KAROSHI: Is It Sweeping America?

Mara Eleina Conway†

I. INTRODUCTION

Every era has given and taken something from society. The technology driven economy of the twentieth century has given us access to global markets and produced more competition while taking away one of the most precious commodities of human society: time. Historically, physical work hours in Western society seemed to reach an intense level with the introduction of the industrial era and factories.[1] Translated into our twentieth century socio-economic environment, this work culture has resulted in a serious social problem: *karoshi* or death by overwork. In Japan, "[i]t is said that the only way to prevent death by overwork is to avoid overworking yourself, or to take a rest when you feel tired" [if only you could take the time!].[2] The absurdity of this comment illustrates the losing battle faced by employees in Japan, and similarly in America. Thus, it is imperative to examine and evaluate laws which attempt to protect the worker from a potential death sentence and enable employers to lessen work factors, but can lead to death by overwork.

"The problem of *karoshi*, or death by overwork, is getting worse as companies struggle to save themselves on the bottom line by trying to produce more with fewer workers."[3] Japanese Labor Minister Takanobu Nagai said, "76 people died of overwork in FY '95, [period] ended March 31, more than double the toll of FY '94. The Labor Ministry found that 16.5% of the busi-

† Attorney at Epstein Becker & Green, .P.C.; Law Fellow at the Northwest Center for Emerging Technologies. (1996-1997); LL.M., University of Washington, 1997; J.D., Syracuse University, 1996; B.S., New York University, 1991. I am grateful to Professor Daniel Foote (University of Washington, School of Law) for his advice, support, and editorial assistance.

1. JULIET B. SCHOR, THE OVERWORKED AMERICAN 45- 49 (1991).

2. Toshiro Ueyanagi, *Laws Concerning Karoshi*, *in* NATIONAL DEFENSE COUNSEL FOR VICTIMS OF KAROSHI, KAROSHI: WHEN THE CORPORATE WARRIOR DIES 84, 84 (1990) [hereinafter CORPORATE WARRIOR].

3. *Labor Minister Urges Employers To Reduce Death By Overwork*, JAPAN DIG., Apr. 1996 [hereinafter *Labor Minister*].

nesses under its jurisdiction violated overtime regulations."[4] Similarly, in America, overtime work has become a legal and cultural problem for both the employer and the employee. The recent case of Helen Stanwell, a county worker [in King County, Washington] is illustrative of these issues. Ms. Stanwell would not stop working even after she had worked for 40 hours in one week. Thus, she was ordered to start serving a six-day suspension without pay for insubordination. Her offense: "working too much."[5] Was the county's response to Ms. Stanwell a case of a benevolent employer correcting unhealthy behavior by an employee? Not really. The then King County Executive [now Governor] of Washington, Gary Locke, "said the country has lost millions of dollars in lawsuits to employees who worked extra hours without pay and then sued."[6]

The overwork phenomena is escalating in America. Between 1980 and 1985 stress-related worker's compensation claims tripled. "A study by the Economic Policy Institute released in February 1992 indicated that the average American worker puts in about 140 more hours on the job each year than two decades ago."[7] How people perform work, the environment in which they work, the length of service, and the pay and benefits are all dictated by cultural norms and value structures. If a person dies due to conditions created in the workplace, is the employer guilty of causing this death? Sociologist, Edward T. Hall pointed out that in every society, cultural knowledge exists in two levels of consciousness: the explicit and tacit.[8] Cultural norms dictate the approach taken by both the worker and employer in the development of the workplace. As a cultural matter, murder is a socially reprehensible and punishable crime in both the United States and Japan. But in order to prove that either murder or wrongful death has taken place, one must first establish that a crime has taken place. Although it is not necessarily considered criminal, *Karoshi*, as noted by Labor Minister Takanobu Nagai[9], is a recognized social and legal issue within the Japanese society and legal system. In America, research along with a growing number of worker's compensation cases related to this issue point toward the need for change and recognition of a similar *karoshi* phenomenon.

---

4. *Id.* (Note: Some authorities and agencies place the figure much higher.)

5. Duff Wilson, *Overwork Gets Woman Suspended*, SEATTLE TIMES, Nov. 2, 1996, at A1.

6. *Id.*

7. Marilyn M. Kennedy, *When Does Work Become Overwork?* MGMT. REV., Jan. 1996, at 51.

8. EDWARD T. HALL, THE SILENT LANGUAGE 62 (1973).

9. *See* footnote 38 and accompanying text

Any time social issues change on a primary level, we need to also consider the foundation of the law to understand how change can occur within the current system. H.L.A. Hart, in *The Concept of Law*, defined features of the law that cause us to look at legal rules in their societal setting as well as their content.[10] In order to view both the societal setting and content, Hart divided legal rules into two categories: primary and secondary.[11] Primary rules of law impose obligations, or duties, by serving as standards. A rule is like a sanction only in the sense that it serves as a reason that justifies a sanction, not that it is the grounds for predicting a sanction. Adopting Hart's model, this article will generally examine the primary rules and the federal and state rules controlling workers' hours, health, and compensation. Furthermore, it will consider the social conditions that create and maintain the current set of rules.

Continuing under Hart's model, this article will also examine secondary rules regarding workplace norms. Secondary rules help us enforce primary rules and determine what happens. Secondary rules are comprised of three basic and intimately related kinds of rules: recognition of primary rules, rules of adjudication, and rules of change. Recognition of primary rules allows one to identify and recognize norms governing one's society. Recognizing these primary rules can serve to change and adjudicate controversies related to the rules. Additionally, rules of change and adjudication are sources for developing additional primary rules; therefore, the connection between the two is important. Rules of change establish authoritative mechanisms for enactment and repeal of rules to overcome the static characteristic that is inherent in the primary system. Rules of adjudication establish mechanisms to overcome the problem of inefficiency present when controversy over primary rules exist. Rules of adjudication and change help us to understand phenomena such as *karoshi*. These secondary rules also enable us to ask questions about social phenomenon and prod us to critically rethink primary rules to adjust to the changing needs of our fluid society. This study will examine the phases of recognition, adjudication and change with respect to both the U.S. and Japan and assess where the two nations stand on the process currently.

Through the course of this discussion a link will be developed between how longer work hours, work-related stress, and heart failure results in *karoshi* in America and their parallel manifestation in Japan. In this manner, recognition, change and adjudication will also be reviewed. A rule of recognition allows

10. H.L.A. HART, THE CONCEPT OF LAW ch. 1 (1961).
11. *Id.* at 79.

one to identify, or recognize, the actual rules of one's own society. Rules will "specify some feature or features possession of which by a suggested rule is taken as conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts."[12] Once we can understand the nature of the rule of recognition as a cure for the problem of uncertainty we can view other sorts of secondary rules such as rules of change. This study will examine the changes occurring in both the United States and Japan, including a look at the expanding definitions allowing for compensation and the current legal limitations placed on work hours to safeguard the health and well-being of the workforce. These secondary rules establish the authoritative mechanisms for enacting and/or repealing of primary rules as well as help to overcome the static character of such a system. However, the secondary rules cannot fill the deficit left by primary rules if there is a lack of formal recognition of death by overwork. Thus, rules of adjudication will be considered in establishing mechanisms to overcome the problem of inefficiency present when controversy over primary rules exists. Since the rules of change and adjudication are sources for future primary rules (i.e. formal recognition of *karoshi*) a strong link will be developed for the connection between these rules and rules of recognition.

