

Checklist of Current Problems in the Workers' Compensation System

General

- Workers' compensation, the nation's oldest social insurance program, is broken. Introduced as a no-fault program to provide medical benefits and wage replacement in the place of the uncertainty of tort recovery, workers' comp has seen massive efforts to shift both the blame and the burden of workplace injuries and illnesses to the backs of workers.
- Workers' compensation provides "exclusive remedy" protections to employers while denying workers virtually any opportunity to seek justice when their social and economic livelihood is severely damaged or ruined by a job injury or illness. The failures and shortcomings of the comp system add to the pain and suffering experienced by workers.
- Sustained and coordinated efforts by insurers and employers to paint injured workers as frauds, cheats and malingerers have had the desired effect of stigmatizing workers injured at or made ill by their job. This campaign, along with the decline in the number of workers represented by unions, has resulted in a situation where many workers who should be eligible for workers' compensation benefits are reluctant and even frightened to assert their rights.
- Employers and insurers have pressed states into passing laws permitting post-injury drug and alcohol testing. Such testing violates fundamental principles of privacy.
- The uses of safety bingo or safety incentive programs coerce or intimidate workers into not reporting injuries or unsafe and dangerous conditions at the workplace. They are another form of "blame the worker" and are designed to subvert injury reporting and compensation.
- The "race to the bottom," where employers and insurers pressured governors and state legislatures to weaken laws, cut benefits and restrict access to benefits has been brutally successful. Claim suppression and statutory changes over this period have been the major factors in leading to drastic reductions in both benefits and costs. Benefits to injured workers (measured as a percent of payroll) over the past 15 years have declined at least 42 percent. According to the National Academy of Social Insurance, benefits went from \$1.65 per \$100 of payroll in 1992 to \$0.95 per \$100 of payroll in 2007 (the latest year for which figures are available). Costs

in that same period dropped 32 percent, going from \$2.13 per \$100 of payroll in 1992 to \$1.45 per \$100 of payroll in 2007.

- The true costs of job injury and illness have either been shifted to other programs, like Social Security Disability Insurance, or borne by the injured workers, their families and communities as well as private health insurance programs.

Coverage

- Coverage is not universal. Exclusions and exceptions are common, leaving many workers uncovered and unprotected.
- In at least one state, Texas, workers' compensation coverage for employers is voluntary, permitting employers to "non-subscribe." Over 114,000 employers in that state have chosen not to carry workers' compensation insurance. While they do not have the protection of exclusive remedy, workers can only sue their employer if they can prove that their injury was the result of employer "negligence." Non-subscribing employers can assert that the accident was caused by an "intentional act" of the employee or by intoxication.
- A significant number of workers are not protected by workers' compensation because they are classified (usually by their employers) as "independent contractors" - not because they are, but because employers wish to avoid responsibility for them, both for benefits that are provided to employees voluntarily and for legally mandated benefits including workers' compensation, unemployment insurance, Social Security and Medicare.
- Although many states claim that their workers' compensation laws cover occupational disease, very few occupational disease claims are successful. This is due to many factors, including statutes of limitations, exclusions of diseases that can occur in non-occupational circumstances or if the disease could be "a result of the normal aging process." Some states ban specific occupational diseases if they are the result of "stress" or "repetitive motion."
- Many states have introduced limits on some injuries and occupational diseases if it can be shown that the job was only "partially" responsible, or if the worker had a "pre-existing" condition that was exacerbated by the accident or exposure, or if the condition was in part related to aging.

Indemnity Benefits

- Most states limit benefits by a formula that fails to take into account the real economic impact of the worker's job injury or illness.
- Most states have durational limits on the payment of indemnity benefits that have no relationship to the worker's real or continuing wage-loss.
- Most states limit maximum benefits to two thirds of the worker's wage up to the state average weekly wage. Such limitations establish an unfair burden on higher wage-earning workers, including workers in dangerous industries such as construction, mining and manufacturing. The loss of income suffered by these workers can be substantial. Insurance premiums are paid on all earned income. All earned income should be a factor in wage replacement.
- Even in the most serious cases, permanent total disability cases and benefits to the surviving spouse of workers killed on the job, some states terminate benefits after the passage of time or when the disabled worker or surviving spouse reaches "retirement" age.
- In many states, benefits are limited to funeral expenses if a worker is killed on the job but dies without dependents. In fact, it costs employers and insurers the least amount when a young single worker is killed.
- States that have systems where benefits are based on "impairment" ignore the economic consequences of the injury and/or the effect of the injury on the worker's ability to work (or the reduced earning capacity of the worker).
- Some jurisdictions allow benefits to be cut or terminated if a worker is "deemed" capable of performing any employment, even minimum wage jobs, regardless of prior income, skills or experience – or whether there is a job available for the worker to do.
- The practice of compromise and release (C&Rs) or the use of settlements to close out claims, particularly when the worker loses continuing medical coverage for their work injury or illness, is generally detrimental to the long-term interests and wellbeing of the worker.
- Benefits in many jurisdictions can be terminated without a hearing or administrative process. Such tactics have been used by insurers to pressure injured workers into accepting settlements or C&Rs that are not in their economic interests or to pressure workers to return to work before they are adequately healed.

