ is ultimately going to have to make, for legal purposes, a medical judgment that in many cases will necessarily be an arbitrary one. **Much can be said in favor of substituting for this trial by contradictory medical testimony a single determination by an impartially selected medical panel.** The results would not necessarily be better, but there is little reason to think they would be worse, and they would almost surely be much cheaper and faster.

Impartial medical panels or examiners have not proved popular, needless to say, in the workers' compensation systems of this country. Nonetheless, they exist in one form or another in about fifteen jurisdictions, sometimes concentrating on dust or other lung diseases. Professor Peter S. Barth, of the University of Connecticut, a leading authority on occupational diseases, is currently conducting a major study of medical panels in several states. In 1980 he produced a most thoughtful and balanced report on medical review panels in what he described as the "profoundly" different workers' compensation systems of British Columbia, Manitoba, and Saskatchewan. If his findings concerning the generally successful Canadian experience can only be given limited weight because of the differences in the two countries' systems, his forthcoming American study should definitely receive the closest attention.

2. Limitations. Employers have long sought a "tougher" or "more meaningful" statute of limitations in workers' compensation cases. There is an understandable resistance to the assertion of stale claims that may be based on forgotten events of long ago. On the other hand, the consequences of certain injuries, especially those involving occupational diseases with a

long period of latency, may not be known for many months or even years. The legislative effort to work out a reasonable balance between employer and employee interests is reflected in MCL §§ 418.381, 441, and 833. These statutory provisions, which were amended in 1980 and 1981, contain some drafting inconsistencies, but their general purport seems as follows. An employee must give the employer notice within 90 days after the employee knows or should have known of an injury, although failure to give notice is excused unless the employer can prove prejudice. Then, an oral or written claim for compensation must be made to the employer, or a written claim must be made to the Bureau, within two years after the injury, or the manifestation of disability, or the last date of employment. (That last phrase obviously introduces the possibility of a considerable extension of the time for filing a claim after the actual date of injury.) Despite the possibility that a claim may be filed many years after an injury occurs, the employee cannot receive compensation benefits for more than two years preceding the application for a hearing with the Bureau. Furthermore, if payment of compensation is begun and then stopped, and a worker later petitions for a resumption of the payment of benefits of the same type, compensation will not be ordered for more than one year prior to the filing date. Both these latter provisions protect an employer against liability for a large accumulation of benefits.

The 1980 and 1981 amendments on limitations have not yet received definitive interpretations. My impression is that they will probably not produce significant changes in the preexisting law. (One definite but relatively minor change is the reduction of the period for notice concerning occupational diseases from 120 days to 90 days, to coincide with the period for giving notice of personal injuries.) Limitations on claims for occupational diseases will continue to be the most troublesome area, but that a nationwide problem. However a statute is worded, agencies and courts are going to be sympathetic to the worker who ultimately succumbs to a disease with a recognized period of long latency. **Michigan's two-year limitation on claims is generally in line with other industrial states, and less generous than the three-year period of Illinois, Minnesota, Pennsylvania, and Recommendation 6.13 of the National Commission (Report** at 107-08).

3. Voluntary payments, petitions to stop, etc. Employee and employer counsel called to my attention two situations about which both groups felt grieved in different ways. The first is when an employer starts voluntary payments, and then terminates them for some reason, **e.g.**, it discovers the employee has been working elsewhere or believes the employee is no longer disabled. The second situation is when the employer is under a final Bureau order to make payments, and wishes to stop for reasons similar to those just mentioned.

In the case of voluntary payments that are later cut off, the employee has to file a new application and wait a year or more for a hearing before an ALJ. On the other hand, if the employer's payments are pursuant to a final Bureau order, they must be continued until the employer is able to obtain an

ALJ hearing in accordance with a "petition to stop" compensation. Rule 10(2) of the Bureau's Administrative Rules provides that a hearing shall be scheduled within 30 days of the filing of the petition to stop, but the ALJs' backlog has usually prevented this. The results make all parties unhappy.

Employees and their representatives do not think it is fair that the employer gets priority treatment on its petition to stop, while the employee must ordinarily wait for a whole year to get a hearing before an ALJ concerning the employer's termination of voluntary payments. That is especially galling if the voluntary payments only began on the eve of a previously scheduled hearing, after the employee had already waited a year or so. For its part, the employer paying under an order feels that it is being denied its plain rights under the rules to a 30-day hearing, and in the meantime it must maintain payments to a worker whom it considers no longer eligible.

In my view, both positions are sound. At the very least an employee subjected to an employer's unilateral termination of benefits should have to wait no longer for a new hearing than he would have had to wait for the originally scheduled hearing at the time when the employer began voluntary payments. Furthermore, after voluntary payments have been continued for some substantial length of time, regardless of when they started, any subsequent cessation should entitle the employee to priority processing of the application for a new hearing. The same 30-day period should be applicable to both employee and employer petitions, and every effort should be made to comply with those deadlines. Strong equities are at stake in these cases, feelings run high, and special measures may be warranted. With a decline in claims filings and an increase in the number of ALJs, as discussed in Part VII-A-1, **supra, implementation of a priority hearing calendar may soon become practicable.**