II. *KAROSHI*: UNDERSTANDING WHAT IT IS AND HOW IT RELATES TO WORK

1. General Definition of Karoshi in the Workplace

What is *karoshi*? According to Japanese labor standards:

> In the simplest terms, *karoshi* is death from overwork. Defined in more professional terms, it is a "condition in which psychologically unsound work processes are allowed to continue in a way that disrupts the worker's normal work and life rhythms, leading to a build-up of fatigue in the body and chronic condition of overwork accompanied by a worsening of preexistent high blood pressure and hardening of the arteries and finally resulting in a fatal breakdown."[13]

Dr. Tetsunojyo Uehata, of the National Institute of Public Health, identifies three issues that contribute to *karoshi*:

- "[H]eavy physical labor"
- "[L]ong hours of overtime, working without days off, late night work and other factors that obstruct biological rhythms"

---

12. *Id.* at 92.

13. Hiroshi Kawahito, *Karoshi and Its Background: From the "Karoshi Hotline" Program, in* Corporate Warrior, *supra* note 2, at 4, 8 (quoting Dr. Tetsunojyo Uehata).

- "[E]xcessive stress resulting from factors like overly intense work responsibilities, solitary job transfers and undesired job assignments or transfers."[14]

"In addition, factors that tend to accompany excessive work loads like disruption of sleep rhythms, reduction of free time for rest and leisure, excessive drinking and smoking, alteration of eating habits, neglect of medical treatment and disruption of family life, all contribute to the build-up of fatigue."[15] Given its identifiable characteristics, it is arguable that *karoshi* is a definable term. Yet, even though *karoshi*, as a concept, lacks ambiguity, it is widely challenged as a recognizable cause of death. To fully understand this issue, we need to look at the tacit (social), as well as the implicit (legal), reasons behind this phenomenon.[16]

2. JAPAN — SOCIAL AND LEGAL DEFINITION OF WORK HOURS

Cultural/Environmental Background

The law needs to reflect the ebb and flow of society. To do so, it always remains one step behind the tacit cultural changes occurring in society. Thus, it is impossible to truly understand what is driving any society to work employees to the point of death by overwork without examining the foundation causing past changes and predicting future needs.

Karoshi is a culturally recognized phenomenon in Japan. Evidence abounds in both the public and private sector today attesting to its existence. The Economic Research Institute of the Economic Planning Agency (EPA) in Japan stated that:

> "Karoshi" or death from overwork is closely related to Japanese labor practices which are characterized by conspicuously longer working hours than in other industrial countries . . . .
>
> . . . Japanese workers are believed to work an average 1.5 hours daily of so-called "service overtime" or unrecorded and consequently unpaid overtime work.
>
> Most of the people whose deaths are suspected to be caused by fatigue from overwork had worked more than 3,000 hours a year, including overtime. . . .
>
> The researchers said people's sense of values, combined with the long-standing labor practices in Japan, tend to aggravate overwork. Individuals and corporations need to change their attitudes toward work in order to prevent overwork. . . .
>
> They suggest that the government extend workers' accident compensation insurance to cover karoshi cases and intro-

14. *Id.*
15. *Id.*
16. *See* footnote 8 and accompanying text

> duce a new premium calculation method for the insurance based on the working hours at each workplace.[17]

The Japan Institute of Labor, in its *1996 Labor-Management Relation in Japan* report, indicated that labor hours in Japan had leveled off at 2100 per year as a result of the enforcement of Labour Standards Law (LSL).[18] The LSL encourages the taking of holidays and strives to maintain a 40 hour work week.[19] These are admirable goals aimed at improving the quality of life for the Japanese worker and reducing work-related stress. Yet, the reality is still that much longer hours are worked than reported and official figures do not take them into account.

This overwork phenomena in Japan appears to be linked to the worker's sense of self-worth and his place in society as shown by the following illustrations. In the Japanese culture, the corporation has come to represent the worker's extended family.

> In Japan standard employment form is a lifetime employment system accompanied by periodic pay increase and promotion based on seniority. . . . Lifetime employment means that new school graduates enter a particular company and continue to stay with the company for many years or, as the case may be, until they retire from the company at the mandatory retirement age of 55-60.[20]

Thus, in Japan, there is a strong feeling that companies will take care of employees. In the book *Karoshi*, Yoko Kuroiwa and Hiroshi Kawahito, examine the employment history of a woman employed by a major bank. In that case, the woman died from *karoshi*, caused by long hours and resulting stress. The victim's family observed her worsening condition and regretted not taking any action. They stated, "[w]e were fearful something serious might happen. But at the same time we felt that Fuji Bank, one of the top financial institutions in Japan, would not let any disaster happen."[21] This case illustrates the type of loyalty demonstrated by individuals, and expected by Japanese society, toward their job.

> In Japanese corporations, making a contribution to the company through long working hours is one of the prerequisites for advancement. Employees who don't work overtime, or

---

17. *EPA Study Links "Karoshi" To Long Working Hours*, Japan Economic Newswire, Jan. 7, 1994, *available in* Westlaw, Japanecon Database.

18. JAPAN INSTITUTE OF LABOUR, LABOUR-MANAGEMENT RELATIONS IN JAPAN 37 (1996).

19. *See* MINISTRY OF LABOUR JAPAN, LABOUR LAWS OF JAPAN 67 (1990).

20. Hobara Kishio, *New Forms and Aspects of Atypical Employment Relations in Japan*, NAT'L REPT., Sept. 1985, *reprinted in* DANIEL H. FOOTE, LABOR LAW IN JAPAN (1989).

21. Yoko Kuroiwa & Hiroshi Kawahito, *A Female Employee of a Major Bank, in* CORPORATE WARRIOR, *supra* note 2, at 55, 61 (quoting Mr. and Mrs. Daiken Iwata).

> who often take their allotted paid vacations days are evaluated negatively. If such negative behavior continues, it results in a slowing of one's advancement within the company . . . . Some workers even find themselves being fired for refusing to work overtime.[22]

Another example of the Japanese attitude and work culture is the 1991 Hitachi case.[23] In this case, an employee was dismissed for refusing to work overtime. The employee's appeal was taken all the way to the Japanese Supreme Court where he was told that overtime was permissible in this case as he (the employee) needed to fix the "slipshod" work he had done. While the court did not directly support the concept of overtime, the decision should still send a fearful message to the average Japanese employee: no overtime will result in no advancement and possibly no job.

While the Japanese government is making great strides toward the recognition of *karoshi,* there has been a great deal of difficulty in getting cases recognized.[24] In Japan, as in the U.S., worker's compensation exists to pay benefits to the workers' family when the worker die from illness resulting from overwork. The Japanese government has been slow to recognize such claims. In 1987, there were only 21 cases, 29 cases in 1988, and the government authorized recovery in 30 cases during 1989.

Applying The Labour Standards Law (LSL) to Groups of Workers

The first primary rule to be considered when building a case for *karoshi* in Japan is the LSL and its regulation of working hours. The LSL, first established in 1947 was, as the Fair Labor Standards Act (FLSA) in the United States, designed to cover the blue-collar worker or the factory worker. "Its unsuitability has surfaced, however, in accordance with the increase of white-collar workers who are free from concrete directives from their employers and who are given wider discretion in performance of their work."[25] As the law was modified to allow employers to increase work hours with only a 25% overtime premium, the work hours in Japan also increased. The labor hours of the Japanese worker continued to rise after World War II to a peak in

22. Kawahito, *supra* note 13, at 11.

23. Tanaka v. Hitachi Manufacturing Co., (Sup. Ct.) [Saiko Saibansho], 1st P.B., Nov. 28, 1991, 594 RŌDŌ HANREI 7, *cited in* Daniel H. Foote, *Law as an Agent of Change? Governmental Efforts To Reduce Working Hours in Japan, in* JAPAN: ECONOMIC SUCCESS AND THE LEGAL SYSTEM 251, 253 (Harald Baum ed., 1997).

