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THE RELATIONSHIP BETWEEN DISABILITY AND DEATH BENEFITS
 PAYABLE UNDER THE VARIOUS PUBLIC EMPLOYE RETIREMENT
 SYSTEMS AND WORKMEN'S COMPENSATION AWARDS IN WISCONSIN

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I. INTRODUCTION

A. The Problem

Although the first public employe retirement systems established in Wisconsin date back nearly half a century, the coverage of the great mass of public employes under such programs is a comparatively recent development. General classifications of state employes and those of municipalities other than the City or County of Milwaukee first received this protection in 1943. Thus, what was once a special benefit for such particular occupations as teachers, policemen and firemen has become an accepted feature of public employment in general. Today, the total number of employes included under the 10 retirement systems in operation in Wisconsin probably exceeds 60,000.

While the primary purpose of any retirement plan is, of course, to provide for the efficient and equitable retirement of older employes, a secondary purpose is to afford some insurance against financial distress occasioned by disability or death before attainment of retirement age. Some form of disability and death benefits is featured in each of the 10 public employe retirement systems in Wisconsin. A majority of the systems provide especially liberal benefits in cases where permanent total disability or death occurs as a direct result of duty. In addition, since the state and its political subdivisions are employers subject to the provisions of the state's Workmen's Compensation Act, they are liable for the payment of disability and death benefits provided under the act growing out of injury or death incurred in the scope of employment. Therefore, a duty-incurred injury causing the total permanent disability or death of a member of one of the systems gives rise to a claim for compensation under the general law applicable to industrial accidents in general and, as well, a claim for such benefits as are provided under the particular retirement system. In such cases, the question arises whether these provisions should operate independently or whether there is such an interrelationship between the two that payment under one logically excludes payment under the other.

Since there is a surprising lack of uniformity among the various public employe retirement systems in the approach to this problem, it seems doubtful that this detail has ever received a pin-pointed consideration in reference to the over-all scheme of things. The vast expansion of such systems in recent years, however, has intensified the problem to the extent that the 1953 legislature recognized the need for "a comprehensive study of the problem of the relationship between benefits for death under workmen's compensation and the various public employe retirement systems with all its ramifications". (Chapter 397, Laws of 1953).

This report does not purport to represent the comprehensive study requested by the legislature. It seeks, however, to assemble information and ideas that may provide at least a starting point for the committee of experts which must eventually make the policy recommendations involved.

(1) Prepared by Edmund P. Arpin, attorney and former bill draftsman, Legislative Reference Library.

B. The Approach

Specifically, our point of inquiry is whether disability and death benefits payable under a public employe retirement system duplicate such benefits as are payable under workmen's compensation. To what extent are setoffs justified? Essentially, the problem resolves into an examination of the relationship between these two basic systems, retirement and compensation. Such an analysis would appear to involve at least two main strains of consideration. First, whether the social-economic bases of the respective systems are sufficiently similar so that benefits under the one logically exclude benefits under the other. Second, if the systems are separate and distinct in theory, whether in the actual administration of benefit provisions the principles of each system have been so intermeshed that there is in reality a duplication of benefits when both systems operate independently. This poses the rather formidable task of comparing the duty disability and accidental death benefit provisions, or their equivalent, of the various public employe retirement systems with such benefits under workmen's compensation.

II. COMPARATIVE SOCIAL-ECONOMIC BASES

Prior to Wisconsin's adoption of workmen's compensation legislation in 1911, liability in industrial accidents to employes was determined under the hidebound rules of master and servant which imposed an intolerable burden upon the employe and his dependents. The new system effected a major social-economic adjustment by shifting this burden from the hard-pressed individual to society in general through limited liability without fault imposed on the employer, who in turn passed this expense on to the consumer as an additional cost of production. Strictly speaking, the employer's liability under workmen's compensation is neither tortious nor contractual but an obligation imposed by law arising out of the status created by the employment. In essence, such liability is merely a convenient device by which the economic loss resulting from industrial accidents to employes can be underwritten by those who benefit most from the very activity which occasioned the loss--the consuming public in the case of private industrial accidents; the taxpaying public in cases of accidents to governmental employes.

While workmen's compensation was an outgrowth of the common law principles of indemnity governing the employer-employe relationship, employe retirement systems emerged from the force of the natural laws of life and economics coupled with an advanced social attitude of the employer toward his employe. Perhaps the following statement of purpose introducing the Wisconsin Retirement Act sets forth as clearly as anything the basic policy factors underlying employe retirement systems in general:

"The purpose of this fund is to provide for the payments of annuities and other benefits to employes and to beneficiaries of employes of the state of Wisconsin and municipalities in the state, thereby enabling such employes to provide for themselves and their dependents in case of old age, disability and death, and thereby effecting economy and efficiency in the public service by furnishing an orderly means whereby employes who become aged or otherwise incapacitated may, without hardship or prejudice, be retired from active service."
(s. 66.90 (1) stats.)

In the case of public employment, coverage under a retirement system tends to compensate for the lower rates of pay generally prevailing there in comparison with equivalent positions in private industry. The Employees' Retirement Act of Milwaukee County frankly recognizes this factor:

"Employees have been attracted to and have remained in public service in counties of more than 500,000 population despite the prevailing higher wages in other employments because of the deferred compensation for their services promised to them in the form of retirement annuities and death benefits in the retirement system to which they have been admitted as contributing members ...". (Sec. 13a (1) Chapter 201, Laws of 1937, as added by Chapter 138, Laws of 1945)

Retirement systems, then, would appear to rest on fundamentally different principles of social engineering from those supporting workmen's compensation. The former are founded on the principles of security through savings and deferred compensation; the latter is a statutory indemnity against a specific wage loss. Since the comparison of the two systems in their theoretical aspects appears to furnish no philosophical grounds on which to justify setting off benefits of one against the other in the event of actual loss,⁽¹⁾ it becomes necessary to examine the actual provisions involved in an attempt to determine whether there is in fact any basis for such offsets.

