

Workers' Compensation:
A Cautionary Tale

2006

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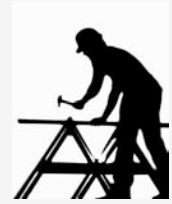
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Introduction

Over the years, there have been many proposals that require wrongly injured persons to have their disputes resolved outside the court system. Very often, these proposals are encouraged based on the experience of workers' compensation, an administrative system to compensate injured workers that was instituted throughout this country almost a century ago. The most recent proposal to receive attention is "Health Courts," which would cover all those injured or killed by medical malpractice. Reliance on workers' compensation as a model would be terrible public policy.

The workers' compensation system has been rife with problems almost since its inception. Employers who pay into it, employees who rely on it, analysts who look at it, and scholars who study it all have a long list of complaints about how it does not work. It is a heavily bureaucratic, adversarial system that shortchanges injured workers, even while employers struggle now and then with rapidly rising workers' compensation insurance rates. And to the extent that rate reductions have taken place, they inevitably have come at the expense of the injured, where lawmakers have slashed benefits and pushed many of the injured entirely out of the system.

Moreover, in the early 1990s, insurers and businesses began a misleading media campaign focusing on employee fraud, even though only a tiny percentage of workers - 1 to 2 percent - have engaged in fraud. In response to this campaign and complaints about rising insurance costs, many new restrictions on workers' rights and benefits

have been pushed through in many states. Meanwhile, insurance profits climbed to new heights while workers have been dealt more bureaucratic hurdles, lower benefits, and the new added stigma that they were somehow cheating the system.



Workers' compensation is an unfortunate example of how a seemingly fair program can be manipulated by political forces into a nightmare for those it was originally meant to help. Once an area of law is removed from the civil justice system, it becomes vulnerable to money, politics and influence-peddling. This happens either through aggressive industry lobbying of legislators, political influence on the agencies charged with implementing the system, or orchestrated media efforts. All have happened to workers' compensation.

Workers' compensation is in trouble and workers are suffering. This paper takes a close look at what has contributed to the colossal failure of this program and will examine a few states' legislative battles that illustrate recent disturbing trends in the system. It is crucial to take a hard look at workers' compensation not only because hard-working Americans are being left out in the cold, but also because lawmakers are looking to use this system as a model to create more programs in other areas – a recipe for disaster.



Chipping Away at the Status Quo

Early twentieth century America, a time of great industrial expansion, was also a time of great contention between workers and employers. Some have estimated that as many as one worker out of every fifty was killed or seriously disabled from industrial accidents each year.¹ At the time, the laws on the books were unfair to injured workers and made it extremely hard for them to get compensation for their injuries.²

Workers' compensation in America was seen as a new system that would help workers - a compromise whereby workers traded their (already limited) rights to go to court over work-related injuries for a system where they would no longer have to prove the employer was at fault for their injuries, a "no-fault" system that would provide automatic compensation for workplace injuries within certain limits. The theory was one of social efficiency - that the cost of injuries should be borne by the manufacturers rather than the employee, the employee's family or the government.

The compensation system was meant to keep an injured worker and his family from becoming destitute due to inability to work while at the same time providing employers with insurance to cover the fixed liability costs. By setting up a compensation system, employers knew how much each injury would cost them and employees received limited benefits, but still more than they were receiving without workers' compensation given the state of law at the time.

The first wave of workers' compensation legislation merely removed the old laws limiting an employer's legal responsibility for workers' injuries. By 1949, however, every state had passed a new workers' compensation law, which created a system of compensation for injuries that did not allow going to court.³



How it Works

Each state devises its own workers' compensation system, and state statutes and court decisions guide most of the restrictions and requirements. While each state has its own laws, the following general concepts apply to most workers' compensation systems:



- o When a worker is hurt, workers' compensation is the exclusive remedy against an employer. Lawsuits against employers are not allowed (although if another party causes the injury, such as the manufacturer of defective equipment, suits against this other party are still allowed). Domestic and agricultural workers are usually excluded, as are some federal workers.⁴
- o Two types of compensation are generally allowed: medical benefits and disability (for lost earnings, divided by duration and severity: temporary, permanent, partial, total). Some programs provide limited death benefits.⁵ No compensation is allowed for pain and suffering.
- o In the case of some disabilities, state lawmakers enact by statute a fixed schedule of benefits (so much for an eye or leg based on a fixed number of weeks). These schedules ignore actual or projected economic loss.⁶
- o If a worker is injured, s/he files a claim with the state workers' compensation agency that oversees administration of the system. Almost all states require that the injured employee notify the employer promptly of any injury. Usually an informal resolution procedure begins. Many times, however, the claim will be contested in some way, and at this point a more formal adjudicative administrative process begins before the state's workers' compensation board.
- o Once the board reaches a decision, a court may only review that decision on questions of law. In other words, an administrative decision may not be appealed to a court purely on the grounds that the administrative court found certain facts to be right or wrong, i.e., a determination of type of injury or duration of benefits.
- o Generally, employers pay premiums to an insurance company or self-insured fund, and, when an employee is injured, s/he receives compensation from the insurance company or fund.
- o There are three mechanisms for administering workers' compensation benefits: a purely state-run system, a state-run system that competes with private insurers, and a purely privately run system. The trend is toward more privately-run systems.⁷

The Path Towards Destruction

By the early 1970s, workers faced serious disadvantages relative to those with access to the judicial system.