Medical Benefits

- Most systems now rely on doctors to make key decisions that impact the worker's cash benefits. These include decisions on whether the condition is "work related," what proportion of the condition is related to the accident or exposure, and the percentage of impairment that is a result of the injury or exposure. A worker's confidence in the physician's medical judgment can certainly be impaired in the knowledge that the very same physician, having been selected and paid by the employer or insurer, is making decisions about the cash benefits that the worker will receive as a result of the injury or illness.
- Due to the burdens placed on doctors and other providers of medical care, the provision of medical treatment, in the minds of injured workers, has frequently become secondary to the struggle to control the non-medical decisions of such providers. Additionally, the pressure to limit benefits or to limit the duration of work absence can lead to decisions by treating medical providers to limit the availability of medical treatment.
- The exclusive remedy rule in workers' compensation can sometimes block medical malpractice actions against medical providers, even in cases of negligence, mistakes and incompetence.
- The once common practice of permitting the worker to treat with his or her own regular physician is becoming rare.
- In some states that provide for "employee choice" of the treating physician, the worker must use the employer's or insurer's doctor if the plan provides for "managed care."
- Many states have provided an absolute right for the employer (or the employer's insurer) to choose the physician or require that the injured worker be "treated" by a specific provider.
- Some employer or insurer-chosen doctors participate in "screening" workers for pre-existing conditions, even though this practice is likely to be illegal under the laws governing disability discrimination or genetic discrimination.
- The scope of intrusion into injured workers' medical privacy is troubling. While injured workers are increasingly barred from seeking medical treatment for their work related injuries from their regular treating physicians, employer or insurer-chosen doctors now inquire into the worker's general or previous medical history – a practice that may be encouraged by legal changes that suggest that the worker's prior health conditions are relevant to the compensability of a condition.

Workers are therefore confronted with an intrusion into their broader rights to medical privacy as the results of medical examinations in workers' compensation claims are incorporated into workers' compensation claim records and become accessible to their employers.

- Many outstanding physicians refuse to take workers' compensation cases due to the non-medical demands placed upon them – a clear loss to the system of access to excellent medical care.
- Occupational medicine has continued to suffer the consequences of the “politicalization” of workers' compensation by discouraging some doctors from practicing in the field. It may even result in some doctors ignoring important questions, when treating patients, about the patient's condition and possible relationship to their employment in order to avoid unpleasant consequences of workers' compensation.

Legal Rights

- Many states have instituted changes designed to reduce “litigation.” These changes are virtually always directed at attorneys who represent workers. The problem of workers being able to find competent attorneys to represent them is made worse by other changes in the law that have introduced concepts into this “no fault” system such as apportionment, pre-existing conditions, and employee misconduct (e.g. the infamous Loretta Shelton case in Virginia where Ms. Shelton was denied benefits for misconduct after losing her hand in a chopping machine because she had been verbally instructed to never stick her hand in the machine – the fact that the company had removed the machine guards and had been cited for it by the state OSHA inspector was ruled inadmissible). Such efforts to reduce litigation have never been applied to employers or insurers.
- States have enacted increasingly strict statutory limitations on claimants' attorney fees, thereby threatening the ability of injured workers to find competent legal representation, particularly for more complex claims. There are no restrictions on the amount of money that employers and insurers can spend.
- Many states have changed or removed provisions in their workers' compensation statutes requiring that the law “be liberally construed in favor of the employee.”
- Some states have changed the “burden of proof” requirements on claimants from “preponderance of evidence” to “clear and convincing.”

Return to Work

- Generally an injured worker should only return to work when cleared to do so by the treating physician. However, when the physician is chosen by the employer or insurer, the injured worker must have confidence that the physician is making the recommendation in the worker's interest.
- Well run RTW programs can benefit both the injured worker and the employer.
- Worker's compensation benefits are typically reduced or stopped when a worker returns to work through a light duty program. This is acceptable if the worker's take-home-pay, wages and reduced workers' compensation benefits do not result in a loss of income. However, in practice the wages from "light duty" and reduced comp benefits frequently result in lower real income.
- Workers are generally not provided with an opportunity for a trial return to work with an easy return to weekly indemnity benefits if the trial is unsuccessful. Instead, benefits are generally terminated upon return to work, and reinstatement of benefits can be challenging.
- Most states do not require the employer to make a good faith effort to return the injured worker to work.
- Some employers and insurers attempt to use RTW programs to limit their liability with no real effort to return the injured worker to his or her pre-injury wage.
- Some employers have used light duty programs to punish injured workers or to create a situation where the worker can be disciplined and eventually fired for cause.
- Research indicates that RTW outcomes are generally much worse for claims where there has been a settlement, compromise and release, or lump sum payment. Such arrangements usually absolve the employer of any responsibility to rehire the injured worker and are often used by employers to rid themselves of "problem" injured workers.

Insurance

- Insurers are hired and paid for by employers. They see themselves as first representing their shareholders and then representing employers. Injured workers are seen as their adversaries, not their clients. Their job is to manage 'risk.' To them, risk is the risk of increased claims costs.

- Labor has long argued that a social insurance program should not be provided by private, for-profit, insurance companies. A public insurance arrangement can be efficient and well run (Washington) if insulated from political pressures and poor management (Ohio). There are just four states that operate exclusive state funds. There is a continuing campaign by private insurers to “privatize” both exclusive and competitive state funds. All Canadian provinces operate exclusive provincial funds and self-insurance is not permitted in Canada.
- Private insurers maintain most of the data in workers’ compensation and restrict access to this data, thus limiting the public’s ability to monitor workers’ compensation, identify problems, and propose solutions.
- Private insurers, working together with large employer associations, the Chamber of Commerce, NFIB, and other trade associations, regularly spearhead campaigns to reduce benefit levels and eligibility for benefits.
- Private insurers often demean those who file claims by questioning their motivation, investigating their behavior, and evaluating their condition with physicians who treat them with suspicion. The job of claims examiners in private insurance is to limit the liability of the insurer for claims. They achieve this through demeaning workers and otherwise casting doubt on the validity of claims, even valid claims. As a consequence, many workers will only file a claim and subject themselves to this treatment if they feel they have no other choice.