III. THE RETIREMENT SYSTEMS

A. General Survey

The accompanying chart (1) lists the 10 public employe retirement systems operating in Wisconsin. The earlier plans dealt with special classes of employes, such as policemen, firemen and teachers. Plans which embrace general classifications of public employes are of fairly recent origin; City of Milwaukee (1937), Milwaukee County (1937), other municipalities of the state (1943) and state (1943). A more recent trend has seen integration at both classification and system levels. In this connection, the Wisconsin Retirement Fund established in 1947 merged two separate systems involving state employes and municipal employes, respectively, and also included future entrants into such classifications formerly covered by separate systems as policemen and firemen outside Milwaukee and state conservation wardens. Integration has also taken place in regard to the retirement systems of Milwaukee, city and county. As the result, 5 of the 10 systems are closed to all but those participating before the effective date of the particular integration affecting such classifications. The closed systems include the Conservation Wardens Pension Fund, the Policemen's and Firemen's Pension Fund for Cities of the Second and Third Class, the Policemen's Annuity and Benefit Fund of Milwaukee, the Firemen's Annuity and

(1) This is based on the supposition that the retirement system benefit will not amount to the payment of full salary as disability or death benefit so as not to fall within the rule that, "one who has sustained no wage loss cannot recover compensation based on a theoretical loss of wages". Employers Mut. L. Ins. Co. v. Industrial Comm. 230 Wis. 670, 681 (1939).

Benefit Fund of Milwaukee and the Sheriffs' Annuity and Benefit Fund of Milwaukee County. The provisions of these closed systems, however, must be considered because they are still effective as to members participating prior to the cut-off date.

Eight of the 10 retirement systems operate under variations of the so-called "savings fund" plan, the Conservation Wardens Pension Fund and the Policemen's and Firemen's Pension Fund for Cities of the Second and Third Class being the exceptions. Under the "savings fund" plan, employe contributions and the prior service and current contributions of the employer are credited to individual employe accounts and accumulate at prevailing rates of interest. The present value of such credits furnishes a tangible basis upon which benefits can be determined on actuarial principles. Under the "pay as you go" plan, on the other hand, regular employe contributions are not set aside in individual accounts but are used to defray expenses as they occur, and the municipal contributions are based on the amount required to make up current deficits. Inasmuch as benefits under such a plan bear no direct relation to contributions, "pay as you go" is no longer recognized as a sound basis for a retirement system.

B. Disability and Death Benefits

Although all 10 public employe retirement systems make some provision for the payment of permanent total disability and death benefits to members and dependents or beneficiaries, as is shown in charts 2A and 2B, not all systems provide special benefits where the injury causing the disability or death occurs in the line of duty. Special duty disability and accidental death benefits prevail throughout those systems including classifications in which the element of personal risk was deemed relatively high, as for example, policemen, firemen and conservation wardens. The 2 plans affecting teachers, on the other hand, make no provision whatever for duty disability or accidental death, and except for one rather minor provision relating to Milwaukee teachers,⁽²⁾ the teacher systems pose no apparent problem in respect to offsets and will, therefore, be omitted from further discussion in this connection. In the omnibus systems covering general employe classifications, the Wisconsin Retirement Fund and the Employe Retirement Systems of the City of Milwaukee and Milwaukee County, respectively, the policy in regard to duty disability and accidental death is not entirely consistent. Duty disability benefits are provided by all 3 systems but only the City of Milwaukee system has a general accidental death benefit.⁽³⁾

A summary consideration of the specific provisions of the various systems relating to permanent total disability and accidental death benefits, or their equivalent, may serve to emphasize the differences in respect to such benefits and in the application of offsets against concurrent workmen's compensation benefits:

(2) S. 38.24 (16) (c) stats. granting death benefits to beneficiaries of certain teachers under the Milwaukee system on an actuarial equivalent basis instead of the usual refund makes provision for an offset as against any workmen's compensation award.

(3) The general accidental death benefit in the Milwaukee County system was repealed in 1941 and presently only deputy sheriffs receive such coverage.

1. Wisconsin Retirement Fund

Duty disability--

The amount monthly which is the greater of: (1) the annuity which can be provided from the total accumulations in employee's account, or (2) 50 per cent of employee's final rate of earnings, plus the annuity which can be provided from any of his additional credits. (However, if the credits of such employee at age 65 would provide an annuity less than 50 per cent of such final rate of earnings, such lesser amount is payable in lieu of the 50 per cent rate). (s. 66.907 (2) (c) stats.) Disability annuities are permanently withheld to an amount equal to the total of any workmen's compensation award which employee receives or is entitled to receive from the same disability. (s. 66.907 (2) (g) stats.)

Death--

The Wisconsin Retirement Fund provides no accidental death benefit. The ordinary death benefit consists of the greater of the following: (a) \$500 plus any additional contributions made by employee; or (b) the total accumulated contributions of the employee. (s. 66.908 (2) (a) stats.) There is no offset as between an ordinary death benefit under this section and any death benefit payable under workmen's compensation.

An additional death benefit is payable if the deceased employee had been a participant for 60 months or more in the employment of any one participating municipality and if his beneficiaries are a spouse, child, grandchild, parent, brother or sister. The additional death benefit is added to the ordinary death benefit and consists of an amount equivalent to the deceased employee's accumulated municipality and prior service credits, provided such credits do not exceed such as could have been used to provide an annuity for the employee at his age at time of death, assuming an annuity could have been granted at such age. (s. 66.908 (2) (aa))

If the amount of any death benefit above is sufficient to provide an annuity of at least \$10 a month and the beneficiary is a widow or minor child, payment must be made in annuity form. The widow may elect the 180 payment plan in lieu of a straight life annuity. (s. 66.909 (1) stats.)

Prior to chapter 397, Laws of 1953, if any beneficiary of an additional death benefit was also entitled to a workmen's compensation award because of such death, the amount of the workmen's compensation award was reduced by the amount of the accumulated municipality and prior service credits payable to the beneficiary as an additional death benefit. Under the temporary act, until July 1, 1955, there will be no offset until the aggregate monthly or weekly payments exceed 75 per cent of the deceased employee's last rate of earnings.

2. Conservation Wardens Pension Fund

Duty disability--

A monthly payment equal to one-half employe's monthly salary at date of retirement from service. (s. 23.14 (7) stats.) There is no provision requiring offsets against any concurrent workmen's compensation award.