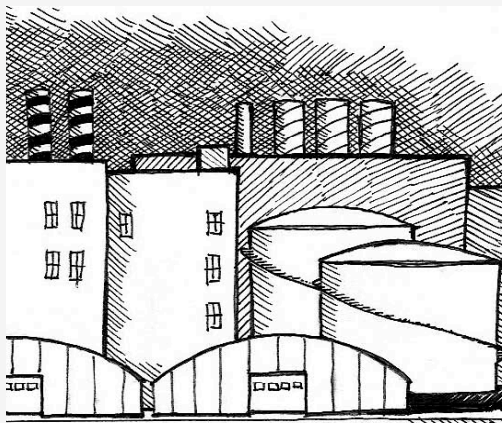
Recognizing these and other problems, in 1972, the Nixon Administration appointed a bi-partisan commission that produced a unanimous Report of the National Commission on State Workmen's Compensation Laws. The Commission declared that "[t]he inescapable conclusion is that State workmen's compensation laws in general are inadequate and inequitable."⁸ "The report listed nineteen 'essential recommendations,' all of which focused on expanding benefits to workers: eight recommendations dealt with expanded coverage; nine with increased disability benefits; and two with improvements to medical and rehabilitation benefits."⁹ These recommendations were to further the following goals:

- "Broad coverage of employees and of work-related injuries and diseases;
- Substantial protection against interruption of income;
- Provision of sufficient medical care and rehabilitation services;
- Encouragement of safety;
- An effective system for delivery of benefits and services."¹⁰



One would expect that in the three-plus decades since this Report there would have been a slow progression toward establishment of these objectives. To be sure, immediately following the 1972 Commission report, most state workers' compensation laws slightly improved for workers. But following this, a nationwide backlash took hold, and, rather than approaching the Commission's goals, the state of workers' compensation has now significantly worsened for workers.

Indeed, an organized political campaign by both employers, to lower their workers' compensation insurance premiums, and by insurance companies, to increase their profits by paying out less in claims, has put the most basic level of workers' compensation in great jeopardy, doing little to save employers' costs while at that same time endangering worker safety. This is the inevitable result of taking judgments about compensation and benefits out of the judicial system and into a statutory administrative system that is subject to the whim of industry money and the regular influence-peddling that reaches legislators.



IMMIGRANTS AND WORKERS' COMPENSATION

Studies show that immigrant workers suffer statistically more workplace injuries than American-born workers. Some reasons for this high percentage of workplace fatalities include the fact that immigrants are often "hired to do the most undesirable and dangerous jobs and often receive no safety training or equipment." Moreover, "[l]anguage and cultural barriers make it difficult for immigrants to learn of their workplace rights and particularly those who are undocumented are fearful to complain about hazardous working conditions." In fact, a UCLA study revealed that although the majority of immigrant workers interviewed had experienced work-related injuries or illnesses, only 63 percent of these reported their injuries. A large reason these workers did not report injuries was fear of retaliation due to their immigrant status and/or lack of work authorization.

According to one hotel worker, when a group of workers were laid off they were given a paper to sign stating that they had received no injuries on the job. But, according to this worker, "since we did not know English, I think they only say what is in their interest and leave us to interpret. Many signed it, the majority . . . people that really did have injuries! [T]hey don't speak English and they're not sure how it works."

A few state appellate courts have recently held that workers' compensation benefits apply to all workers, regardless of immigration or work authorization status. These decisions sharply narrow the Supreme Court's ruling that an undocumented worker no longer employed may not receive back pay for wrongful termination.

Sources:

Bureau of Labor Statistics 2001 annual report found that "the rate of on-the-job deaths for all Hispanics has been 20 percent higher than for whites or blacks.," UCLA LOSH Policy Brief, "California's Immigrant Workers Speak Up About Health and Safety in the Workplace," available on-line at http://www.losh.ucla.edu/publications/immigrant_brief.html; The New York Immigrant Coalition, <http://www.thenyic.org/templates/documentFinder.asp?did=211> (In the year 2000, 67 percent of occupational fatalities involved immigrant workers in New York City); Balbuena v. IDR Realty LLC, et al., 787 N.Y.S.2d 35 (2004); *Sanango v. East 16th St. Housing Corp.*, 2004 N.Y. App. Div. LEXIS 15637 (Dec. 28, 2004); *Rajeh v. Steel City Corp.*, et al., 2004 Ohio App. LEXIS 2899 (June 15, 2004); *Design Kitchen and Baths et al. v. Lagos*, CA No. 82, Sept. Term 2003. Reported. Opinion by Bell, C.J.; Dissent by Harell, J. Filed Sept. 12, 2005; *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002)

USING AMERICAN MEDICAL ASSOCIATION (AMA) GUIDELINES TO DETERMINE BENEFITS

To determine the amount and duration of compensation, many states are now relying on the *AMA Guide to the Evaluation of Permanent Impairment*, which establishes criteria for measuring loss of function of a body part. This is despite the AMA's own statement that its guidelines should not be used to determine injured workers' benefits. Because the AMA guide does not factor in the type of work or work conditions for the particular injured worker, many workers are no longer eligible for sufficient compensation.

