Commentary

Immigrant Workers and Worker's Compensation: The Need for Reform

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Foreign-born workers in the United States suffer high rates of workplace injuries and accidents. Both for workers who are unauthorized to work in the United States and for those who are present legally under guest worker programs, access to workers’ compensation benefits presents nearly insurmountable barriers. Some of these are longstanding, such as employer retaliation and aggressive litigation of claims. Some are more recent and related to the increasingly transnational character of the workforce and to barriers put in place by administrators.

This is a legal overview of the cases, statutes, and policies that act as barriers to access for immigrant workers, conducted by reviewing case law and basic compensation statutes in all fifty states. Where these are known, policies that keep workers locked out of workers’ compensation are also discussed. It concludes that reform of the system is needed in order to ensure its standing as an insurance program with universal application. As part of that reform, further state by state research and advocacy would discover specific administrative practices in each state that keep immigrant workers from receiving the benefits to which they are entitled. Am. J. Ind. Med. 55:537–544, 2012. © 2012 Wiley Periodicals, Inc.

KEY WORDS: immigrant; immigration; workers’ compensation; undocumented; unauthorized; injury; work; social security; retaliation

INTRODUCTION

Global migration is at an all-time high, and the United States is the largest receiving nation of migrant workers in the world [United Nations, 2008]. Our country’s total immigrant population currently stands at nearly 40 million [Migration Policy Institute, 2010]. Among these, there are some eight million undocumented immigrants working in the United States economy [Passel and Cohn, 2011]. Most unauthorized workers are in the agricultural, construction, services, and manufacturing sectors, performing some of the most dangerous and low-paid jobs in our economy. Given the tragically high accident rates in these industries and the fatality rates for immigrant workers, protecting their access to workers’ compensation must be a high priority for advocates, researchers, and policymakers.

It is not known exactly how many immigrant workers go without workers’ compensation benefits following work-related injuries. Of course, immigrant workers face the same pressures to forego filing for workers’ compensation faced by other workers, including lack of knowledge of their rights, lack of union representation to support filing, and employer pressures to refrain from filing. Immigrant workers are also frequently disadvantaged by inability to speak the fluent English often required to file government forms. Most importantly, immigrant workers face real possibilities of retaliation in the form of reports...
to immigration authorities, with very severe consequences. Along with these legitimate fears of retaliation, both unauthorized workers and guest workers face legal and administrative barriers that can keep them from receiving badly needed benefits.

Immigrant workers are generally winning court battles over access to workers’ compensation benefits. In the past 8 years, appellate courts and review boards in 20 states have found that immigration status does not affect general eligibility for benefits. At the same time, barriers imposed by state agencies and insurance companies, especially Social Security Number (SSN) requirements, have made it impossible for workers to claim benefits. In the typical case, employers aggressively investigate a claimant’s immigration status in the hope of getting a free pass on claims. In the worst cases, employers and insurance companies have reported workers to immigration authorities in order to escape responsibility for workplace injuries and accidents.

Even where workers overcome fear of retaliation, file claims and are initially covered, transnational workers face nearly insurmountable obstacles to pursuing their claims from inside their home countries. State agencies are ill equipped to process time loss checks across borders. State requirements that workers be present to pursue their claims make it impossible for some workers to recover. Doctors in home countries are often unwilling or unable to bill U.S. insurance companies and agencies for their services.

Denying these workers their compensation undermines the integrity of an experienced-based workers’ compensation system. Advocates, researchers, and policymakers must address these issues in order to protect workers, workplaces and the workers’ compensation system itself.

ANALYSIS

Immigrant Workers and Workplace Injuries and Fatalities

There is strong evidence that immigrant workers and ethnic minorities face abnormally high rates of workplace injuries and fatalities. Fatalities on the job among foreign-born workers, particularly those from Mexico, have been increasing at a time in which the overall rate of workplace fatalities for all workers has been decreasing [Zuehlke, 2009]. The Department of Labor’s Bureau of Labor Statistics found that from 1992 to 2006, Latino workers experienced a general increase in the number of fatal injuries in the workplace, peaking at 990 in 2006. The increase in fatalities among Latino workers during this time period was entirely accounted for by foreign-born workers [Schenker, 2010]. Although the number of work-related Latino fatalities fell to 668 in 2009, the drop was likely the result of high unemployment among Latino workers, as well as underreporting, rather than an increase in workplace safety [Bureau of Labor Statistics, 2009; Greenhouse, 2010].