24. *See* Kawahito, *supra* note 13, at 12.

25. Takashi Araki, *Regulation of Working Hours for White-collar Workers Engaging in "Discretionary Activities,"* JAPAN LAB. BULL. (Japan Inst. of Labour, Tokyo), July 1996, at 4, 4.

1960 of 2426 hours per worker per year with a reduction in hours that mirrors the swings of the economy.[26] Fortunately for the Japanese worker, there has been a downward trend, leveling off hours at approximately 2,100 hours per worker per year in 1988.[27]

Treatment of Non-exempt Workers Under The Labour Standards Law

Article 32 of the 1947 LSL set a maximum number of working hours as 8 per day and 48 per week, with criminal sanctions for violations.[28] At the same time, however, Article 36 gave the employer an option to extend working hours beyond the maximum set in Article 32 if the following conditions were met:

- The employer must conclude a written agreement with a labor union organizing a majority of employees, or
- A representative of majority of employees in the undertaking prescribing the limits and reasons for the extension.

Additionally, a copy of the agreement must be submitted to the Labor Inspection Office. An example of a company which successfully obtained this type of overtime request can be found in the Japanese Supreme Court's 1991 *Hitachi* decision. *Hitachi*'69 had established acceptable overtime provisions with the union. Thus, the plaintiff was subject to the rules set in place and was not allowed to refuse overtime. Many questioned whether this ruling gave too much power to the managers since the LSL essentially leaves room for maneuver around the 40 hour week standard. The result for the non-exempt employee is limited protection as applied by the union/employee representative. Additional concerns surround the 1987 revision which allows discretionary work hours to be applied to white-collar workers. In this scheme, worker and manager agree to a task set that should total eight hours. If the task set is not completed, the workers must stay and complete the task without charging overtime premium.[29] To fall under such discretionary plan an employer must simply file an intention to create a plan file an intention to create a plan, detail the type of work to be done, and submit the agreement to the Labor Office. The low threshold that an employer must meet to request this type of work leaves a majority of white-collar workers performing discretionary work plans without the opportunity to be paid overtime or reject overtime. Thus, although the LSL has a long- standing policy of a

26. *Id.*
27. JAPAN INST. OF LABOUR, *supra* note 16, at 38.
28. *Id.*
29. *See* MINISTRY OF LABOUR JAPAN, *supra* note 19, at 70.

forty hour work week, this does not appear to have been a major goal. As one scholar notes, "attention was not deflected away from the 40-hour standard, but its adoption was delayed nonetheless [by custom and culture]."[30] Custom and culture have dissipated the strength that the 40 work week provision should have held. Thus, the strength of society's tacit cultural needs are reflected in the law, because the rules are simply a reflection of the people who promulgate them.

The LSL Treatment of Exempt Workers

The LSL 40 hour work week requirement, similar to that of the Fair Labour Standards Act (FLSA), does not cover all workers. Article 41 states, "[t]he provisions [under the preceding paragraph] shall not apply to . . . persons in positions of supervision or management or persons handling confidential matters, regardless of enterprise."[31]

Though this exemption appears to be similar to that found in the FLSA, it is estimated that nearly 60% of the U.S. workforce is exempt from FLSA regulation.[32] In Japan, on the other hand, it is estimated that 4.4% of the workforce is in such management or exempt category.[33] Looking simply at the statistics it appears that fewer people are affected by this problem in Japan, and as a result maybe there should be of little concern about the application of the labor law in this area. However, Professor Takashi Araki of the University of Tokyo, asserts that in reality, the discretionary work schemes are moving many white-collar non-management people into the yearly salaried exempt category.[34] As more people find themselves without coverage under the LSL, increased stress from longer work hours would likely result in more cases of *karoshi.*

Worker's Compensation in Japan

The second primary rule to be considered in building a case for *karoshi* in Japan is worker's compensation. Worker's compensation primary rules reflect the society's need for change as will be examined in the following historical progression of the law through recognition, adjudication, and change.

---

30. Daniel H. Foote, *Law as an Agent of Change? Governmental Efforts to Reduce Working Hours, in Japan, in* JAPAN: ECONOMIC SUCCESS AND THE LEGAL SYSTEM, 251, 280 (Harald Baum ed., 1997).

31. MINISTRY OF LABOUR JAPAN, *supra* note 19, art. 4.

32. *See* Juliet Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act,* 70 CHI.-KENT L. REV. 157 (1994).

33. *See* Araki, *supra* note 25, at 6.

34. *Id.*

Former Administrative Formula — *Tsutatsu*

Historically, compensation for death or injury resulting from participation in the work environment in Japan falls under the Worker's Compensation laws. In 1961, the Japanese Labor Standards Bureau of the Ministry of Labor issued a circular illustrating administrative interpretation concerning the coverage formula or standards for judging causation between cardiovascular disease and work.[35] Requirements under the former *tsutatsu*, or worker's compensation theory, stated that "generally it must be clearly recognized in a medical sense that working situations of various sorts caused the disease."[36] When attempting to determine if an individual can be compensated for injuries, the Ministry has stated, "it must be recognized that there was psychological or physical burden by extraordinary work heavier (quality or quantity wise) than the employee's own former work just before or at least on the same day of the fall."[37] While there was progress because there was recognition of the ailment and its relation to work conditions, direct application of the administrative rules left an injured worker a long way from being compensated without the ability to show his condition was caused by an accident at work. Under the former *tsutatsu* formula the Ministry of Labor stated that the only time overwork was considered the cause of death was when the victim "worked continuously for 24 hours preceding death."[38] This inflexible formula stifled the ability of the insured's family to recover any compensation.

Worker's Compensation Coverage: Case Law Before 1987

What the government was unwilling to do to recognize *karoshi*, the courts seemed to make up for through adjudication. Criticizing the *tsutatsu* formula, courts repeatedly overruled administrative decisions that denied claims of victims who died of cardiovascular disease.[39] Thus, great disparity between administrative interpretation and case law continued until 1987 when the

35. Chusu shinkei oyobi junkanki kei shikkan (no sotchu kyusei shi to) no gyomu jo gai nintei kijun ni tsuite, kihatsu 116 go [Circular no. 116 of the Chief of the Labor Standards Bureau of the Ministry of Labor], Feb. 13, 1961, *cited in* Toshiro Ueyanagi, Death by Overwork: Working Hours Law and Worker's Compensation in Japan and the U.S. (1990) (unpublished LLM thesis) (on file with the University of Washington Law Library).

36. *Id.*

37. *Id.*

38. LABOR STANDARDS DIV., MINISTRY OF LABOR, CIRCULAR NO. 38 OF 1995, DAIUICHI YAMAKAWA KOYOKANKEHO 213-14 (Oct. 1996).

39. *See* C. Okamura, *No shin shikkan to gyomu jo gai nintei no shin gyosei kaishiku to horitsu teki kadai* [New Administrative Interpretation and Legal Problem of Judging Worker's compensation Claims of Cerebral and Heart Disease] 1 SUTORESU ROSAI KENKYU 23 (1987).