The impact of using this criteria was described by Professor Martha McCluskey: "In the classic (though atypical) example, direct use of the AMA Guides to determine disability benefits means that the bank president who loses a finger but has no resulting lost income would receive the same benefits as the pianist whose lost finger renders her permanently and totally disabled—because both would receive the same percentage whole-person impairment rating (just as both would receive the same fixed award in a scheduled system)."

Sources:

Linda Cocchiarella and Gunnar B.J. Andersson, eds., *AMA Guide to the Evaluation of Permanent Impairment, 5th edition*, American Medical Association, p.13 ("Impairment percentages derived from the Guides criteria should not be used as direct estimates of disability...The complexity of work activities requires individual analyses."); McCluskey, Martha T., "The Illusion of Efficiency in Workers' Compensation 'Reform'," 50 *Rutgers L. Rev* 657, 833-34 (1998)

Slashed Benefits and Remedies

State legislatures are chipping away at workers' compensation systems at an alarming rate in direct response to the requests of insurance carriers and businesses.¹¹ In many states, the process workers must go through to make claims and receive compensation has become longer, less efficient, and ultimately less successful in terms of its original goals.¹² According to one legal scholar who studies workers' compensation, "injured workers often face denials and delays of apparently legitimate claims, high litigation costs, discrimination, and harassment by employers and coworkers...[M]any reports suggest that recent reforms have substantially increased injured workers' financial burdens."¹³



Since Florida enacted its first workers' compensation legislation in 1935, practically every session of the Florida legislature has amended the act, usually to the detriment of workers. At least a handful of states, including Florida,¹⁴ as well as California,¹⁵ West Virginia and Missouri, have now completely gutted their workers' compensation systems. These states have left their workers with no remedy for many types of injuries.



Another handful of states, like South Carolina, Maryland and Kansas, are actively fighting heated legislative battles to preserve the limited benefits that currently exist. Still more states are barely holding on to programs that, at their strongest, don't come close to satisfying the 1972 Commission's recommended objectives.

The recent spate of legislation concentrates on lowering benefits, narrowing eligibility requirements, and putting medical treatment decisions in the hands of the insurance companies. According to Jim Ellenberger at the AFL-CIOs Department of Occupational Safety & Health, all "reform" campaigns sponsored by the insurance industry share the following criteria: insurance

company control over the choice of physician; reliance on the more restrictive American Medical Association's Guides to the Evaluation of Permanent Impairment in order to rate injuries - a guide that was not written for this purpose and does not control for particulars of an injury; narrowing the definition of what qualifies as a condition eligible for compensation; much stricter criteria for "proving" a workplace injury; restrictions on attorney's fees; and restrictions on amount and duration of benefits received.¹⁶



HOW THE DISABLED ARE FARING

It is clear that workers who are permanently disabled are not getting enough compensation and the compensation duration is too short. Data consistently shows that a worker injured at the workplace earns significantly less than before the injury, even after returning to work.

For example, according to one Rand Institute for Civil Justice study, "permanent partial disability claimants injured in 1991-1992 [in California] received approximately 40 percent less in earnings over the four to five years following their injuries than did their uninjured counterparts." Moreover, "for workers with minor disabilities, benefits replace a small fraction of lost wages."

An earlier Rand ICJ report, released in 1991 found that "injured workers recovered a lower percentage of their accident costs than all accident victims (54.1%), and that workers' compensation only compensated about 30% of the costs of long-term disabilities from work accidents."

If an injured worker is unable to find suitable work at all, the results are even worse because wage loss continues, yet many benefits run out. The system simply does not work for the permanently disabled.

Sources:

Rand Research Brief, "Compensating Permanent Workplace Injuries," 1998.; McCluskey, Martha T., "The Illusion of Efficiency in Workers' Compensation 'Reform'," 50 Rutgers L. Rev 657, 699 (1998) n. 156, 157 (citing Deborah R. Hensler et al., *Compensation For Accidental Injuries In The United States* 107 fig.4.8 (1991)).

For example, many legislative proposals limit workers' compensation to an injury with a defined date of occurrence. This in effect throws out claims of repetitive stress and other cumulative injuries like those from toxic exposure. These types of injuries constitute a large proportion of claims. Also, proposals that limit attorney's fees make it hard for injured workers to find legal representation. All of these restrictions ultimately reduce attorney involvement in workers' compensation, which makes the injured worker that much more vulnerable.

In addition, many workers' compensation statutes originally included a legal presumption weighted toward the injured worker. This meant that, by law, the workers' compensation board had to weigh the evidence in a light most favorable to the injured worker. This has been changed recently in many states.



Professor Martha McCuskey summed up the impact on workers this way: “Taken cumulatively, changes involving administrative procedures favoring employers and insurers and reduced worker access to lawyers and doctors have probably increased workers’ costs and suffering as much as or more than direct benefit decreases.”¹⁷

Statutory changes are not the only way workers and their families are being harmed. In West Virginia, the Workers’ Compensation Commission officials recently made an internal agency decision to stop providing benefits to widows when their spouses would have been 65 years of age. This was contrary to the way policies had been administered originally, and contrary to the statutory provisions on the books. Industry lobbyists had strongly attempted to codify this restriction into the 2003 legislation, but failed. So now the Workers’ Compensation Board denies these benefits in what is essentially an administrative end-run around the democratic process, because workers’ compensation is eliminating benefits that are directly given in the current law.¹⁸



NEW YORK TROUBLES

More than thirty years after the 1972 Nixon-appointed National Commission on State Workmen's Compensation Laws recommended that the minimum maximum benefit be set at 100% of the of states' average weekly wage (SAWW), New York is one of only four states that have failed to comply with the National Commission's recommendation.