Fatal injuries to immigrant workers have a regional focus, which correlates to the presence of unauthorized workers. Of the total number of unauthorized workers, many live in six states: California (23%), Texas (11%), Florida (9%), New York (8%), Illinois (6%), and New Jersey (5%) [Passel and Cohn, 2011]. This corresponds to the rates of fatal work injuries involving foreign-born workers, which are primarily concentrated in the same six states [Loh and Richardson, 2004]. The occupation fatality rate among immigrant workers is almost 1.6 deaths per 100,000 workers higher than the average rate among native workers. With respect to occupational injuries, the rate for immigrant workers is 31 injuries per 10,000 workers higher than the average [Orrenius and Zavodny, 2009].

Immigrant Workers and Workforce Segmentation

The highest work-related fatality rates are in the construction, transport and warehousing, and agricultural sectors, all industries in which immigrant workers are overrepresented [Bureau of Labor Statistics, 2011].

A number of researchers have documented the workforce segmentation that has historically been the lot of racial and ethnic minorities within the United States, and that now often relegates Latino workers both to the highest risk sectors, and to the hardest job assignments within a workplace [Anderson et al., 2000; Lipscomb et al., 2006; Friedman and Forst, 2008; Marin et al., 2009]. For unauthorized workers, immigration status can be a potent source of potential abuse and exploitation by supervisors that may, in fact, contribute to more accidents. (“Many workers live in a constant state of anxiety, fearing they will be deported and lose everything, perhaps even their children. Supervisors, both Latinos and Americans, can force workers to work beyond their normal duties” [Marin et al., 2009].)

In industry-specific studies of immigrant workers, researchers have documented high rates of workplace injuries and pain. For example, Latino construction workers are more than two times as likely to suffer traumatic injuries requiring trauma center treatment [Friedman and Forst, 2008]; Latino and limited English speaking hotel workers were more likely to complain about work-related pain, and, along with immigrant workers, miss work due to this pain [Premji and Krause, 2010]; immigrant sewing machine operators experience a high prevalence of upper body pain [Wang et al., 2007]; and 28% of largely immigrant Latino poultry workers had suffered a work-related illness or injury in the past twelve months [Quandt et al., 2006].
Apart from segmentation by industry and occupation into more dangerous jobs, the prevalence of injuries, accidents, and fatalities among Latino and/or immigrant workers can be partly explained by segmentation by firm size and sophistication. Hispanic workers in general are concentrated in small businesses and other work environments where job-related injuries tend to be underreported, making the full scope of the problem difficult to assess. [Anderson et al., 2000; National Council of La Raza, 2009]. Some workers, due to language or their employers’ lack of robust safety programs, are unaware of the risks they face on the job [Anderson et al., 2000].

Finally, other workers may feel that there is little choice but to accept those risks. In a study on immigrant workers’ perceptions of workplace health and safety, researchers from UCLA observed that: “[w]orkers worried because they know the work they did was dangerous, and also because they knew that if they got injured they would have limited medical care options. Some respondents said that they could not really ‘afford to worry’ because they needed the job and had little control over the working conditions” [Brown et al., 2002]. UCLA researchers found that workers in the garment and restaurant industries “said they could not speak up about workplace issues because they would get fired or ‘blacklisted’” [Brown et al., 2002].

Researchers in North Carolina observed that: “[m]any immigrant workers believe that in a dangerous work situation, they have no choice but to perform the task, despite the risk.” [Immigrant Workers at Risk, 2000]. One former employment supervisor in a poultry plant in Greenville, North Carolina, has reported that her boss did not like “repeat complainers.” She worked for 5 years hiring and translating for Spanish-speaking employees. She tried to urge plant managers to send injured workers to the doctor but was told “if they keep coming to the office [to complain] they are going to have to be let go.” One study of poultry workers in North Carolina found that supervisors who abuse their power by using immigration status as a threat may promote occupational illnesses and injuries, especially for women [Marin et al., 2009].

Barriers to Filing of Workers’ Compensation Claims for Immigrant Workers

Underreporting of workplace injuries and illnesses is a problem across industries and populations [Hidden Tragedy, 2008]. For immigrant workers, it has become a particularly vexing issue. In one recent study where over 4,000 low-wage workers, one-third of them unauthorized immigrants, were interviewed, only 8% of injured workers had actually made claims for workers compensation [Bernhardt et al., 2009].

