

THE POLITICS OF WORKERS' COMPENSATION IN NEW YORK STATE:

Developing a Pro-Labor Strategy to Defeat Business-Sponsored 'Reform' and Win Increased Protection for Workers

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In 1995, with George Pataki installed as the first Republican governor in a generation and Republicans continuing to control the state senate, New York business leaders mobilized to win long-sought changes in the workers' compensation system. Arguing that unreasonable workers' compensation premiums were driving employers out of business or out of state, business leaders claimed that their cost-cutting reforms would serve the interests of workers as well as employers by protecting jobs and promoting economic development. In fact, however, the proposed reforms would have weakened protections for injured workers and shifted much of the cost of workplace injuries and illnesses from employers to workers and taxpayers.

Given the enhanced power of the business lobby in the Republican-dominated state government, it was clear that New York would go the way of other recently "reformed" states unless a labor-based coalition formed to protect workers' compensation. To succeed, the coalition would have to reset the terms of the discussion about the "crisis" in the workers' compensation system and make the discussion part of a public debate rather than a private deal. It would have to expose the human costs of the proposed reforms by bringing injured workers into legislative hearings and getting their stories into the media. And it would have to challenge the insurance industry as the exclusive source of statistical information on the workers' compensation system in New York. Moreover, it would have to do all this with a fraction of the money and staff that the business lobby could devote to its legislative objectives.

To meet these formidable tasks, the New York State AFL-CIO took the lead in organizing a coalition that included the federation's affiliates and the state's network of COSH groups (committees on occupational safety and health) as well as injured workers and their legal representatives, the lawyers of the New York State workers' compensation claimants' bar and the New York State Trial Lawyers Association. This broad-based network successfully fought off the harshest parts of the business coalition's legislative proposals, including measures that have already eroded workers' compensation benefits in other states. Unfortunately, however, the business lobby was able to push

through a number of measures detrimental to injured workers including several administrative law changes that restrict workers' procedural rights and probably will result in dramatic cuts in benefits paid, particularly to the approximately 70 percent of injured workers who are not represented by an attorney.

Through its largely successful campaign against the business-sponsored reforms, the labor-based coalition served notice that any future attempts by employers and insurers to "reform" the system would be resisted by workers and organizations capable of independent research and analysis as well as effective state-wide political action. Labor's coalition-building work also laid the groundwork for a pro-active, pro-labor campaign to win true economic security for injured workers and safe jobs for all.

New York's experience foreshadows the struggle unfolding in 20 other states where new legislative proposals are pending and sophisticated pro-worker networks are needed. This article highlights the political lessons of the New York campaign, redefines the so-called workers' compensation "crisis" from a pro-labor perspective, and outlines an alternative reform program which can reduce workers' compensation costs while enhancing workplace safety through prevention programs.

THE NEW YORK STATE WORKERS' COMPENSATION SYSTEM

The New York State workers' compensation system covers nearly 7.9 million workers. Of the more than 450,000 accidents reported in 1996 to the Workers' Compensation Board which administers the system, about 180,000 resulted in claims filed. (1) In 1992-93, 38 percent of the covered employers — primarily small businesses — were insured by the public State Insurance fund while 41 percent purchased policies from private insurance companies. The remaining employers — mostly large firms — were self-insured. (2) Annual workers' compensation premiums paid by New York employers total approximately \$5 billion a year, of which about \$2 billion go to private carriers. (3) The top carriers in New York are the national heavyweights in workers' compensation insurance: Travelers, Chubb, CIGNA, Liberty, ITT, and CNA.

Injured workers are eligible for three types of benefits: medical care, wage replacement income (for disabilities classified as temporary partial, permanent partial, or temporary or permanent total), and death benefits. (Insurers and employers are not required to provide vocational rehabilitation services although some do so voluntarily.)