Accidental death--

Payment to widow, \$50 per month for life or until remarriage. Payment to each child under age 16, \$8 per month. If widow dies or remarries, her share is paid on behalf of such child or children under age 16. (s. 23.14 (8) stats.) (Total of all benefits payable to family shall not exceed one-half deceased's last rate of earnings)

There is no provision in the statutes requiring any offset as between such death benefits and any concurrent workmen's compensation award.

3. Policemen's and Firemen's Pension Fund for Cities of the Second and Third Class

Duty disability--

A monthly payment equal to one-half of salary as of date of retirement. (s. 62.13 (9) (c) 1 stats.) Any concurrent workmen's compensation award payable to such beneficiary is reduced by the amount of the pension benefit. (s. 102.07 (2) stats.)

Accidental death--

To widow, monthly payment of one-third deceased's last rate of salary for life or until remarriage.

To children under 18 years, \$12 per month. (Total of benefits paid to family not to exceed 65 per cent of deceased's last rate of salary.

To dependent parent, if no widow, the amount widow would have received.

Although it seems to have been the practice to deduct the amount of such benefit from concurrent death benefits under workmen's compensation and chapter 397, Laws of 1953, refers to s. 102.07 (2) stats. as requiring such an offset, the terms of the statute are limited to payments of compensation to "policemen and firemen". No express mention is made of payments to dependents. This section, s. 102.07 (2), will be discussed in more detail under "Workmen's Compensation Benefits".

4. Policemen's Annuity and Benefit Fund of Milwaukee

Duty Disability--

Monthly payment of 55 per cent of the member's salary at date of disability, payable until retirement age, at which time he receives the ordinary annuity provided under the act.

During the time that disability is being paid, amounts which ordinarily would have been deducted from the member's salary as contributions are contributed toward retirement by the city, together with the regular municipal contributions which are made as if the member had remained in active service. (Sec. 1 (50), Chapter 589, Laws of 1921)

In addition, a children's annuity of \$10 per month is provided in behalf of children under 18 years. (Total of such children's benefits not to exceed 20 per cent of the employe's final rate of earnings)

Any disability award under workmen's compensation, if smaller than the benefits provided by pension, is deducted from benefits otherwise payable from the fund. If the workmen's compensation award is greater than the disability benefit above, no disability benefits are paid by the fund until the expiration of the period during which the accrued benefits would equal the amount of workmen's compensation award. (Sec. 1 (52) (c), Chapter 589, Laws of 1921)

Accidental death--

To widow, if husband dies before his annuity is fixed, an additional annuity so that the total annuity will equal the annuity she would have received had her husband lived to retirement age. The difference between this total annuity and the annuity which would have been paid if husband had died an ordinary death is called "compensation annuity" to date of fixation and "supplementary annuity" thereafter.

Children under 18 receive a child's annuity of \$10 per month if widow is living, otherwise \$15 per month. (The aggregate of benefits payable to the family not to exceed 75 per cent of the member's final rate of earnings)

Like s. 102.07 (2) stats., the offset provision of the act, Sec. 1 (52) (c) expressly includes only disability payments made to members. No mention is made of death benefits payable to widows or children.

5. Firemen's Annuity and Benefit Fund of Milwaukee

✓The provisions in respect to duty disability, accidental death benefits and offsets are substantially identical to those of the Milwaukee policemen's fund above.✓

6. Employes' Retirement System of the City of Milwaukee

Duty disability--

Monthly annuity equal to the service retirement allowance if such member has attained minimum retirement age, otherwise, the annuity which is the actuarial equivalent of his accumulated contributions plus a pension equal to 75 per cent of his final average salary.

Any amount of workmen's compensation payable is offset against and payable in lieu of any disability payments provided under the retirement system, and any social security payments for disability are similarly set off. (Sec. 13 of Chapter 396, Laws of 1937)

Accidental death--

Monthly payment of one-half deceased's final average salary: (1) to widow during widowhood; or (2) if no widow, or if she dies or remarries before any child of deceased reaches 18 years, then to such child or children while under 18 years; or (3) if no widow or child under 18, then to a dependent parent.

Since Sec. 13 of the act expressly includes payment to dependents, prior to ch. 397, Laws of 1953, any amounts paid or payable under workmen's compensation to such dependents were offset against and payable in lieu of the benefits provided by the city under the retirement act. Under the temporary enactment of 1953, there is no offset until the aggregate monthly or weekly payments exceed 75 per cent of the deceased's final average salary.

7. Employes' Retirement System of Milwaukee County

Duty disability--

/Same as City of Milwaukee system above/

/Same offset provision as City of Milwaukee system under Sec. 13, Chapter 201, Laws of 1937/

Death--

Ordinary death benefit payable only (except in the case of deputy sheriffs) which is equal to the sum of the member's accumulated contributions and, if he had been a participating employe for one year or more, an additional lump sum benefit of one-half deceased's final average salary, but not to exceed \$2,000.

Accidental death benefits are payable in the case of participating deputy sheriffs. Such benefits are computed on the same basis as accidental death benefits under the City of Milwaukee system above.

Since Chapter 397, Laws of 1953, which sets up the temporary 75 per cent limitation as to offsets, does not apply to the Milwaukee County System, Sec. 13 of the act remains in effect. Therefore, any amounts payable to dependents under workmen's compensation are offset against and payable in lieu of death benefits provided out of funds provided by the county under the retirement act. If the present value of the total commuted benefits under workmen's compensation is less than the pension reserve on benefits otherwise payable from the retirement system, such present value of the commuted payments are deducted from the pension reserve and such benefits as may be provided by the pension reserve as so reduced are payable from the system.

8. Sheriffs' Annuity and Benefit Fund of Milwaukee County

Duty disability--

Monthly payment of 55 per cent of the member's salary at the time of disability. This benefit is payable during disability until member attains age 57, at which time he receives the ordinary retirement benefits. During the time disability benefits are paid, amounts which ordinarily would have been deducted from the member's salary as contributions are paid by the county, together with the regular employer contributions which continue to be made as if the member had remained in active service until the annuity becomes fixed.

Unmarried children under age 18 of a disabled member are entitled to a child's annuity of \$10 per month.