Workers compensation benefits are not linked to the state's average weekly wage. As a result, New York's current maximum weekly benefit of \$400 is today standing at less than forty-five (45%) percent of the state's current average weekly wage of over \$960 per week. This is the lowest percentage of all fifty states.

The last time the rate was increased was July 1, 1992, over fourteen years ago. If the rate had been adjusted for inflation alone, it would today be \$566. If New York complied with the National Commission recommendation to link the maximum to the SAWW, weekly benefits would be roughly \$1000 per week, instead of half that figure.

New York Governor George Pataki proposed broad benefit restrictions in the form of caps on the duration of permanent partial disability benefits and cuts in awards for permanent impairments. In addition, taken cumulatively, administrative changes in procedures which favor employers and insurers have further eroded worker access to system remedies.

No Longer No-Fault

The system has moved far from its original conception as a no-fault form of social insurance toward a complex industry-run system where injured workers are suffering. As far back as 1980, a Rand Institute for Civil Justice (ICJ) study stated: "Despite its no-fault characteristics, the compensation system as it presently operates is heavily adversarial. It has replaced litigation over who is at fault with litigation over what is at fault (whether that cause is more or less related to the workplace situation than other possible causes) and what the effects of an accident will be on the victim."¹⁹

New laws requiring workers to prove eligibility add time and expense to what was originally to be a streamlined process. Also, once the injured person is required to prove fault, that person is forced into the unfair position of having to "litigate" without the benefit of being fully compensated, which would exist in the court system. What has happened with workers' compensation has been a wholesale corruption of the original theory into something more akin to an industry-sponsored system that is parallel to the civil justice system but lacks the typical procedural safeguards or financial benefits of such a system.



Some specific ways the no-fault standard has been turned on its head are: requiring that work be more than 50 percent of the cause of the injury or illness; requiring that work be a “substantial contributing cause,” or “major contributing cause” of the injury; requiring that an occupational injury or disease is “clearly work-related” and “a substantial factor in the cause of” the resulting disability; and raising the standard of causation where there are pre-existing conditions.²⁰

Once a worker is shut out of the workers’ compensation system because he or she is unable to meet these strict new eligibility standards, workers often still cannot get into court. For example, Massachusetts recently denied access to court to workers even where their injury was no longer covered under workers’ compensation, leaving those workers with absolutely no compensation for their injuries.²¹ This Massachusetts court reasoned that if the Legislature removed an injury from workers’ compensation, then the Legislature intended that there be no recovery in tort either for such an injury.²²



Average national statutory benefit levels have dropped repeatedly, with total benefits paid declining 24.6% from 1991 through 1994. However, New York benefits have declined even more. Consider the following:

- o Indemnity claims resulting in cash benefits paid to workers declined from policy year 1988 through 1997 a total of -36.43%; this represented an annual average percentage change for the period of -4.91%; an annual average percent change from 1993-97 of -7.90%;
- o During the same period (1988 through 1997) total indemnity claims per hundred workers declined a total of -32.23%; this represented an annual percentage change for the period of -4.23%; an annual percentage change from 1993-97 of -8.28%;
- o During the 1991 - 2000 period, new cases opened per 100 employed workers (nonagricultural workers, excluding federal workers) declined by -26.9% with an annual average percentage change of -3.4.

In addition to the implications of declining benefits paid to workers, administrative changes in the New York system have resulted in fewer hearings than was previously the case prior to the amendments of 1990 and 1996.

Source: NYCOSH



Cost and Profits

The workers' compensation system is extremely costly, and the costs have not been relieved by the recent reductions in benefits.²³ Like the entire property-casualty insurance industry, workers' compensation insurance rate hikes are cyclical. In other words, insurers make most of their profits from investment income. During years of high interest rates and/or excellent insurer profits, insurance companies engage in fierce competition for premium dollars to invest for maximum return. They can severely under-price their policies and insure very poor risks just to

get premium dollars to invest. This is known as the "soft" insurance market.

But when investment income decreases – because interest rates drop or the stock market plummets or the cumulative price cuts make profits become unbearably low – the industry responds by sharply increasing premiums and reducing coverage, creating a "hard" insurance market usually degenerating into a "liability insurance crisis."



MISSOURI MESS

2005 Reductions in Workers' Compensation Benefits:

Changes Standard for Receiving Benefits for Medical Care and Partial Lost Income: Work now has to be the "prevailing factor" of the injury rather than a "contributing factor," which was the previous standard. This wiped out 80 years of case law on the topic. No clear standards are set out for what constitutes a "prevailing factor," lending confusion to the process.

Eliminates State "legal advisers" : These advisers provided free guidance to many injured workers making claims.

Makes it Easier for Administrative Judges to Approve Unfair Settlements Regarding Benefits: Previously, administrative judges were prohibited from approving any settlement that was not in accordance with the injured worker's rights. Now, they must approve any settlement that wasn't coerced. Administrative judges, subject to regular "performance audits" by legislators, have no incentive to investigate whether the worker was pressured into a settlement to avoid conflict with the employer and to avoid having to pay to hire an attorney.