Many of the same factors that lead to increased injuries on the job also affect immigrant workers’ ability to report workplace injuries. These include a lack of understanding of workers’ compensation coverage, and lack of ability to communicate in English [Lashuay and Harrison, 2006]. Workers’ lack of understanding of the legal system and lack of union membership, only exacerbate the willingness of some employers to fire vulnerable workers [Lipscomb et al., 2006]. A study of even unionized, largely immigrant hotel workers found that only 20 percent of those who had experienced work-related pain had filed workers’ compensation claims, for fear of getting “in trouble” or being fired [Scherzer et al., 2005].

When injured immigrant workers do file workers’ compensation claims, there is evidence that they are more likely than other workers to have their claims contested [Lashuay and Harrison, 2006; Premji and Krause, 2010]. The remainder of this paper focuses on the nature and outcome of those contested cases, both in cases involving unauthorized immigrant workers and temporary foreign workers.

Court Treatment of Immigration Status and Access to Workers’ Compensation

Legal authority that immigrant workers, including guest workers and the unauthorized, is nearly unanimous that workers are entitled to workers’ compensation benefits. However, a decade-old U.S. Supreme Court decision reopened the question of workers’ entitlement to the full range of workers’ compensation benefits available to other workers.

In Hoffman Plastic Compounds, Inc. v. NLRB, [2002] the Supreme Court held, by a slim 5–4 margin, that undocumented workers are not entitled to back pay—that is, pay for the time that an unlawfully-fired worker could not work after the unlawful discharge—under the National Labor Relations Act. In that case, the worker had used false documents in order to get the job, and, the Court said, could not legally comply with his duty to mitigate his damages (search for other work that would partially compensate him for lost pay). The Court reasoned that a worker who used false documents to get his job could not receive back pay “for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by criminal fraud.”

Hoffman caused an onslaught of litigation in which employers and insurance companies argued that unauthorized workers were either not covered by workers’ compensation schemes or not entitled to specific benefits. For the most part, courts rejected these claims. Post-Hoffman, state courts and administrative agencies in Arizona, California, the District of Columbia, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan,
provisions of the Immigration Reform and Control Act (IRCA) [Gayton v. Gage Carolina Metals, Inc., 2002]. The North Carolina Court held, however, that there were a number of vocational rehabilitation functions that could be performed without violating federal law, including performing labor market surveys to find suitable jobs in the area, counseling, job analysis, analysis of transferable skills, job seeking skills training, or vocational exploration, and ordered that these be provided as necessary. Unfortunately, some courts have held that undocumented immigrants are not entitled to vocational rehabilitation benefits [See, for example, Nevada: Tarango v. State Indus. Ins. System, 2001; Nebraska: Ortiz v. Cement Products, Inc., 2005].

State workers’ compensation systems include provisions for death benefits to be paid to the dependents of a deceased worker. The question of whether “dependents” can include those that reside in another country has not been problematic for courts. Even in a case of a male immigrant who left his wife behind for 37 years, the court was able to find that the widow was not voluntarily living apart from her husband, and that the presumption of dependency applied [Baburic v. Butler Bros., 1951, cited in Larson’s Workmen’s Compensation, 96.06(2)]. The concept of constructively “living with” the deceased employee is also applied to children. Even when a child lived in a foreign country but received support from the father, he was considered to be “living with” the father for purposes of entitlement to death benefits [Milwaukee W. Fuel Co. v. Indus. Comm’n, 1922, Larson, 96.06(4)].

Some state laws contain particular restrictive provisions regarding death benefits payable to non-resident dependents. Most of these provide reduced benefits to dependents residing in another country [DEL CODE ANN. tit.19, § 2333, IOWA CODE § 85.31(5); KY.REV-STAT.ANN. § 342.130; OR.REV. STAT. § 656.232; S.C.- CODE ANN. § 42-9-290]. At least one state, Alabama, expressly excludes nonresident aliens from benefits, and a few specify that only certain classes of beneficiaries may receive benefits as nonresident alien dependents. (ALA. CODE § 25-5-82; WIS. STAT. § 102.51(2)(b); ARK. CODE ANN. § 11-9-111(a); N.C.GEN.STAT. § 97-38).

Other Barriers to Access to Workers’ Compensation: Social Security Number Requirements

Even in states where state law clearly allows immigrants, regardless of immigration status, to receive compensation for job injuries, use (and misuse) of SSN requirements can bar access. Florida is one of many states with favorable court rulings that immigrants, no matter what their status, are entitled to workers’ compensation.