Any amounts payable to the member under workmen's compensation for such disability are offset against and payable in lieu of such benefits under the fund.

Accidental death--

To widow, if death occurs before the annuity becomes fixed, an additional annuity so that the total annuity is equal to that she would have received had husband lived and remained in service until date of fixation. This additional annuity is called "compensation annuity" to date of fixation and "supplemental annuity" thereafter.

In addition, a "child's annuity" of \$10 per month is payable in behalf of each unmarried child of deceased under age 18, while widow survives, and \$15 per month after death of widow. (All payments to family not to exceed 75 per cent of final salary of deceased)

Since the offset provision of the retirement act in question expressly includes only disability payments made to the members themselves, and not death benefits to dependents, there would appear to be no offset affecting the above accidental death benefits. In any event, Chapter 397, Laws of 1953, does not affect benefits payable under this system.

IV. WORKMEN'S COMPENSATION BENEFITS

Although the Workmen's Compensation Act provides different schedules of awards for various types of disabilities and for death under varying circumstances, this discussion will be confined to cases of permanent total disability, permanent partial disability and death proximately resulting from a compensable injury or disease where deceased leaves a person or persons wholly dependent upon him for support. It is in these situations that such awards are most apt to clash with concurrent benefits of one of the public employe retirement systems. Two different compensation systems are involved, however: the standard coverage applicable to employes in general, both private and public; and the special coverage applicable only to certain employes subject to the Wisconsin Retirement Fund.

A. Standard Coverage

Permanent total disability--

Weekly indemnity for life equal to 70 per cent of average weekly earnings (up to \$60). Maximum weekly payment, \$42; or \$182 per month.

Permanent partial disability--

Weekly indemnity equal to 70 per cent of average weekly earnings (up to \$60) for a certain number of weeks depending upon the nature of the disability and the age of the employe.

Accidental death--

Primary benefit: 4 times deceased's average annual earnings (computed subject to \$60 per week maximum based on 50-week year). Maximum value of death benefit, \$12,000. Industrial Commission may order payment of benefit in gross on 3 per cent discount basis, but in lieu of such order, the benefit is payable at the rate of 50 per cent of deceased's weekly earnings until consumed. Maximum payment: \$30 per week; or \$130 per month, over a period of approximately 7 years and 8 months.

Additional death benefit for children: A proportion of deceased's average annual earnings based on the age of child, starting at 1-1/15 for a child one year or under and reduced by 1/16th in each successive age group until age 16, after which no benefit is payable. (Maximum benefit for a child one year or under, \$3,200) Children's benefits are paid at the rate of 13 per cent of the surviving parent's weekly indemnity. (Maximum rate of payment \$3.90 per week; or \$16.90 per month until benefit consumed)

Offset--

Customarily, offset provisions affecting concurrent benefits arising from disability or death originate in the act creating the particular retirement system. However, in the case of certain policemen and firemen entitled to pension benefits under a system to which the municipality may contribute, the offset provision is found in the Workmen's Compensation Act. This is probably because the enabling act for pension funds on behalf of policemen and firemen of cities of the second and third class dates back to 1907, 4 years before the passage of the Workmen's Compensation Act. The compensation offset was added in 1913 and provides as follows:

"Any policeman or fireman claiming compensation shall have deducted from such compensation any sum which such policeman or fireman may receive from any pension or benefit fund to which the municipality may contribute; provided further that any other peace officer shall be considered an employe while engaged in the enforcement of peace or in the pursuit and capture of those charged with crime." (s. 102.07 (2) stats.)

Although the language used is sufficiently broad to include policemen and firemen of Milwaukee, the fact that the legislature provided a special offset provision in each of the retirement acts in question suggests a contrary construction. A more serious question of construction arises from the failure of the statute to refer specifically to death benefit claims by dependents of such a policeman or fireman entitled to death benefits from such a pension fund. The terms of Chapter 397, Laws of 1953, suggest that the section is regarded as effecting setoffs against death benefits as well as disability awards, but it is difficult to reach that conclusion from a literal reading of the provision. The fact that the offset provisions in the general retirement systems of the City of Milwaukee and Milwaukee County specifically enumerate payments to beneficiaries on account of death is some evidence that if the legislature intends to setoff death benefits it will do so expressly and not by implication alone.

The constitutionality of the compensation setoff provision was upheld in Lenfesty v. Eau Claire, 245 Wis. 220 (1944), on the ground that the classification was reasonable in that its purpose was to prevent payment by the city of both pension and workmen's compensation benefits when both were derived from municipal funds. The court did not dwell on the matter at length, and no discussion was directed to the possibility that the pension benefit might be financed in fact largely or entirely from the contributions of the claimant.

Apart from the issue of constitutionality, the practical administration of this section has obviously caused some difficulty. Apparently the Industrial Commission has not made a practice of ordering the offset in its award, relying on the city to protect its own interests. It wasn't until the fairly recent case of Columbia Casualty Co. v. Industrial Commission, 254 Wis. 310 (1949) that the duty of the commission in this respect was clearly spelled out. It was there held that the commission had the duty to include in its award either a statement of the amount to be deducted or, in cases where that cannot be done, a statement to the effect that there shall be paid to the claimant the amount of the award less any sum he may receive from such pension fund.

B. Certain Public Employees Subject to Wisconsin Retirement Act

The older pension funds for policemen, firemen and conservation wardens provide liberal retirement, duty disability and accidental death benefits to an extent not generally available under the Wisconsin Retirement Fund. This is especially true in respect to the death benefit since there is no accidental death benefit provision under the Wisconsin Retirement Fund. As a compromise when all future entrants into such classifications were integrated into the fund in 1947, they were offered the 7 per cent contribution rate together with a special schedule of workmen's compensation benefits to cover duty disability and accidental death. (s. 102.455 stats.) The special schedule provides the following benefits:

Disability causing retirement--

Monthly payment of a sum equal to one-half employe's salary at the time of disability.

The amount of any retirement or disability annuity to which employe is entitled under the Wisconsin Retirement Fund is deducted from payments under this section.

Accidental death--

To widow, monthly payment of one-third of salary being paid deceased in such service at time of disability or death, for life or until remarriage.