Between the mid-1980s and through the 1990s, the country was in a soft market period. Beginning in 2001, the country started experiencing a “hard market again,” this time impacting property as well as liability coverages with some lines of insurance seeing rates going up 100 percent or more.²⁴

The hard market for workers’ compensation insurance, characterized by sharp increases in insurance premiums, has typically been blamed on rising benefit costs. The solutions proposed by insurers and businesses, and implemented by lawmakers, have been to reduce workers’ benefits. The result, combined with the overwhelming social stigma created by an unfair fraud campaign aimed at workers (see next page), is that fewer workers are bringing claims.²⁵ However, “[t]he extent to which these reduced costs for employers result from benefit restrictions rather than from changes in insurance markets or from reforms directed at



safety and reemployment is unclear.”²⁶

Eliminates Coverage for Injuries Manifesting Through Pain or Soft-tissue Damage: Now require x-rays or similar tests to prove injury.

Affirmatively Excludes “ordinary, gradual deterioration” Caused by Aging or Daily Living from Compensable Injury: This provides an opening for employers and insurers to argue that the injury resulted from daily living and that work was not the “prevailing factor” of the disability.

Shifts the Blame: Reduces coverage for many injuries by 25 to 50% if a worker didn’t follow a workplace safety rule. This inserts a “fault” criteria into an allegedly “no-fault” system.

Eliminates Transportation Costs for Treatment: This increased out-of-pocket costs for workers in rural areas having to travel for treatment.

In addition, the new law requires workers to use vacation and personal leave to seek medical care for injuries, and disqualifies many repetitive injuries from coverage.

Source: Missouri Watch

One thing is clear. The real winners are insurance companies, who continue to boast record profits as workers’ benefits are declining.²⁷ As economist John F. Burton, Jr. observed, throughout the 1990s, “the statutory protection and actual benefits paid to workers deteriorated, while the costs for employers stabilized and the profits for workers’ compensation insurers soared.”²⁸



Safety



Workers' compensation systems are not designed to reflect the full costs of accidents, so they are an ineffective deterrent against workplace dangers. As Professor Martha McCluskey put it in a 1998 article, "[t]he evidence of widespread underreporting, continuing high fatality numbers, and increasing severity of nonfatal injury claims suggests that, even during a period of benefit expansion, workers' compensation failed to protect large numbers of workers from serious harm..[T]he recent reforms move toward a vision of workers' compensation which takes as its norm an employment relationship made up of safety-conscious, robust workers in unhealthy, unsafe workplaces."²⁹

Indeed, the rate of workplace fatalities is up for the first time in a decade.²⁹ Clearly, one reason is that the current Administration has slashed funding for agencies like the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA). This Administration instead emphasizes voluntary efforts on behalf of employers.³⁰



What Fraud?

In the early 1990s, insurance companies mounted an organized campaign to shift the financial burden of workers' compensation claims back to the injured worker. They did this by trumpeting up distorted rhetoric around the idea of "fraudulent" workers' compensation claims, greatly exaggerating the extent of the problem in order to have such assumptions become part of the public consciousness.

For example, according to a *Los Angeles Times* article, "[a]t the height of anti-fraud fever in California, then-Gov. Pete Wilson . . . asserted without proof that 30% of all claims were fraudulent."³² At the same time, California's Department of Insurance estimated that worker fraud only accounted for about three-tenths of one percent of claims.³³ Most studies have shown that only about 1 percent of claims are fraudulent.³⁴



WORKERS' STORIES

Kevin Laytham - Missouri

Kevin worked many 70+ hour workweeks at a distribution plant hauling equipment using a device called a "yard-dog," often complaining to his supervisor that the device was hurting his back. He finally sought medical treatment on his own after being denied access to treatment by his employer. Kevin suffered three herniated discs and permanent nerve damage that required the use of a wheelchair. His company denied his workers' compensation claim. It took him more than three years to reach a settlement, which he finally did.

This was before Missouri's legislative changes. Had Kevin's injuries occurred after the 2005 Missouri law, he most certainly would never have received any compensation because he would have had no written notice of the date of his injury. In fact the date of the injury would be impossible to discern since it was a repetitive stress injury. Finally, he would be unable to demonstrate that the equipment was the prevailing factor causing the injury. This means that under the new law, the 41-year-old father of three would have been left unable to pay for his medications and necessary medical devices and unable to find work.

Source:

"Bill Tackles Work Injuries," *Columbia Daily Tribune*, January 23, 2005.

Diana and Eudell Dickerson - West Virginia

Eudell spent most of his life at the coal mines. He died at age 60 from a mine accident – a rock fell on him as he was working as a roof belter. His wife was told she would receive his workers' compensation checks until she died or remarried.

Five years after Eudell's death, Diana received notice that she would no longer receive benefits because Eudell would have been 65 years old had he lived. Diana could not afford to keep her house.

Source:

Paul J. Nyden, "Mine Widows Left with Nothing; West Virginia breaks its benefits-for-life promise," *Sunday Gazette-Mail*, Charleston, W.Va., February 12, 2006.