Labor Standards Board issued a new circular that revised the former *tsutatsu* of 1961.[40]

Present *Tsutatsu*

The present *tsutatsu* reflects the changing needs of the Japanese society by setting out a standard for an award which requires "objective recognition of especially heavier psychological or physical overload or burden by work, arising a week before the fall, while conducting usual specified work."[41] The *tsutatsu* circular clearly defines usual work as "not the work including overtime, but the work only in specified work hours."[42] The present *tsutatsu* standard set out in the Circular No. 38 of 1995 issued by the Ministry of Labor expands the two-part standard that a person must meet to recover compensation. The test considers two prongs: the type of person who should be allowed recovery, and the time factor of when the accident occurred in relation to work activities.[43]

Under the prior standard, a person was judged against one colleague or individual engaged in the same type of work. However, in the new circular, the Ministry has held that in order for a person to be the type of person who can recover, that individual will be judged against a worker of the same age and experience who would be able to undertake ordinary work in a normal fashion.[44] In addition, the time requirement that the injury occur within a specific time has been expanded from the originally stated twenty-four hour period.[45] As mentioned above, circular 38 now states that it will take into account the work prior to the period one week before the onset of the injury.[46] Furthermore, if the individual was very hardworking one week prior to the injury, the court may expand the allowable time frame even further.[47] Finally, as a result of the more flexible standard, it is important to note that the number of recognized cases of *karoshi* by the Ministry of Labor in 1995 was up to 76.[48] This demonstrates how administrative changes in the secondary rules help overcome the previous primary rule that no longer reflected the needs of society.

---

40. *See id.*
41. *Id.*
42. RODOSHA, RODO KIJUN KYOKU HOSHO KA [MINISTRY OF LABOR, COMPENSATION SECTION], SHOKAI: NO KEKKAN SHIKKAN KYOKETSU SEI SHIN SNIKKAN NO ROSAI NINTEI 80 (1988).
43. *See* LABOR STANDARDS DIV., *supra* note 38, at 213-14.
44. *See id.*
45. *See id.*
46. *Id.*
47. *See id.*
48. *See Labor Minister, supra* note 3 and accompanying text.

Case Law After 1987

Courts continue to overrule cases that deserve more than what the former or present *tsutatsu* can provide.[49] In fact, this has become such a problem that in 1989 the Ministry of Labor established an in-house study group "to put the brake on losing their suits in the area of worker's compensation: cerebral and cardiac cases. [The group concluded that] 'the main cause of losing is their failure to persuade the courts regarding the importance of the established worker's compensation system.'"[50] Perhaps as a result of the courts not adhering to judicial interpretation, the Ministry of Labor has expanded the two prong requirement of the type of person and time. Nevertheless, it is clear that the trend adjudicatively is moving away from strict application of the one week time period and going toward a more holistic approach taking account of the totality of the circumstances.[51]

The Karoshi *Hotline*

The *Karoshi* Hotline, or similar mechanisms for advocating rules of change, can be seen as representing a continuous flow in attempts to overcome the static nature of the primary rule system. In the recent past, "the Ministry [had] contend[ed] that 3 or 4 hours of overtime every day cannot be classified as overwork."[52] Kawahito points out that this allows Japanese corporations to continue their indifference towards *karoshi* because they are basically supported by the government in this posture.[53] However, on June 18, 1988 some lawyers and doctors established the "*karoshi* hotline" in seven major Japanese cities, which provides information and help on worker's compensation cases for death by overwork[54] These activities have received wide media coverage and have contributed towards societal recognition of a serious problem.[55] In fact, this year Labor Minister Takanobu Nagai "sent a letter to Nikkeiren [the Japanese Federation of Employers Associations] telling it to start passing the message via personal conversations with employers, that they'd better

49. *See* Saitama chikosai kikin v. Aida, 528 RŌDŌ HANREI 98 (Tokyo High Ct., June 29, 1988);
Yokkaichi Rokisho v. Kameyama, 529 RŌDŌ HANREI 15 (Nagoya High Ct., Oct. 31, 1988); Nakano rokisho v. Mita, Kikan rodosho no kenri (no. 182) 37 (Tokyo High Ct., Oct. 26, 1989).

50. *Id.*

51. *See* LABOR STANDARDS DIV., *supra* note 38.

52. Kawahito, *supra* note 13, at 12.

53. *See id.* at 13.

54. *Id.* at 6.

55. *See id.* at 7.

start to cut down their working hours."[56] We should, however, not hastily conclude that the Japanese government has taken radical action due to the *karoshi* movement because it is campaigning to reduce hours.[57] Professor Daniel Foote, of the University of Washington School of Law, has noted that the push by the Japanese Government to reduce hours "appears to lie in certain factors . . . Japan's perceived international reputation (along with some international pressure) and, more importantly, the view that reducing hours is an important step in moving Japan to a domestic consumption-led economy that will be less dependent on exports for growth."[58] Noting Professor Foote's observation, we can conclude that although some progress has been made, the struggle facing *karoshi* victims is still a tough one and is only in its beginning stages.

3. AMERICA — SOCIAL AND LEGAL DEFINITION OF WORK HOURS

Cultural/Social Background

If the Japanese tacit cultural roots of *karoshi* are deep set in self-valuation, the premise behind the overwork phenomenon in America can be traced to similar tacit roots established by the Puritan heritage woven into the fabric of American history, culture and economic life. The foundation of the United States claims as its roots the Puritan colonists that came to America. The Puritans subscribed to the Calvinist philosophy that man is essentially sinful. Only the grace of God could regenerate or "save" man.[59]

> Since the Deity did not dispense this grace lightly, the majority of the human race was doomed to roast forever in Hell. The few who were God's "elect" would discover their fortune. . . . God's blessings being material as well as spiritual, success in the accumulation of worldly goods was a likely indication of the Lord's good will. Thus, hard work, thrift, and strict attention to business were qualities to be cultivated by those who hoped to enter Heaven.[60]

In medieval times, there were plenty of regular holidays that provided needed rest times for the workers.[61] The Puritans, however, changed that by "launch[ing] a holy crusade against holidays, demanding that only one day a week be set aside for

56. *Labor Minister, supra* note 3.
57. *See* Foote, *supra* note 30, at 292.
58. *Id.* at 299.
59. *See* JOHN A. GARRATY, THE AMERICAN NATION: A HISTORY OF THE UNITED STATES 51 (1966).
60. *Id.*
61. *See* SCHOR, *supra* note 1, at 51.

rest."[62] This day of rest was to be given to God with strict rules about attending Church and doing Church work. Building upon this cultural heritage, according to Max Weber in the article *The Protestant Ethic and the Spirit of Capitalism (1904-1905)*, Americans structured a socio-economic life in which

> [l]abour is not merely an economic means: it is a spiritual end. Covetousness, if a danger to the soul, is a less formidable menace than sloth. So far from there being an inevitable conflict between money-making and piety, they are natural allies, for the virtues incumbent on the elect - diligence, thrift, sobriety, prudence - are the most reliable passport to commercial prosperity. Thus, the pursuit of riches, which once had been feared as the enemy of religion, was now welcomed as its ally.[63]

This cultural and economic heritage of the United States has long encouraged the worker to demonstrate his worthiness to earn a wage that will allow him to purchase the goods that will demonstrate his virtue to society.

As the American worker moved into the industrial era his reward for hard work was no longer the sale of his crops but the size of his paycheck. The dawn of the twentieth century found the majority of these industrial workers subject to "starvation wages and intolerable hours - the underpaid and the overworked."[64] The social "safety net" (that is the welfare program) in America has traditionally been ineffective. The Puritan philosophy tends to see poor people, or the unemployed, as less deserving of salvation or even damned.[65] Thus, the American worker has more than just his societal self-worth vested in maintaining a job. The employer controls not only the workers wages but his/her place in society. If more hours are demanded, the worker must comply or stand to lose his livelihood and standing in the community.