To guardian of each child under 18, \$15 per month. (Total of such benefits to family not to exceed 65 per cent of monthly salary being paid deceased in such service at time of his disability or death)

Prior to the temporary partial moratorium on offsets effected by Chapter 397, Laws of 1953, the amount of reversionary annuities, death benefits or death benefit annuities payable to such widow or child under the Wisconsin Retirement Fund were deducted from payments under this section. Under the temporary enactment, there is no such reduction in the award until the sum of all benefits exceeds 75 per cent of deceased's last rate of salary.

The special schedule affords at least 3 distinct advantages over the standard benefits. First, the definition of the qualifying permanent disability is much more liberal than the definition of permanent total disability giving rise to lifetime benefits under the regular workmen's compensation provisions. All that is required under the special schedule is that the injury or disease render the employe so "completely and presumably permanently disabled, either physically or mentally, as to render necessary his retirement from any of the (included) services". It is highly possible, therefore, that permanent disability under the special schedule would be only permanent partial disability under standard coverage. Second, there is no apparent limitation on the amount of salary which may be used as a base in computing disability or death benefits. Third, the widow's benefit, in case of death, is payable for life or until remarriage, and in addition, the children's benefits are more liberal. The scheme of benefits appears clearly analogous to the duty disability and death benefits provided by the older pension systems for policemen, firemen and conservation wardens.⁽⁴⁾ No doubt, placing this machinery within the general framework of workmen's compensation promotes simplicity of administration and also eliminates the necessity of computing an additional cost in fixing municipal contributions to the Wisconsin Retirement Fund. Nevertheless, this approach has brought some dubious results. From the practical standpoint, there is the constant pressure exerted in behalf of some excluded but related classifications of employes to have them included under the special schedule. Originally, the measure related only to policemen, firemen and conservation wardens subject to the Wisconsin Retirement Fund, but it has since been amended to include deputy state fire marshals, state forest rangers, field employes of the conservation commission subject to call for forest fire control or

(4) The original version of Bill No. 211, S. (1953) proposed the transfer of this section to the Wisconsin Retirement Act.

warden duty, members of the state traffic patrol, state university full-time policemen, guards or any other employes whose principal duties are supervision and discipline of inmates at a state penal institution, and state beverage tax investigators. Furthermore, during recent sessions of the legislature bills have been introduced which would admit additional classifications to this coverage.⁽⁵⁾ This is perhaps the inevitable result of special privilege legislation of this kind. From the constitutional viewpoint, such discriminatory class legislation raises the issue of reasonableness, and the section in question is being tested on this ground in the case of Krueger v. City of Merrill now pending in the Circuit Court for Dane County. In denying liability for benefits under the special schedule, it is the contention of the city, by its insurance carrier, that statistics demonstrate that the hazards involved in the included classifications are in fact no greater than those involved in other types of employment generally and that, therefore, singling out such classifications for preferred treatment is arbitrary and void. This position is at least partly supported by the policy of the Joint Survey Committee on Retirement Systems which has consistently opposed extending such benefits to other than policemen and firemen.⁽⁵⁾ It appears likely that the administration of s. 102.455 will be pretty well hamstrung pending a final decision on its constitutionality by the State Supreme Court.

V. GENERAL APPRAISAL OF OFFSET PROVISIONS

It was suggested previously that there is no conflict per se between retirement system benefits and concurrent awards under workmen's compensation inasmuch as the 2 schemes are based on fundamentally different social-economic principles. The actual provisions relating to disability and death benefits under the various public employe retirement systems and workmen's compensation were then considered in an effort to determine the extent to which this distinction was preserved in practice. This was done with the thought that offsets of one type of benefit against the other are justified only if their respective bases and sources are such as to clearly indicate the imposition of a double indemnity against the employing municipality.

A. Disability Benefits

In general, duty disability benefits when provided under one of the various public employe retirement systems are based on a rate of past earnings standard rather than on credits accumulated under the fund. In most cases, therefore, such payments, based on the general principles of indemnity and made primarily out of funds provided by the municipality, bear a striking resemblance to workmen's compensation awards. As a consequence, of the 8 systems having the duty disability feature, only one, the Conservation Wardens Pension Fund, fails to make some provision for setting off one benefit against the other. Apparently, there is no serious dispute over the logic of setoffs in this area. Without such provisions, an employe eligible for both types of benefits would receive about the same in retirement as working full-time, and this primarily at the expense of the tax-paying public. It should be noted that Chapter 397, Laws of 1953, makes no provision for the abatement of setoffs in respect to disability benefits but deals exclusively with the problem of death benefits.

⁽⁵⁾ See for example, Bill No. 195, S. (1953) and Bill No. 150, S. (1955)

Although the general offset principle in such cases appears justified, there is some question about its exact application. Since a part of the disability benefit may stem from the employe's own contributions, it would seem unfair to subject the entire amount of the benefit to an offset by the concurrent workmen's compensation award. Yet, only the general systems of Milwaukee and Milwaukee County expressly limit the offset to such part of the benefit as is payable out of the funds provided by the municipality. In the case of "savings fund plans", a further issue might be raised in respect to accumulated prior service and municipal credits. As in the case of death under certain circumstances, it would seem plausible to view these credits as justly vesting in the employe on such a contingency as his being disabled in the line of duty. If so, that part of the disability benefit payable out of the accumulated prior service and municipal credits, as well, would be released from the application of an offset.

B. Death Benefits

The different bases of death benefits under the various retirement systems in question lends an additional complicating factor to the setoff picture in this area. Primary accidental death benefits under the Conservation Wardens Pension Fund, the Policemen's and Firemen's Pension Fund for Cities of the Second and Third Class and the Employees' Retirement System for the City of Milwaukee bear no direct relation to contributions or accumulated credits. Such benefits under the funds relating to Milwaukee policemen and firemen and Milwaukee County sheriffs are based on accumulated credits up to the point that supplementary and compensation annuities are payable. The ordinary death benefits under the 2 systems which do not feature general accidental death benefits, the Wisconsin Retirement Fund and the Employees' Retirement Fund for Milwaukee County, are based primarily on contributions although some municipal funds may also be involved.