Insurance companies were not interested so much in the real numbers, however, because they knew that once the public bought into the notion that a "fraud" problem existed, it would be easier to turn the tide against workers. A decade later, media and legislators remain wrongly focused on this message.³⁵ According to one insurance lobbyist, claimant fraud was never a big issue for workers' compensation cost, but since people

understand employee fraud it "got more attention perhaps than it deserved" even though fraud is much more rampant on the employer side.³⁶ Employer fraud is most likely evidenced by underreporting payroll, declaring employees as independent contractors, misclassifying occupations, and misrepresenting claims experience.³⁷

Because of the lobbying efforts and worker fraud "spin" from the insurance carriers, the 98 percent of workers who are honest and suffering from workplace injuries with legitimate claims are subjected to discrimination, criticism, and an antagonistic system in order to receive any financial assistance for their injuries.



9/11 Workers - New York

Many emergency workers and volunteers who helped at the World Trade Center site are now struggling with respiratory and other ailments. These workers are repeatedly being denied workers' compensation. Other people injured by the "largest acute environmental disaster that has ever befallen New York City" are receiving compensation but only after years of challenging arguments and attacks on their character and trustworthiness. Even more injured people have not filed claims because they have no faith in the system.

As of August 2006, over 10,000 claims had been filed with the New York State Workers' Compensation Board relating to the collapse of the World Trade Center. According to lawyers working on workers' compensation cases, "employers have challenged a majority of the claims."

Source:

Anthony DePalma, "Many Who Served on 9/11 Press Fight for Compensation," *The New York Times*, May 13, 2004.; New York State Workers' Compensation Board.

Other Compensation Systems

One would think that the progressive deterioration of the workers' compensation system would serve as a warning sign to lawmakers that throwing people into an administrative compensation program and stripping them of their legal rights is fraught with problems. But, instead, over the last 20 years, legislators have been introducing more and more alternative compensation systems modeled after workers' compensation.

Consider, for example, the 1986 federal Vaccine Injury Program, which, like workers' compensation, began rather quietly, but became an extremely adversarial and inefficient way to compensate children injured by vaccinations.³⁸ There have been many problems with access and compensation for victims under the current Vaccine Injury Compensation Program. Although originally proposed as a no-fault model that would be efficient and provide for quick compensation, many argue that the Program has been co-opted by political forces and turned into a victim's nightmare.³⁹



STATE VICTORIES FOR WORKERS

Despite the major media campaigns and the amount of money business and insurance lobbies have devoted to stripping workers of their rights, a few states have mounted successful efforts to retain rights for workers.

Workers and advocates in Maryland recently were instrumental in the defeat of more than 40 bills that would have chipped away at workers' compensation rights in that state. Those protecting workers in South Carolina were also able to weaken a House Bill and put the issue to rest for this year.

In Kansas, the Governor vetoed SB 461, which among other things, discriminated against workers based on age, and eliminated work disability benefits for all workers by providing an out for the businesses and insurance companies. Under the bill, if the business or insurance company could claim "economic reasons" for terminating employment, then they no longer had to pay general disability compensation. According to the Kansas Coalition for Workplace Safety, "[e]conomic reasons" can mean anything from mismanagement to inflated CEO bonuses to raiding the corporate coffers." SB 461 would have made an already bad situation worse for Kansas workers.

While these successes are important, the attacks are on-going and we expect to see repeat challenges to the existing laws in these states in future legislative sessions.

Sources:

H. 4427 (Maryland 2005); SB 461 (South Carolina 2005); Press Release, Kansas Coalition for Workplace Safety.

For example, unilateral decisions by the Secretary of the Department of Health and Human Services to remove certain injuries from the compensation table have left many injured people without recourse to the no-fault system. Once an injury is removed from the table, the injured person is still within the Program but no longer receives the benefit of a no-fault system. These injured people are then forced to “litigate” their claim and prove causation and fault in an administrative court that is removed from the civil justice system.⁴⁰

Recently there have been proposals for both an asbestos injury compensation system as well as an entire “health court” system to replace resolving medical malpractice cases in court.⁴¹

While alternative compensation systems may seem like quick fixes, the sad tales of workers’ compensation and the vaccine injury program show all too vividly how these systems harm the injured even more, through adversarial processes without judicial safeguards and the constant scaling back of benefits by legislators. Such problems are well understood and documented by academics studying these systems. The civil justice system remains one of the best defenses against these abuses of democracy.⁴²



Conclusion

Workers' compensation, as it currently applies, is neither sufficient nor efficient compensation for injury. In many states it is looking more like a shield for employ-



ers and insurance companies to retain ever-higher profits at the expense of workers. New amendments that require the worker to show some wrongdoing by the employer (for example, that the employer failed to follow safety rules or use safety devices) coupled with the now-pervasive message that employees who file for workers' compensation are somehow engaging in fraud, have deterred many workers from using the compensation system at all, a development that completely undermines the original intent of such a program. Other new amendments are reminiscent of the original laws that workers' compensation was supposed to replace.⁴³ All of these developments change the original balance struck by the turn of the century legislatures and courts wrestling with structuring a fair compensation system.

The breakdown of compensation systems like workers' compensation happens because, unlike our courts and juries, political money and lobbying can easily influence the legislatures and agencies that retain the sole power to redefine limits and benefits. Once political forces take over a statutory system, and they always do, it is merely a matter of time before a pro-victim proposal for no-fault compensation is turned into a fault-based, bureaucratic nightmare for the injured person.