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However, in 2004, the state began rejecting workers’ compensation applications submitted without a SSN, pursuant to a state law. In only a few months, the state had rejected hundreds of applications [Chandler, 2006]. In November 2005, the Florida Supreme Court held that this practice was unlawful under the Federal Privacy Act [Florida Div. Of Workers’ Compensation v. Cagnoli, 2005].

In some instances, employers have argued that if a worker provided an invalid SSN to the agency, she has committed “fraud” and is ineligible for benefits. The Kansas Supreme Court held that a worker who submitted a false name and SSN on her application for workers’ compensation had committed a “fraudulent or abusive act” within the meaning of the Kansas workers’ compensation law [Doe v. Kansas Dept. of Human Resources, Doe, 20042004]. In that case, the court held that the worker could be fined for committing a “fraudulent act,” but that she was still entitled to benefits, since undocumented workers are entitled to benefits under Kansas law. Courts in California, Tennessee, New York, and Florida have found that use of a false SSN does not constitute fraud [Tennessee: Silva v. Martin Lumber Company, 2003; California: Farmers Bros. Coffee v. Worker’s Comp. Appeals Bd, 2005; New York: XYZ Cleaning Contractors, 2006; Florida: Matrix Employee Leasing v. Leopoldo Hernandez, 2008]. The California court refused to call the use of a false SSN fraud, since the use of the false number had no direct connection to the injury. The Court reasoned, “It was employment, not the compensable injury, that Ruiz obtained as a direct result of the use of fraudulent documents.”

The SSN issue has become more complicated by new requirements with respect to Medicare Secondary Payer laws. Providers of workers’ compensation are required as of January 1, 2011 to provide information to the Department of Health and Human Services about whether workers’ compensation applicants are receiving Medicare, in order to determine whether a claim should be paid by Medicare or by the workers’ compensation system. After a number of extensions on the effective date of the reporting requirements, the Centers for Medicare and Medicaid Services (CMS), the federal agency that administers Medicare, issued an alert regarding collecting of HCINs and SSNs, on April 10, 2010 [CMS, 2010].

CMS has provided some guidance that indicates that reporting entities are not required to ask injured workers for a SSN. States may fulfill their obligations simply by mailing a letter to claimants asking whether they are receiving Medicare. Claimants who are not receiving Medicare can simply answer “no” and sign the form. If claimants do not return the letter, states face no penalties, but will be required to send it annually for as long as a claim is open. CMS has a model form that may be used by states. However, CMS does not require states and insurance companies to take this approach. It is not yet clear how many states are currently using the suggested form instead of requesting a SSN.

### Direct and Implied Retaliation

A review of reported workers’ compensation cases reveals a disturbing trend. In many of the cases decided since Hoffman, an employer hires an undocumented immigrant without much regard to the worker’s status, and then somehow discovers, once the worker is injured, that he or she is undocumented. The employer, often supported by workers’ compensation insurance carriers, then argues that the worker is not entitled to workers’ compensation benefits.

Especially brazen employers and insurance companies attempt to retaliate by alerting U.S. Immigration and Customs Enforcement (ICE) of the worker’s undocumented status. In Kansas, for example, an injured worker was arrested and detained after ICE learned that he used fraudulent documents to obtain his job. Although he had not yet recovered from his work-related injury, he was deported and the workers’ compensation insurance carrier stopped making temporary total disability payments [Smith and Avendaño, 2009]. Another injured worker in Kansas suffered retaliation when he and five co-workers were arrested and indicted after the company “found a ‘discrepancy’ in employment records and turned the workers over to immigration authorities” [Smith and Avendaño, 2009]. An Assistant US Attorney from Kansas announced to an American Bar Association meeting that his office’s policy was to solicit and prosecute these claims.

In a grievous case from Wisconsin, an insurance company liable for workers’ compensation payments retaliated against a worker by notifying authorities of his invalid SSN. The company issued a letter stating that its policy was to report such workers to government agencies and request prosecution of identity theft [Jones, 2009]. By filing charges of identity theft that lead to criminal prosecution and ultimate deportation, such insurance companies engage in a thinly veiled attempt to avoid paying valid claims.