The situation in respect to offsets as between such death benefits and concurrent death benefits under workmen's compensation is equally variable and confused. Disregarding the temporary partial abatement of offsets effected by Chapter 397, Laws of 1953, offsets are expressly provided under the Wisconsin Retirement Fund in respect to the additional death benefit, (s. 66.908 (2) (aa) stats.) by which any concurrent workmen's compensation award otherwise payable to such beneficiary is reduced by the amount of the additional death benefit; and also under the general systems of Milwaukee and Milwaukee County where death benefits payable from municipal funds are reduced by the amount of any concurrent workmen's compensation award payable to such beneficiary. Offsets affecting death benefits under the Policemen's and Firemen's Pension Fund for Cities of the Second and Third Class, the Policemen's Annuity and Benefit Fund of Milwaukee, the Firemen's Annuity and Benefit Fund of Milwaukee and the Sheriffs Annuity and Benefit Fund of Milwaukee County rest, at best, on mere implication. There is no offset, express or implied, in the case of death benefits payable under the Conservation Wardens Pension Fund.

While the offset provisions do not reduce death benefits payable solely from the accumulated contributions of the deceased employe, the question of policy remains whether death suffered in line of duty is a contingency which should give rise to a vested interest in all credits in the employe's account, including prior service and

municipal credits, as well as the contributions of the employe. The impact of this issue is particularly significant in the administration of the additional death benefit provided under the Wisconsin Retirement Fund. Prior to the enactment of Chapter 397, Laws of 1953, the required reduction in the workmen's compensation award by the amount of the prior service and municipal credits composing the additional death benefit, if a substantial amount was involved, worked a decided hardship on the beneficiary, especially in the case of a young or middle-aged widow with dependent children. For example, if the amount of the additional death benefit was \$12,000, the offset completely wiped out the maximum workmen's compensation award, otherwise payable at the rate of \$130 per month. On the other hand, the \$12,000 additional death benefit under the fund, together with the ordinary death benefit, would be payable on an annuity basis to the widow and at a much lower monthly rate. A widow becoming eligible at age 40, for instance, would receive but \$45.21 per month from \$12,000 on a life annuity basis, as compared with \$130 per month payable for almost 8 years under workmen's compensation. Thus, during the critical period of adjustment following death of the husband, the typical widow would be left with only a fraction of the monthly income which she would receive under workmen's compensation. This result has been stayed, at least temporarily, by the provisions of Chapter 397, Laws of 1953, under which there is no offset against the workmen's compensation award until the sum of the combined benefits to the beneficiary exceeds 75 per cent of the deceased's last rate of salary. However, the adoption of the vested rights policy in respect to the credits composing the additional death benefit would, of course, dispose of this problem permanently, at least insofar as the beneficiaries are concerned. In lieu of such a change in policy, a more equitable mode of effecting such an offset would appear desirable if the remedial provisions of Chapter 397 are not renewed in some manner.

C. Special Workmen's Compensation Benefits under S. 102.455

The similarity of the special workmen's compensation schedule applicable to certain employes under the Wisconsin Retirement Fund to pension benefits for disability and death provided under the older systems affecting related classifications has already been discussed. The 7 per cent contribution rate required of employes eligible for the special benefits furnishes a further tie-in with the Wisconsin Retirement Fund itself. In view of this situation, it would be only natural to expect a setoff as between concurrent benefits under the special schedule and the Wisconsin Retirement Fund. In respect to the permanent disability benefits payable under the special schedule, s. 102.455 (1) contains the following setoff provision:

"...If such person might be entitled to a benefit under either section 66.906 (2) or 66.907 (2) he shall make application therefor within 30 days after the entry of an order directing payment under this subsection and there shall be deducted from payments to be made under this subsection such sums as may be paid to such person pursuant to section 66.906 (2) or 66.907 (2)."

It is to be noted that this setoff includes retirement as well as disability annuities, which are paid and the amounts thereof

deducted from payments made pursuant to the special schedule. In respect to disability payments under the fund, the manner of effecting this setoff is in conflict with that prescribed by s. 66.907 (2) (g) of the statutes which requires the permanent withholding of all disability payments to an amount equal to the total of the workmen's compensation awards, "notwithstanding any provisions to the contrary". Because of the relationship between the special benefits and coverage under the Wisconsin Retirement Fund and the previously discussed advantages of the special schedule of disability benefits over the regular schedule of workmen's compensation benefits, it does not appear inequitable to require a complete setoff as against concurrent benefits received from the fund, even though such benefits stem directly from contributions and credits. Moreover, if in a particular circumstance such setoff acts to the detriment of an eligible employe, s. 102.455 (4), added by Chapter 397, Laws of 1953, permits the waiver of the special schedule of benefits in favor of the regular workmen's compensation provisions.

Although held in abeyance by the remedial provisions of Chapter 397, Laws of 1953, s. 102.455 (2) (b) prescribes the following setoff in respect to death benefits payable under the special schedule:

"...If any such widow or child might be entitled to a benefit under section 66.907 (1), 66.908 or 66.909 she or he shall make application therefor within 30 days after the entry of any order directing payments in accordance with this subsection, and there shall be deducted from payments to be made under this subsection such sums as may be paid pursuant to sections 66.907 (1), 66.908 and 66.909 because of the death of the participating employe."

This setoff includes reversionary annuities and ordinary death benefits as well as additional death benefits, which are paid and the amounts thereof deducted from payments made pursuant to the special schedule. Unlike the primary death benefit under the regular provisions of workmen's compensation, in the case of the widow's annuity under the special schedule there is no lump sum award from which the credits composing the additional death benefit can be deducted. Thus, although the exact manner of effecting the setoff is left somewhat in doubt by the general language employed, it would seem most plausible that in the case of annuities the deductions are to be made on a month by month basis. In such event, a widow receiving an annuity under the fund, would have such monthly amount deducted from the monthly payment under the special schedule. If the death benefit under the fund is sufficiently small to be payable in a lump sum, it would appear that payments under the special schedule are to be withheld for such period as payments pursuant to the schedule would correspond to the lump sum benefit. As so construed, such manner of effecting the setoff in respect to additional death benefits would appear to be in conflict with that prescribed by section 66.908 (2) (aa) of the statutes, enacted 4 years subsequent to the special schedule, which requires the amount of the award under Chapter 102 to be reduced by the amount of the accumulated municipality and prior service credits payable to such beneficiary as an additional death benefit. This implies a single lump sum setoff which, when applied to the death benefit under the regular

workmen's compensation provisions, can result in a drastic reduction of benefits.