Long Hours in Federal Law

The first primary rule to be considered in building a case for *karoshi* in the U.S. is the FLSA's (1938) regulation of working hours. In order to understand this primary law one must consider the historical foundation of the law itself. William Gould writes that:

> The roots of the American labor law system are in the Great Depression. They were formed in an attempt to modify and renew the capitalist system of the 1920's and 1930's. The

62. *Id.*

63. R.H. Tawney, *Max Weber: An Evaluation*, *in* 1 THE EUROPEAN PAST 108, 112 (Shepard B. Clough et al. eds., 1964).

64. *Id.*

65. SCHOR, *supra* note 1, at 51.

> Wage Labor Board operating under the emergency conditions of World War II gave these reforms much of the shape that they possess today.[66]

Though the FLSA was to have addressed many of these issues, in reality, it did not apply to all industrial workers.

> The Depression had shortened hours considerably. For example, in 1934, weekly hours in manufacturing had fallen to 35 hours. . . . [T]here were no maximum hours limits, only financial disincentives for employers above 40 hours. The [FLSA] contained no provisions for vacations or other time off, nor did it institute any provisions for future reductions in hours in line with productivity growth. The 40-hour standard work week was set in stone, and has not been altered to this day. Furthermore, at the time of its passage, the bill omitted a very large fraction of the labor force.[67]

It appears that more and more exceptions have been enacted especially with respect to white-collar workers, and "in 1990 only 67% of wage and salaried employees were covered under the legislation's overtime provisions."[68] The Depression had robbed the population of the very essence of their ability to fulfill the primary socio-economic goal that had been instilled by their Puritan forefathers — hard work and economic prosperity that would prove they were worthy people. The goal of the FLSA legislation was aimed at the creation of jobs rather than the reduction of labor hours. Thus, both Presidents Roosevelt and Hoover favored legislation that would spread the available work across the population to raise the morale of the country.

Despite the enactment of the FLSA sixty years ago, long working hours and the decay of the quality of life within America have become well-documented facts as evidenced by one scholar:

> Longer hours were not planned, debated, or "chosen" in any normal sense of the word. They seem to have just "happened." The result is that large numbers of working Americans are now feeling overworked, "time poor" and torn between their jobs and families. The nation's worktime legislation, the *Fair Labor Standards Act*, is not up to the task of regulating or governing these changing work patterns and realities. It is minimalist legislation which is in urgent need of reform.[69]

Not very much attention has been paid to the tacit reasons behind these serious problems because we have not even formally recognized that such a phenomena is occurring. One must consider the current trends in business and the economy to more fully comprehend the extent of the problem. The general trend

---

66. WILLIAM B. GOULD, A PRIMER ON AMERICAN LABOR LAW (1982).
67. Schor, *supra* note 32, at 164 (footnotes omitted).
68. *Id.*
69. *Id.* at 157-58 (footnote omitted).

in corporations to reduce staff over the past decade has affected employee morale and increased work hours and stress for those remaining with the companies.

> [S]ince 1989, rates of workforce reduction among member companies of the American Management Association, who are larger and more heavily involved in manufacturing than is the economy as a whole, have been 35.7% (1989-90), 55.5% (1990-91), 46.1% (1991-92), and 46.6% (1992-93), with the average reduction equaling between 9 and 10% of the workforce. Since January 1988, 69% of this sector has downsized . . . [s]ixty-two percent of companies reported adverse effects on "workloads" as a result of these reductions in force. Finally, polls report longer worktimes, as 48% of the Americans said in 1992 that they had less leisure time than they had five years earlier.[70]

These tacit effects on work hours can be linked, as in Japan, to health-related problems in the general population.

> Long working hours are associated with stress and workplace injuries. The International Labor Office estimated that job stress currently costs the United States $200 billion a year and that stress is "one of the most serious health issues of the twentieth century." Automobile factories in the U.S., which have very high overtime hours, experienced a 460% rise in injuries between 1985 and 1991.[71]

The link between long working hours and workers' death or injury is a strong one. Before exploring the necessary evidence for this linkage, one should examine the FLSA's provisions regarding long hours as they are the minimum standards that all states must follow. While states can regulate beyond these standards, the FLSA provides the basis for work-related injury cases in America.

The FLSA, and later the Wagner Act, instituted laws to require overtime pay for hours worked beyond forty per week.[72] This has not proved an incentive to reduce overtime.

> Since 1989, there are strong indications that work time continues to rise. Weekly hours have been rising, and now stand at 43.8 hours for full-time workers as compared to 43.7 in 1989. Manufacturing overtime, at 4.8 hours per week in April 1994, is higher than it has been at any time during which these statistics have been collected. These data are not ideal, because they do not account for changes in the fraction of the year worked, and are not corrected for business cycle - induced fluctuations. However they are strongly indicative of continuing increases in hours.[73]

---

70. *Id.* at 160 (footnotes omitted).
71. *Id.* at 161 (footnote omitted).
72. *See id.* at 164.
73. *Id.*at 159-60 (footnotes omitted).

Why are hours on the rise rather than the number of jobs available? People like Helen Stanwell seem to be 'choosing' to work longer hours.[74] Historian Juliet Schor notes the choices among time, work, and money that the FLSA's forty-hour week rule provided for American society:

> On the one hand, the nation could use its expanding productive potential to reduce work time and cultivate a society oriented around free-time activities: education, politics, and public culture. On the other, it could encourage what I have elsewhere called "work-and-spend" an economy of long working hours, high income growth, and high consumption.[75]

Schor concludes that the FLSA's forty-hour work week rule has ultimately encouraged American workers to put in longer working hours. She explains that this is because:

> [t]he premium pay provisions became attractive to workers, particularly males. With the 40-hour week enshrined as the norm, and the gender division of labor which prevailed in the postwar era, many men came to strongly desire overtime hours. Economic research has shown that where overtime is frequent, employers reduce the base wage, so that workers do not end up receiving higher wages overall. They merely work longer hours. But this effect has generally not been recognized by workers, who perceive overtime premia as just that.[76]

The time and a half incentive for overtime work draws on the Puritan ethic of the American worker. If you can make more money you should not idle away precious time in leisure activities. Salvation, demonstrated by economic prosperity, is more important than one's health or physical well-being. Additionally, it is interesting to note that with an increase in benefits, salary in proportion to the total package, has dropped.[77]

Not only has the number of actual work hours increased for the workforce covered by the FLSA, but large segments of the U.S. workforce are not covered by this basic legislation. "Although coverage has expanded over time for employees who are not exempt, in 1990 only 67% of wage and salaried employees were covered under the legislation's overtime provisions".[78]

Turning back to the basic question of *karoshi*; has the FLSA had the desired effect of limiting an employer's grip on workers' hours? Under the FLSA, employers are required to keep extensive records regarding their employees. The detail required by the employer depends on the employee's classification, either

---

74. *See* footnote 5 and accompanying text.

75. *Id.* at 163.

76. *Id.* at 164 (footnote omitted).

77. For additional detail on this topic see "Fringe Benefits Add Financial Stress," page 32 below.

78. *Id.* at 164.

hourly or exempt. At the time the FLSA was initially promulgated, a definite goal appears to have been an attempt to protect the employee. As applied today, the statute does provide some protection to both the employee and employer. Nevertheless, the overall issue of whether or not the FLSA has achieved any real protection for either the employer or employee needs further examination. Such an examination requires one to consider the classification of the employee as either hourly or exempt. This distinction is imperative because the hourly and exempt employee receive different and not equal protection under the FLSA.