Notes

¹ John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law*, Harvard Univ. Press 2004.

² A. Larson, *Worker's Compensation* s. 2.03 For example, a doctrine known as the “fellow-servant rule” meant that an worker who was injured by another worker on the job could not sue the employer for compensation. Another limit to an employer’s liability was known as contributory negligence. In this case, a worker who fails to use reasonable prudence and precautions had no right to any compensation if he was injured. Finally, a theory known as assumption of risk provided no compensation where the worker had agreed (implicitly, even) to accept the risks associated with the job.

³ Hammond and Kniesner, “The Law and Economics of Worker’s Compensation,” Rand Institute for Civil Justice, 1980.

⁴ McCluskey, Martha T., “The Illusion of Efficiency in Workers’ Compensation ‘Reform’,” 50 Rutgers L. Rev 657, 670-671, n. 34, 35 (1998).

⁵ Id. at n. 37-39.

⁶ Id. at 810.

⁷ West Virginia is one of the most recent states to switch from a state-run system to a private system. A state-run system retains some governmental oversight and/or regulation over rate-setting, whereas a private system is run entirely by the private insurance companies. Although there are long-standing debates about whether a state-run system or a privately-run system is more effective, many labor activists believe that a privately-run system is more subject to profiteering, since the market generally dictates rates set by private insurance companies.

⁸ “The Report of The National Commission on State Workmen’s Compensation Laws,” Washington D.C., July 1972.

⁹ McCluskey, Martha T., “The Illusion of Efficiency in Workers’ Compensation ‘Reform’,” 50 Rutgers L. Rev 657 (1998), n. 88, 89 (1998), citing, “The Report of The National Commission on State Workmen’s Compensation Laws,” Washington D.C., July 1972. The commission was made up of representatives from business, labor, insurance, the medical profession, academics, and the public.

¹⁰ “The Report of The National Commission on State Workmen’s Compensation Laws,” Washington D.C., July 1972.

¹¹ See, “Worker’s Comp: Falling Down on the Job,” *Consumer Reports*, 2000 (discussing the legislative reforms of the 1990s and the resulting profits for worker’s compensation insurance providers).

¹² According to a 1980 Rand Institute study, other developments in worker’s compensation include new links between work and diseases, as well as a judicial doctrine that has slowly altered the original balance of worker’s compensation by reintroducing fault, inflation. See Hammond and Kniesner, “The Law and Economics of Worker’s Compensation,” Rand Institute for Civil Justice, 1980.

¹³ McCluskey, Martha T., “The Illusion of Efficiency in Workers’ Compensation ‘Reform’,” 50 Rutgers L. Rev 657, 699-700, 711 n. 158, 159, 160 (1998).

¹⁴ See e.g., Fl. Stat. Ann. §§ 440.01 et seq.

¹⁵ See, Cal. Labor Code §§ 3200-6149.

¹⁶ See Jay Causey, “Worker’s Compensation at the Turn of the Century,” July 2000, available on-line at <http://www.causey-law.com/home.php?content=pub6>.

¹⁷ McCluskey, Martha T., “The Illusion of Efficiency in Workers’ Compensation ‘Reform’,” 50 Rutgers L. Rev 657, 714 (1998).

¹⁸ Paul J. Nyden, “Chamber Working to Keep Cut-offs of Widows’ Benefits,” *The Charleston Gazette*, Charleston, West Virginia, Feb. 22, 2006; Paul J. Nyden, “AFL-CIO enters widows’ dispute: Union’s state chief says BrickStreet ‘breaking the law’ with benefit cuts,” *The Charleston Gazette*, Charleston, West Virginia, Feb. 18, 2006.

¹⁹ See Hammond and Kniesner, “The Law and Economics of Worker’s Compensation,” Rand Institute for Civil Justice, 1980.

²⁰ McCluskey, Martha T., “The Illusion of Efficiency in Workers’ Compensation ‘Reform’,” 50 Rutgers L. Rev 657, 792-93, n. 572-578 (1998).

²¹ See, e.g., *Green v. Wyman-Gordon Co.*, 664 N.E.2d 808, 814 (Mass. 1996)(“The plaintiff purports to turn this intention on its head, presuming that the Legislature, in cutting off an avenue of recovery for employees under the workers’ compensation act, intended to open up a previously closed common law route. We see no reason to attribute such paradoxical intentions to the Legislature . . .”).

²² Id.