In view of the close affinity between the schedule of special benefits and coverage under the Wisconsin Retirement Fund and the pronounced advantages of the special schedule of death benefits over the regular workmen's compensation awards, it again seems logical that concurrent benefits received by the widow from the fund should be offset against payments to her under the special schedule. Despite the operation of such setoff, the widow receives combined annuities equal to the one-third of deceased's last rate of salary for life, or until remarriage, which in the average case would be a more valuable benefit over the long run than the combined value of a typical death benefit annuity plus the regular workmen's compensation death benefit payable over a limited period of time. The 75 per cent rule effected by Chapter 397, Laws of 1953, would seem particularly advantageous to widows receiving benefits under the special schedule since the abatement of setoffs applies to 2 annuities payable over her lifetime. In the case of beneficiaries of regular workmen's compensation death benefits, the abatement works an advantage only during the limited period over which such death benefits are payable.

VI. PROSPECTS FOR GENERAL REVISION OF THE OFFSET PROVISIONS

The lack of uniformity among the various public employe retirement systems in the operation of setoffs between disability and death benefits and concurrent benefits under workmen's compensation, together with the ambiguity of several existing setoff provisions, suggest the need for a rather full scale revision to harmonize and clarify the legislative policy toward the setoff question. Because of the possible ramifications of any resultant substantive change in benefits under the various systems, a thorough study of the problem should precede the adoption of any permanent program.

The quest for a generally applicable setoff formula equitable to employer and employe alike would appear to involve the establishment of a compromise between the 2 extremes of setoffs straight across the board and no setoffs at all. The former position tends to abrogate the legitimate purposes intended to be served by one or the other basic system; the latter results in disproportionately high benefits at the expense of the public. Such a compromise might be based on the principle granting vested rights to participants in respect to all accumulated credits under the retirement system in the event of duty disability or accidental death. Under such a plan, setoffs would be confined to benefits which are supplementary to those provided actuarially from all credits in the case of a savings fund system or from contributions plus interest in the case of a pay as you go system. Another possible solution might lie in the direction of the 75 per cent formula laid down by Chapter 397, Laws of 1953, in regard to concurrent death benefits. This approach is arbitrary to a degree in that disability and death benefits are in many cases payable without regard to contributions or credits, but its comparative simplicity is a commending feature.

In addition to difficulties in arriving at an acceptable setoff formula, the making of substantive changes in retirement system benefits may be further complicated by the contract rights to existing

benefits granted to members of various systems. Contract rights to benefits have been specifically granted by statute in respect to all systems except the teacher plans and the Conservation Wardens Pension Fund. This action resulted from decisions of the Wisconsin Supreme Court⁽⁶⁾ holding that in the absence of a specific contractual relation, a public employe does not have a vested interest in such benefits and that their continuance or change is strictly a matter of legislative policy. Teachers, on the other hand, were held to enjoy such a contractual relationship with the state as to be protected from any adverse change in benefits under a teachers' retirement system without any express statutory guarantee.⁽⁷⁾ The present provision granting contractual rights to members of the various systems in question would appear to bar any plan which would effect a possible diminution in any existing benefits under those systems.

A legislative program involving substantive changes in benefits affecting any of the pension systems of the City of Milwaukee will also run contrary to the "home rule" provision adopted in 1947 in respect to the general system of Milwaukee.⁽⁸⁾ The Joint Survey Committee on Retirement Systems has regarded this authority as a "moral" bar against legislation relating to benefits under any of the 3 Milwaukee systems. This attitude did not, of course, prevail in the case of Chapter 397, Laws of 1953, which affected death benefits under these 3 systems.⁽⁹⁾

Despite obstacles which may impede a full scale revision of setoff provisions in general, nothing would appear to stand in the way of needed remedial legislation in respect to certain benefits and setoffs within the Wisconsin Retirement Fund. The 1953 legislature singled out sections 66.908 (2) (aa) relating to the additional death benefit and 102.455 the special workmen's compensation schedule as having resulting in ambiguity and confusion as between benefits and setoffs. Even if the special schedule of workmen's compensation benefits for special classifications is retained, it would seem advisable to adjust the conflicting setoff provisions in respect to additional death benefits provided under the Wisconsin Retirement Fund as between special workmen's compensation death benefits, on one hand, and the regular death benefit, on the other. In view of the constitutional doubts now surrounding the special schedule, some thought directed toward a general accidental death benefit under the fund applicable to all participating employes may not be wholly inappropriate.

(6) State ex rel. Risch v. Trustees, 121 Wis. 44 (1904).
State ex rel. McCarty v. Gantter, 240 Wis. 548 (1942).
State ex rel. Bartelt v. Thompson, 246 Wis. 11 (1944).

(7) State ex rel. O'Neil v. Blued, 188 Wis. 442 (1925).

(8) Chapter 441, Laws of 1947.

(9) See 1949 Report, Joint Survey Committee on Retirement Systems, p.81.

CHART 1
PUBLIC EMPLOYE RETIREMENT SYSTEMS IN WISCONSIN

<u>System</u>	<u>Date of Origin</u>	<u>Cut-off Date</u>	<u>Financial Structure</u>	<u>Employee Contributions</u>
Wisconsin Retirement Fund	1947	....	Savings fund	General - 5% of salary up to \$350 per month Special Groups - 7% of salary, with or without limitation depending on occupation
Conservation Wardens Pension Fund	1935	1948	Pay as you go	7% of salary up to \$350 per month
Policemen's and Firemen's Pension Fund of Cities of Second and Third Class	1907	1948	Pay as you go	4% of monthly salary
Policemen's Annuity and Benefit Fund of City of Milwaukee	1921	1947	Savings fund	3% of salary - Retirement 1% of salary - Widow's Annuity $\frac{1}{2}$ % of salary (approx.) - Disability
Firemen's Annuity and Benefit Fund of City of Milwaukee	1923	1947	Savings fund	(Same as Milwaukee Policemen's Plan above)
Employee Retirement System of City of Milwaukee	1937	....	Savings fund	A per cent of salary determined by sex and age at entry. Rate of contribution remains constant for the period of membership
Sheriffs' Annuity and Benefit Fund of Milwaukee County	1937	1947	Savings fund	3% of salary - Retirement 1% of salary - Widow's annuity (Share of expense of disability payments on pro rata basis)
Employee Retirement System of Milwaukee County	1937	....	Savings fund	A per cent of salary determined by sex and age at entry, rate remains constant for the period of membership

CHART 1--Cont.
PUBLIC EMPLOYE RETIREMENT SYSTEMS IN WISCONSIN--Cont.