Applying the FLSA to Groups of Workers

In comparison to Japan's LSL which has very broad coverage with few exemptions, the FLSA exempts from overtime regulation, white-collar workers "employed in a bona fide executive, administrative or professional capacity or in the capacity of outside salesman."[79]

The FLSA Treatment of Non-Exempt or Hourly Employees

The FLSA establishes a general minimum hourly wage rate for those employees who are within its coverage (non-exempt). Though a time and a half premium is set on all hours over forty for covered workers, no number of hours worked in excess of forty per week is imposed on those who are not covered. The law attempts to impose limits through the premium pay mechanism. Thus, employers covered by the FLSA are required to keep records for at least three years on wages, hours, sex, occupation and other terms and practices of employment. Although most employers normally maintain this type of information in their ordinary business practice, any neglect in record keeping will result in a loss of an employer's ability to guard against overtime suits from employees. On the other hand, if employees are diligent in keeping records they may bring suit to avoid exploitation by the employer.

The FLSA Treatment of Exempt Employees

As stated earlier, professionals and executives are exempt from the FLSA's overtime regulations. As Kimberly Pace explains: "Congress exempted professionals, administrators and executives because it believed that these employees have some control over their hours."[80] But are these salaried employees re-

79. Araki, *supra* note 25, at 6 (quoting FLSA § 13).

80. Kimberly A. Pace, *What Does It Mean To Be a Salaried Employee? The Future of Pay-Docking*, 21 J. LEGIS. 49, 53-54 (1995).

ally in control? After all, exempt employees "do not get paid according to the number of hours they log."[81] Is this "professional" status really a privilege? "Salaried employment increased substantially in the twentieth century, as firms added white-collar workers. . . . Today almost 40 percent of all U.S. employees are paid by salary, rather than hourly wages."[82] Since white collar workers are not paid by the hour and are not protected by the FLSA, they work longer hours. "Half of the nations salaried workers belong to this special exempt group."[83] This group has the dubious privilege of working the longest amount of hours. "Over the last 50 years . . . legal, social, and economic developments have greatly strengthened the case for regulating [the working hours of the professional worker]. As the U.S. economy has grown more competitive, American employers have responded by laying off workers while demanding more effort from those they continue to employ."[84]

When the FLSA was initially passed, managerial and professional employees could find protection against long hours through the federal labor law. However, "[w]ithin a decade after the enactment of the FLSA, Congress amended the National Labor Relations Act . . . to eliminate labor law protection for supervisory employees in the private sector. The U.S. Supreme Court later eliminated such protection for all private sector managerial employees, including those with no supervisory functions."[85] Thus "professional" workers are essentially without protection today. Yet, they are under severe pressure today to work longer hours. All exempt employees are subject to this type of abuse. "Medical residents, investment bankers, corporate lawyers, and many other professionals are routinely expected to work 70 or 80 hours routinely."[86] Moreover, a "1970s study found that most managers at *Fortune* 500 corporations put in from 60 to 70 hours a week."[87] When asking a manager in one of many high technology companies today about hours worked, he will most likely tell you that everyone is expected to work a 60-hour week minimum.

It is imperative that some type safeguards be put into place to help these workers. More evidence of this mounting societal crisis is seen through the abundance of articles that appear to highlight the "professional workers" plight. Dr. William Cole, a

81. *Id.* at 54.
82. SCHOR, *supra* note 1, at 68.
83. *Id.*
84. Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act* 43 AM. U. L. REV. 139, 141 (1993).
85. *Id.* at 142 (footnotes omitted).
86. SCHOR, *supra* note 1, at 68.
87. *Id.*

cardiologist who heads the New York Downtown Hospital's Heartsavers Program and serve Wall Street brokers says, "Stress has definite physiological effects, high levels of epinephrine (a stress-related hormone) cause constriction of blood vessels and increased blood pressure; this can lead to changes in lipid levels that could theoretically lead to acceleration in atherosclerosis."[88]

Since it is a well-documented fact that "employers in recent years have reduced their managerial and professional staffs while demanding excessive hours of the managers and professionals that they continue to employ," there is a clear need to protect these workers.[89] In addition, there is no legitimate reason for maintaining the FLSA's managerial-professional exemption.[90] In fact, it would appear that the present state of corporate affairs is able to keep excessive employee scheduling only because of the mentality that as a professional, one cannot keep regular hours. This notion "rests on a pair of misconceptions: first, that managers and professionals have sufficient bargaining power to limit their hours; and second, that their relatively high pay and superior benefits make more time away from the job unnecessary."[91] It is also important to note that while regular hours on professional employees would impose a cost on the employers, in the long run, the regulation would produce benefits in reduced unemployment, higher productivity and enriched lives of affected employees.[92] These benefits far outweigh the current burden and trends toward *karoshi.*

Some might want to describe the overwork problem as something inherent in our culture. One argument is that society respects those who overwork, and as such it is inevitable that we would reward those who can overwork. Medical studies also demonstrate that humans will adapt and adjust to their given environment. This is especially true when one considers the combined impact of socio-economic factors with today's competitive employment market. But the current state of affairs seems to cry out more than ever for employers to take responsibility for quality of life issues. Rules exist in order to enable society to function. They are created by and for people who live within the system. Thus, it is imperative that the rules and system reflect the needs of society and the protection of its members.

One form of protection can be found in the FLSA 29 sec 516(b) which requires that special employee records be kept

88. *Stockbrokers-Health Aspects*, Rodale Press Inc., 1996.
89. DeChiara, *supra* note 84, at 188-89.
90. *See id.* at 140.
91. *Id.* at 189.
92. *See id.*

when dealing with exempt employees. Basically, the requirements are the same as for non-exempt employees with the exception of some of the requirements relating to payment and hours worked (29 CFR sec 516(a)(6)). Additional requirements include record keeping to pay wages, which includes fringe benefits and prerequisites. The requirement to account for fringe benefits is an important move towards protection on the part of the FLSA.

Fringe Benefits Add Financial Stress

Additional pressure on employers to add overtime hours comes from the fringe benefits process. The whole concept of fringe benefits has been noted as a definite factor in perpetuating this cycle of long hours leading toward stress and sometimes death by overwork. These fringe benefits, such as paid vacation time, health and life insurance and pensions "are paid on a per-person basis rather than by the hour, [and] they create a strong discontinuity in cost structures. It becomes far more profitable for a company to hire a smaller number of people for long hours than to divide those hours over more workers (who would also be paid benefits)."[93]

Additionally, tax liability caps on programs such as social security and unemployment insurance cause employers to prefer requiring extra hours for existing workers. After the maximum payment per employee, the employer pays no additional tax regardless of the number of hours worked by the employee. In the alternative, the addition of a new employee would simply cause the tax bill to rise.[94]

Given these statistics, the overtime premium required by the FLSA of 1938 does not appear to have achieved the goal of discouraging the use of overtime and improving the quality of life. Instead it appears to be a "weak sanction" at best.[95]

Worker's Compensation in America

Historically, in the U.S., as in Japan, the second primary rule to be considered after the FLSA, in building a case for *karoshi* is worker's compensation.

> The United States maintains a complicated and imperfectly coordinated system of income support for workers who become physically or mentally unable to continue working. Every state has a worker's compensation system to self-insure against the economic consequences of certain workplace inju-

93. SCHOR, *supra* note 1, at 66 (footnote omitted).
94. *See id.*
95. *Id.*

> ries and illnesses. If a worker becomes disabled, and the job was not the specific cause, he or she may or may not receive disability benefits from the employer depending on the coverage of the employer's disability plan.[96]

While this seems simple enough, the application of this concept varies from jurisdiction to jurisdiction.