Notably, immigration authorities are instructed, pursuant to an internal policy, to avoid involvement in labor disputes [U.S. Immigration and Naturalization Service, 1996]. While it appears that ICE is honoring its policy in cases where it discovers employers are reporting immigrant workers in order to retaliate, it has thus far resisted a policy that would require it to turn away from second-tier retaliation via an insurance company or a prosecutor.

New policies on the exercise of “prosecutorial discretion” in immigration cases may provide some immigration relief to victims of retaliation. A Department of Homeland Security memorandum published in June, 2011 set forth
agency policy regarding prosecutorial discretion in cases involving victims and witnesses of crimes, including “individuals involved in non-frivolous efforts related to the protection of their civil rights and liberties” [U.S. Department of Homeland Security, 2011]. The memorandum instructed ICE officers, special agents, and attorneys to “exercise all appropriate prosecutorial discretion” to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to pursue justice. It is too early to tell whether this new policy will provide protection against retaliation to a substantial number of immigrant victims of workplace accidents who make workers’ compensation claims.

**RECOMMENDATIONS AND CONCLUSIONS**

The extent of workplace injuries and fatalities among Latino and immigrant populations demands attention of researchers and policy-makers, at a time when anti-immigrant policies at a state and federal level are at perilously high levels. Nevertheless, in order to protect individual workers and build safer workplaces, as well as to protect the insurance basis of the system, equality of access to workers’ compensation benefits must be preserved.

Litigation in individual states has accomplished much, but, as has been shown here, it is not sufficient in itself to preserve access to workers’ compensation. The tools of additional research into state policies, development of policy models, and litigation must each be employed. At the sub-statutory and case law level, we have only a poor understanding of which states have informal policies that keep immigrant workers from receiving workers’ compensation, such as SSN requirements. A state survey could develop these. Nor do we know which states are best equipped to deal with transnational claims but this, too, could be developed by a state survey. Advocates and researchers should investigate which states have adopted best practices with respect to the Medicare Secondary Payer rules and support allies in other states to work to adopt these models.

Many of the state policies that bar access to workers’ compensation are in unpublished policies and practices, but some are in formal law. Legal research could uncover states that have legal barriers to transnational claims, such as in person requirements or an unwillingness or inability to process claims transnationally. Legal research could also determine whether certain states have stronger retaliation statutes and whether Insurance Commissioners have the tools to punish insurance companies who retaliate. This kind of research is also urgently needed.

Additionally, further work with the Mexican Foreign Ministry and public health system could develop materials and relationships with doctors in Mexico who can cooperate with workers’ compensation claims in the United States.

Finally, over the past several years, Comprehensive Immigration Reform proposals have often, though not always, included provisions that protect all immigrant workers’ access to workers’ compensation benefits, regardless of immigration status. These provisions have been increasingly more difficult to insert because most legislators would prefer to believe that a legalization program would eliminate unauthorized workers from the workforce. Ensuring these provisions are included in any CIR is one way to protect access to workers’ compensation for immigrant workers as a formal matter.

**Special Problems for Transnational Workers**

Transnational workers, including both unauthorized workers who return home voluntarily or involuntarily and guest workers in the H2A agricultural and H2B non-agricultural temporary worker programs, face additional obstacles to receiving care and compensation. Because many immigrant workers are isolated at workplaces where they have little or no access to transportation or community support, it is even more difficult for them to make and keep a doctor’s appointment. At the end of a guest workers’ contract, he is required to return to his country of origin. Unauthorized workers may be removed from the country at any time, or may return home voluntarily after an injury. At that point, they face huge challenges in care and compensation. Although two states, Florida and Texas, have specific case law that allows claimants to receive care outside the country, many do not [Texas: Barrigan v. MHMR Services for Concho Valley, 2007; Florida: AMS Staff Leasing, Inc. v. Arreola, 2008]. Some states, such as Kansas, require the physical presence of the worker to pursue claims [Kansas Statute 44–528].

Even states that are willing to process claims transnationally face difficulties in money transfer and in locating doctors in other countries who are willing to provide care and bill the state. While some advocates have been able to procure temporary visas for workers’ compensation claimants to return to the U.S. for hearing, and others have been able to identify doctors in Mexico and other countries who are willing to cooperate with U.S. based claims administrators, workers who cross borders face nearly insurmountable obstacles. To the extent that use of guest worker programs is growing in the United States and to the extent that eventual comprehensive immigration reform will include a guest worker program, this issue needs to be addressed in a way that assures compensation for injured workers.
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