- ²³ See, for example, John M. Ostrowski, “Testimony by Kansas AFL-CIO in opposition to SB 181,” February 12, 2003.
- ²⁴ See, e.g., Americans for Insurance Reform, “New Report Confirms: Medical Malpractice Insurance ‘Crisis’ Over” (News Release, February 27, 2006), <http://www.insurance-reform.org/pr/060227.html>; Americans for Insurance Reform, Stable Losses/Unstable Rates, 2004, <http://www.insurance-reform.org/pr/stablelosses2004rel.pdf>.
- ²⁵ Ted Rohrlich and Evelyn Larrubia, “Anti-Fraud Drive Proves Costly for Employees,” *Los Angeles Times*, August 7, 2000.
- ²⁶ McCluskey, Martha T., “The Illusion of Efficiency in Workers’ Compensation ‘Reform,’” 50 Rutgers L. Rev 657, 714 (1998).
- ²⁷ See Edward M. Welch, “Statistics about Worker’s Compensation,” Worker’s Compensation Center, School of Labor & Industrial Relations, Michigan State University, 2005 (showing workers’ compensation line of insurance steadily growing in profits since 2000, and approaching the 1995 high). Available on-line at <http://www.lir.msu.edu/wcc/Data/WC%20Data.pdf>. See also, “Worker’s Comp: Falling Down on the Job,” *Consumer Reports*, 2000 (“By 1995, workers-comp carriers had become the envy of the insurance industry, with annual operating profits of 20 percent.”).
- ²⁸ McCluskey, Martha T., “The Illusion of Efficiency in Workers’ Compensation ‘Reform,’” 50 Rutgers L. Rev 657, 713 (1998)(quoting John F. Burton, Jr., “Workers’ Compensation Benefits, Costs, and Profits: An Overview of Developments in the 1990s,” 9 WORKERS’ COMPENSATION MONITOR 1, 5 (1996)).
- ²⁹ McCluskey, Martha T., “The Illusion of Efficiency in Workers’ Compensation ‘Reform,’” 50 Rutgers L. Rev 657, 704, 939 (1998).
- ³⁰ AFL-CIO Press Release, “Deaths on the Job Increase for the First Time in a Decade,” April 26, 2006 (“On an average day in 2004, 152 workers lost their lives as a result of workplace injuries and diseases and another 11,780 were injured.”).
- ³¹ Id.
- ³² Ted Rohrlich and Evelyn Larrubia, “Anti-Fraud Drive Proves Costly for Employees; Benefits: Ten-Year Crackdown on False Injury Claims in California is Part of a National Trend to Shift Workers’ Comp Costs from Employers and Insurers to Workers, Experts Say,” *Los Angeles Times*, Aug. 7, 2000.
- ³³ Lisa Cullen, “The Myth of Workers’ Compensation Fraud,” *Frontline: A Dangerous Business*, Jan. 9, 2003.
- ³⁴ See, “Workers’ Compensation Fraud: The Real Story,” Labor Research Association Report, June 1998. See also, Lisa Cullen, “The Myth of Workers’ Compensation Fraud,” *Frontline: A Dangerous Business*, Jan. 9, 2003.
- ³⁵ For example, Dateline aired a particularly incendiary “report” on employee fraud, complete with the trumped up numbers, on May 29th, 2000.
- ³⁶ See, “Worker’s Comp: Falling Down on the Job,” *Consumer Reports*, 2000. See also, Lisa Cullen, “The Myth of Workers’ Compensation Fraud,” *Frontline: A Dangerous Business*, Jan. 9, 2003 (stating the fraud by employers is much more common than fraud by employees). New York, Florida, California, and Wisconsin have all reported as much in detailed investigations in those states.
- ³⁷ “Workers’ Compensation Fraud: The Real Story,” Labor Research Association Report, June 1998. See also, Lisa Cullen, “The Myth of Workers’ Compensation Fraud,” *Frontline: A Dangerous Business*, Jan. 9, 2003.
- ³⁸ National Childhood Vaccine Injury Act of 1986, P.L. 99-660.
- ³⁹ See, Elizabeth C. Scott, “The National Childhood Vaccine Injury Act Turns Fifteen,” 56 Food & Drug L.J. 351 (2001)(stating that, as of 2001, 75 percent of claims were denied after long and contentious legal battles taking an average of 7 years to resolve). Id.; see also Statement of the National Vaccine Information Center Co-Founder & President Barbara Loe Fisher, September 28, 1999, House Oversight Hearing, “Compensating Vaccine Injury: Are Reforms Needed?” (discussing the unilateral power DHHS has to change the burdens of proof and other restrictions); Derry Ridgway, “No-Fault Vaccine Insurance: Lessons from the National Vaccine Injury Compensation Program,” 24 J. Health Pol’y & L. 59, 69 (1999)(describing how the program originally awarded many more claims, until the Department of Justice decided to aggressively argue against claimants.)
- ⁴⁰ Statement of the National Vaccine Information Center Co-Founder & President Barbara Loe Fisher, September 28, 1999, House Oversight Hearing, “Compensating Vaccine Injury: Are Reforms Needed?” (discussing the unilateral power DHHS has to change the burdens of proof and other restrictions); Derry Ridgway, “No-Fault Vaccine Insurance: Lessons from the National Vaccine Injury Compensation Program,” 24 J. Health Pol’y & L. 59, 69 (1999)(describing how the program originally awarded many more claims, until the Department of Justice decided to aggressively argue against claimants.)
- ⁴¹ See, e.g., S. 852, The Fairness in Asbestos Injury Resolution (FAIR) Act of 2005, 109th Cong. (2005); S. 1337, The Fair and Reliable Medical Justice Act (“FRMJA”) 109th Cong. (2005).
- ⁴² See generally, Richard L. Revesz, “Specialized Courts and the Administrative Lawmaking System,” 138 U. Pa. L. Rev.. 1111 (1990)(analyzing specialized courts and arguing for a presumption against establishing such courts).
- ⁴³ For example, restrictions that try to blame the injured worker for the accident, like Missouri’s new amendment which reduces benefits up to 50% if the worker does not follow a safety rule.