Worker's compensation programs "require employers to provide cash benefits, medical care, and rehabilitative services for workers who suffer injuries or illnesses arising out of and in the course of their employment".[97] However, insurance companies are always confronted with the burden of determining whether the insured had a pre-existing condition. Not every occupational disease is covered by worker's compensation. In fact, this issue is being debated in several states. As will be discussed later, some states are expanding their definitions and others are repealing for fear of too many fraudulent claims.

If one is to be able to recover for an injury, cash benefits compensate injured workers for lost income and earning capacity. These benefits can be a combination of temporary or permanent and total or partial compensation for non-fatal injuries. "If the worker is fatally injured, the employer is required to provide burial expenses and to pay benefits to specified dependent survivors."[98] While it is important to recognize one's rights under the current system, it is also important for the law to reflect the needs of our changing society and to stop the problem of injury and death by overwork before they occur.

Worker's compensation is an area that cannot be overlooked in this study, not only because it is the law under which one can recover damages, but its case evidences that the social phenomenon of overwork is occurring. Most of the workforce is covered by worker's compensation.

> In 1983, approximately 90 percent of the American workforce (78.5 million workers) was covered by worker's compensation programs. Employers paid a total of $22.9 billion in insurance premiums. Of the $17.5 billion the insurers paid out in compensation, $12.2 billion was for cash benefits and $5.4 billion was for medical care and rehabilitation costs. Private insurance carriers paid $9.3 billion of the total benefits, state and federal funds paid $5 billion, and self-insurers paid $3.2 billion.[99]

Would it be possible to reduce insurance payments if states could enforce regional standards to better protect the employee?

---

96. MARK A. ROTHSTEIN ET AL., CASES AND MATERIALS ON EMPLOYMENT LAW 706 (2d ed. 1991).

97. *Id.*

98. *Id.* at 712.

99. *Id.*

As noted in Table I, well over one-half of the occupational and heart-related worker's compensation claims are contested by insurance carriers. It is argued that regional standards are the best way to deal with these problems and to reduce fraud while assisting those truly in need.

Table I. Percentage of Worker's Compensation Claims Contested by Case Type and Reasons for Contesting[100]

	Occupational Disease	Heart	Accident
% of Claims Contested	62.7	55.2	9.8
Primary Reason for Contesting Claims			
Work relatedness (%)	72.5	76.0	20.6
Extent of disability (%)	12.0	11.6	55.8
Other issues (%)	15.5	12.4	23.6

Worker's Compensation Coverage Dealing with Stress

If the FLSA, as a national standard, has not produced the desired protection, the next step is to look at how states are regulating regional labor issues. Are they more effective in dealing with the issues? While the legal standards vary from one jurisdiction to the next there is one common element that remains recognizable: stress resulting from the demands of working long hours is a prevalent and compensable factor in the workplace. It has been noted that American worker's compensation cases have increased by 30%.

> In the past, workplace health concerns centered mainly on safety and physical working conditions—such as hazardous toxins, cleanliness, noise, cigarette smoke and work overload. But in recent years, complaints of job distress have skyrocketed. One U.S. survey found that almost a quarter of the workforce aged 25-44 suffered from stress-induced nervous strain severe enough to "diminish performance."[101]

Work hours and resulting stress have increased in America, and that Americans, like the Japanese, have a cultural bias toward hard work. We should also recognize the link between these events and death in order to establish a legal foundation for *karoshi* in America. As in Japan, it is necessary to look at the worker's compensation system not only for compensation in the

100. *Id.* at 744, *citing* LINDA DARLING-HAMMOND & THOMAS J. KNIESNER, THE LAW AND ECONOMICS OF WORKER'S COMPENSATION 33 (1980).

101. Toshiro Ueyanagi, Death By Overwork: Working Hours Laws and Worker's compensation in Japan and the U.S. 157 (1990) (unpublished LLM thesis) (on file with the University of Washington Law Library).

case of worker's death, but for the legal foundation of a case. In regards to *karoshi* in America, Dr. Uehata's earlier description of the factors leading to *karoshi* in Japan, are the same leading factors that contribute to heart failure in America according to the American Heart Association [hereinafter AHA]. The actual cause of heart failure is somewhat difficult to pinpoint since it is most often not a one-to-one cause and effect result of a work activity. According to the AHA's, *Heart and Stroke Facts*, research has pointed out that

> it is almost impossible to define and measure someone's level of emotional stress. There is no way to measure the psychological impact of different experiences. All people feel stress, but they feel it in different amounts and react in different ways. Some scientists have noted a relationship between coronary heart disease risk and a person's life stress, behavior habits and socioeconomic risk factors.[102]

Additional proof of the link between heart failure and increased stress can be found in some statistics from the AHA:

> More than 2,600 Americans die each day from cardiovascular diseases, an average of a death every 33 seconds . . . [Moreover,] in 1992, 38 percent of deaths from cardiovascular diseases occurred prematurely.[103]
>
> The study also examined those that suffered disabilities from cardiovascular diseases and found that an estimated 7.9 million Americans age 15 and over suffered from such a condition . . . This is almost 19 percent of disabilities from all conditions.[104]

The AHA study concludes that, "where the ability to describe the causal connection between the ailment and the injury or death exists, the statistics tend to show proof that this is a serious problem that arises from stress. The stress has varying effects on different individuals."[105] The findings of the AHA cannot be ignored and should be given serious deference by employers who promote or allow overwork to become a predominant factor in promotions or survival on the job.

Worker's Compensation Coverage Standards

Requirements of Unusual Stress or Strenuous Exertion

Since stress in the workplace is an essential element in promoting mortality or injury in the workplace, the lack of a direct cause-and-effect relationship may be a moot point, where under

102. AMERICAN HEART AND STROKE ASSOCIATION, HEART AND STROKE FACTS (1994).
103. *Id.*
104. *Id.*
105. *Id.*

worker's compensation an employer must take a worker as he finds him. "The stressful work environment is analogous to a slippery floor, for it is just as capable of injuring those unlucky enough to be ill-suited to the situation."[106] Consequently,

> an employee who is abnormally susceptible to injury, such as one suffering from arteriosclerosis, may still recover compensation if the burden of proof on the causation issue is met. The only question to be resolved in a heart attack case has been the amount of physical stress necessary to complete the causal link between job and heart attack. For many years, a heart attack was not regarded as "arising out of" employment unless there was either *strenuous* physical exertion or some physical exertion in a hot environment.[107]

The "strenuous physical exertion" standard seemed to be an accepted practice until the 1972 *Ferguson v. HDE, Inc.* case loosened this concept by stating that the "performance of even usual and customary duties may be sufficient exertion to conclude that an accident 'arose out of' employment . . . . *Ferguson* involved a heart attack attributable to mental, rather than physical, stress."[108] This finding is underscored by the AHA comments noted earlier linking work-related stress and heart attacks.

In *Ingersoll Milling Machine Co. v. The Industrial Commission* the court held that the working conditions the deceased endured on a daily basis contributed to the worker's myocardial infarction.[109] These working conditions included stressful deadlines, working 55 to 68 hours per week and spending 26 days of every month away from home. In Japan, overwork leading to myocardial infarction would be considered *karoshi*, but in America there is no formal recognition of this condition. The only recognition the U.S. has of myocardial infarction as a compensable work injury results from families filing for worker's compensation benefits for the death of their loved ones.