<u>System</u>	<u>Date of Origin</u>	<u>Cut-off Date</u>	<u>Financial Structure</u>	<u>Employee Contributions</u>
State Teachers Retirement System	1921	....	Savings fund	6% of monthly salary
Milwaukee Public School Teachers Annuity and Retirement Fund	1909	....	Savings fund	Various amounts per month depending upon the date of entry into service (with right of prior entrants to elect higher rate). Current rate: \$17 per month for first 10 years \$26 per month, thereafter

DUTY DISABILITY AND OFFSETS PROVIDED UNDER PUBLIC EMPLOYEE RETIREMENT SYSTEMS

<u>Retirement System</u>	<u>Duty Disability (Permanent)</u>	<u>Annuity Amount</u>	<u>Offset</u>
Wisconsin Retirement Fund	Yes	Greater of: (a) Actuarial value of all credits on annuity basis or (b) Sum of: (1) Actuarial value of available additional credits on annuity basis (2) 50 per cent of final rate of earnings (unless retirement annuity at age 65 would have been smaller, then such smaller amount)	Disability payments permanently withheld to an amount equal to the total of any workmen's compensation award
Conservation Wardens Pension Fund	Yes	$\frac{1}{2}$ last salary for life	None
Policemen's and Firemen's Pension Fund for Cities of Second and Third Class	Yes	$\frac{1}{2}$ last salary for life	Workmen's compensation award reduced by amount of disability benefit
Policemen's Annuity and Benefit Fund of Milwaukee	Yes	55 per cent of last salary until eligible for regular retirement annuity Children under 18: \$10 per month	Disability benefit reduced by amount of workmen's compensation
Firemen's Annuity and Benefit Fund of Milwaukee	Yes	(Same as Milwaukee Policemen above)	Reduced by amount of workmen's compensation award
Employes Retirement System of City of Milwaukee	Yes	Annuity furnished by employes accumulated contributions plus 75% of final average salary. (After regular retirement age, regular retirement annuity paid in lieu of disability benefits)	Reduced by amount of workmen's compensation award (Also by amount of any social security paid by U.S. for disability)

DUTY DISABILITY AND OFFSETS PROVIDED UNDER PUBLIC EMPLOYE RETIREMENT SYSTEMS--Cont.

<u>Retirement System</u>	<u>Duty Disability (Permanent)</u>	<u>Annuity Amount</u>	<u>Offset</u>
Employes Retirement System of Milwaukee County	Yes	Same as City of Milwaukee above	Reduced by amount of workmen's compensation award (also any social security paid for disability)
Sheriffs' Annuity and Benefit Fund of Milwaukee County	Yes	55% of last salary until retirement age reached; thereafter regular retirement annuity Children under 18: \$10 per month	Reduced by amount of workmen's compensation award

CHART 2B.

ACCIDENTAL DEATH BENEFITS AND OFFSETS PROVIDED UNDER PUBLIC EMPLOYE RETIREMENT SYSTEMS

<u>Retirement System</u>	<u>Accidental Death Benefit</u>	<u>Annuity Amount</u>	<u>Offset (Prior to ch. 397, 1953)</u>
Wisconsin Retirement Fund	None (Regular death benefit only)	Ordinary: Normal credits of employe or \$500 (whichever is greater) plus additional credits Additional: (5 or more years service, spouse or close relative surviving) Accumulated municipal and prior service credits (To extent the same would have been available for retirement annuity) (Benefit payable as lump sum unless sufficient to furnish annuity of \$10 per month in case of widow or minor child)	Ordinary - None Additional - Amount of any workmen's compensation award Reduced by amount of credits available for additional death benefit
Conservation Wardens Pension Fund	Yes	Widow: \$50 per month for life, or until remarriage Children under 16: \$8 per month each (Share of widow's annuity in event of her death or remarriage)	None

ACCIDENTAL DEATH BENEFITS AND OFFSETS PROVIDED UNDER PUBLIC EMPLOYEE RETIREMENT SYSTEMS

<u>Retirement System</u>	<u>Accidental Death Benefit</u>	<u>Annuity Amount</u>	<u>Offset (Prior to ch. 397, 1953)</u>
Policemen's and Firemen's Pension Fund for Cities of Second and Third Class	Yes	Widow: 1/3 last salary for life or until remarriage Children under 18: \$12 per month Dependent parent (if no widow) 1/3 last salary	None
Policemen's Annuity and Benefit Fund of Milwaukee	Yes	To widow (for life or until remarriage): Amount of regular retirement annuity which would have been payable to entrant at retirement age Children under 18: \$10 per month (\$15 if no widow)	None
Firemen's Annuity and Benefit Fund of Milwaukee	Yes	(Same as Milwaukee Policemen above)	None
Employees Retirement System of City of Milwaukee	Yes	1/2 final average salary - (a) To widow during widowhood (b) In lieu of eligible widow, to children under 18 (c) In lieu of (a) or (b) to dependent parent	City contribution reduced by amount of workmen's compensation award (Also social security)
Employees Retirement System of Milwaukee County	No (except for deputy sheriffs)	Regular- Sum of accumulated contributions plus (if in service for year or more) lump sum of 1/2 final average salary, but not over \$2,000. Deputy sheriffs- same as city of Milwaukee above.	County contribution reduced by amount of workmen's compensation award (Also social security)
Sheriffs Annuity and Benefit Fund of Milwaukee County	Yes	Same as Milwaukee Policemen and Firemen	None