The "Not Common to Daily Life" Standard

Linkage between increased work hours and general accident rates was noted earlier.[110] While there is no specific consistency from one jurisdiction to the next, it is apparent that "[b]efore 1981, to establish a valid claim for worker's compensation based on a nontraumatic mental injury, a claimant had to establish that

106. Glenn M. Troost, *Worker's compensation and Gradual Stress in the Workplace*, 133 U. PA. L. REV. 847, 861 (1985).

107. Denis Paul Juge & John Phillips, *A New Standard for Cardiovascular Claims in Worker's compensation*, 43 LA. L. REV. 17, 31 (1982).

108. *Id.*

109. Ingersoll Milling Mach. Co. v. Indus. Comm'n, 624 N.E.2d 829 (Ill. App. Ct. 1993).

110. *See supra* note 69 and accompanying text.

unusual stress in the workplace caused his injury."[111] However, the rigid nature of this test has softened, as seen in the 1981 modifications enacted by the Wisconsin Legislature. The legislature "sought to codify this unusual stress standard developed by the Wisconsin Supreme Court, but it used language that would allow compensation only if mental stress that was not 'common to daily life' caused the injury."[112]

The Revised Unusual Stress Test and The Objective Causation Test

Today it appears that there are basically two principal tests being used by most jurisdictions. The two tests are: the unusual stress test and the objective causation test. Under the unusual stress test, "an employee's recovery depends not only on whether gradual stress actually caused her injury, but also on whether the stress she suffered differed from that experienced by her coworkers."[113] The competing test being used in other jurisdictions is called the "objective causation" test.[114] This test "simply requires the disabled worker to establish a causal connection between the workplace and the mental injury; she need not establish that the stress that caused the injury is unusual or extraordinary."[115] While not seen as frequently, a third test used in Michigan is the "subjective causal-nexus test," adopted by Michigan in *Deziel v. Difco Laboratories, Inc.* 268 N.W.2d 1 (1978). In that case, the court held that an employee "is entitled to compensation for a mental injury if she honestly believes that an 'injury incurred during the ordinary work of . . . employment 'caused' the disability. Compensation would thus be allowed even though the employee's subjective perception of the work environment as the cause of her disability was in fact mistaken."[116]

In summary,

> [t]he principal requirements imposed by most state's [sic] worker's compensation statutes are (1) the employee must experience a "personal injury arising out of and in the course of employment" and (2) the injury must result in a disability entailing either partial or total incapacity to work. A majority of

111. George W. Dawes, *Eligibility For Worker's compensation in Cases of Nontraumatic Mental Injury: The Development of the Unusual Stress Test in Wisconsin*, 1987 WIS. L. REV. 363, 363 (1987).

112. *Id.*

113. Troost, *supra* note 106, at 848.

114. *See id.*

115. *Id.*

116. *Id.* at 849 n.5 (citation omitted) (quoting Deziel v. Difco Lab., Inc., 268 N.W.2d 1 (1978)).

> the state statutes also require, or have required, that the injury be "by accident."[117]

Once a clear understanding of the tests being used is acquired, the next question that naturally arises is one of effectiveness. How effective are these standards in providing a framework for recovery? It does appear that the two tests using an objective standard give an employee a better chance of receiving adequate compensation than he would under the "unusual stress" standard. These objective preventative notions are in line with the goals set forth by the worker's compensation laws and do not require "the faulty event-causation bias implicit in the unusual stress test."[118] As a result of the increase in the number of stress-related cases being filed, compensation has been expanded in some jurisdictions. For example, in *Stratemeyer v. Lincoln County* the Montana Supreme Court held that "employees can sue their employers outside worker's compensation law for job-related stress and physical injuries resulting from that stress."[119]

Culling Fraudulent Claims

This analysis would be incomplete without examining the counter-arguments that many states have claimed as a growing problem: how to cull fraudulent claims from legitimate ones. An area of particular concern has been stress claims. At the Third Annual Business Insurance Worker's compensation Conference in San Diego, Dr. Barry Gwartz listed some helpful points to be considered when assessing the legitimacy of stress claims.[120] He noted timing in cases where the claim filed two to three months after termination, and unusual "[s]ubjective complaints of stress that don't relate to a claimant's lifestyle" as clear indicators of fraud.[121] Additionally, California has enacted a "sweeping reform of the state's . . . worker's compensation" to cut costs for the employers and increase benefits for the workers.[122] This reform "repealed [the] minimum rate that could be charged for worker's compensation insurance" and "cracked down on the . . . 'stress mills' that provided costly treatment" for the workers who were claiming stress injuries.[123] Now, State Senator Steve Peace

---

117. *Id.* at 855-56 (footnotes omitted).

118. *Id.* at 865.

119. *Compensation for Stress Expanded,* MONT. EMPLOYMENT L. LETTER (Holland & Hart), Sept. 1996, at 2.

120. *See* Michael Bradford, *Stress Claims Merit Another Look; Employers Find It Hard To Cull Fraudulent Claims From Legitimate Ones*, BUS. INS., Oct. 23, 1995, at 92, 92.

121. *Id.*

122. Ed Mendel, *Worker's Compensation Reform Called Success*, SAN DIEGO UNION TRIB., July 17, 1996, at A4.

123. *Id.*

claims that "[t]here essentially are no stress claims."[124] Thus, it is clear that abuse of the worker's compensation system can occur and is a definite consideration that the courts and states worry about. It is therefore important for us to find middle ground that will allow for those who are truly injured or deceased as a result of injury to recover, while at the same time protect against fraudulent claims.

III. CONCLUSION

It is imperative that the labor laws reflect the needs of our changing society and stop the problem of death by overwork before it reaches the final stage where compensation must be paid to the victim's family. H.L.A. Hart states that rules are put in place to protect individuals, not to create obligations. Accordingly, it is society that must recognize the obligation to change the tacit outlook on work so that there will be an implicit change in the law. During the course of this paper the evolution of *karoshi* as a recognized social and legal issue has been explored within both the Japanese and the U.S. work and legal environments. The legal system in Japan and the U.S. are designed to reflect the evolutionary changes in the social structure as described by Hart's theory. Japan has gone the full cycle in regards to recognition, adjudication and change. Now that *karoshi* has been formally recognized in Japan, it is considered a primary rule. Since its recognition, the rules of adjudication have taken place and the worker's compensation cases have continuously been held in favor of recovery even though such rulings were contrary to the administrative guidelines set out by the Ministry of Labor. As a result, more families are able to recover for their loss. This in turn has resulted in rules of change through progressive movements like the *Karoshi* Hotline. Additionally, administrative changes were seen through the formal expansion of the definition of what constitutes *karoshi,* and a push by the government has been noted by a reduction in work hours. These changes are helping overcome the static character of the previous system of primary rules that was not serving the needs of society.

It is important to understand that the U.S. is still in the initial stages of recognition in this area. This study examined the FLSA with regard to working hours along with worker's compensation laws and noted the results of the current set of primary rules. As part of the evolutionary process of change, simple recognition of the rules in place can serve to change them and adjudicate controversies concerning them.

---

124. *Id.*

While both American and Japanese laws relating to *karoshi* are at different evolutionary stages, this study points out the importance of considering the tacit cultural as well as the explicit phenomenon that drives social and legal changes. Death by overwork is an avoidable cause of death that, in the U.S., has received only peripheral recognition under the current system. It is imperative that the U.S. look to social change and rules of adjudication as sources for future primary rules that can better serve the current needs of our society.