Wage-replacement benefits are capped at \$400 per week, which currently represents less than 60 percent of New York's average weekly wage. (This maximum applies to payments for both total and partial disability, whether temporary or permanent; most workers collect far less than the maximum.) This makes New York's weekly maximum benefit the lowest in the nation, as a percentage of the state's average wage. (4) By comparison, in Connecticut, Massachusetts, and Pennsylvania, the maximum weekly benefit is slightly more than 100 percent of each state's respective average weekly wage. (5)

WORKERS' COMP IS BIG BUSINESS

Workers' compensation in New York is a lucrative business for the private carriers. In 1994, for example, they collected \$2 billion in workers' comp premiums and paid out only \$1 billion in wage replacement and medical benefits. This loss ratio of 50.4 percent was among the lowest in the nation. (6) The 50 percent of premiums collected but not paid out in benefits is not pure profit, of course, since insurers use these funds to cover legitimate administrative and operating costs. It is worth noting, however, that these expenditures -- which are not publicly scrutinized or regulated -- often include multi-million dollar salaries for CEOs and lavish spending on office space and other corporate amenities. A significant portion of the premiums is held aside as reserves to cover future benefit payouts but much of the interest earned while the reserves are invested is retained as profit by the insurance companies.

In New York, as in most states, workers' compensation is a public institution driven by private interests. Although New York has one of the largest workers' compensation bureaucracies in the United States -- its Workers' Compensation Board employs 1,800 people in seven offices across the state and the State Insurance Fund writes a majority of the state's workers' comp policies -- the top 10 private carriers and the employers who buy their poli-

cies dominate legislative and administrative decision-making affecting the workers' compensation system.

For example, premium rates for the private carriers are set officially by the State Insurance Department but it generally approves, with few changes, the recommendations of the Compensation Insurance Rating Board (CIRB), a publicly chartered institution whose members are all representatives of the insurance industry. The insurance companies generate statistics -- on premiums collected, claims paid, and related issues -- that they pass on to the CIRB, which then crunches such numbers into industry-wide statistics that are submitted to the State Insurance Department which, in turn, sets the premium rates.

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THE NATIONWIDE BUSINESS DRIVE FOR 'REFORM' OF WORKERS' COMPENSATION

The 1995-1996 New York business campaign to reform workers' comp was part of a broader national push by employers to make permanent cuts in

labor costs by slashing workers' compensation expenses. (7) When employers look at their labor costs -- still the largest production expense in most industries -- they look at total compensation: wages plus benefits, including the legally required benefits such as Social Security, unemployment and workers' compensation that usually account for 9 percent to 12 percent of total payroll. (8) Workers' compensation premiums alone represent 1.5-2.5% of total payroll nationwide. (9)

While employers have successfully campaigned for 20 years to reverse the historic rise in wages and "voluntary" benefits, legally required benefits are more difficult to tackle. Any cut in workers' compensation premiums that is pocketed by employers, however, is a cut in the total payment made to labor, and no different from a straightforward wage cut from the employers' perspective. From the perspective of labor, if premium cuts are achieved by cutting benefits to injured workers, as they have been in most states, workers are being asked to shoulder the costs of their own injury and of their employer's failure to provide a safe workplace.

As a state-mandated benefit, workers' compensation is more vulnerable to the political power of business than a nationally mandated benefit like Social Security which covers the entire working class. National corporations with

deep pockets, working in tandem with smaller local businesses to reduce workers' compensation benefits, can overwhelm opponents in a single state. After "reform" has been achieved, business lobbyists can leverage the victory by portraying the "reformed" state as a new competitive threat to its neighbors. In New York, for example, the business coalition made frequent reference to new cost-cutting reforms in Connecticut, Massachusetts, Maine, and New Jersey. Using this state-by-state strategy, business interests have succeeded in winning pro-business reforms in workers' compensation in about 20 states over the last five years.

The push for "reform" in most states looks much the same. The common elements include:

- Making deep cuts in permanent partial disability benefits, often achieved by imposing a maximum number on the weeks that wage replacement can be collected.
- Restricting temporary as well as "permanent" benefits by limiting or ending coverage for certain injuries and illnesses, or requiring a stricter standard of evidence that the illness or injury has an occupational basis.
- Reducing maximum weekly benefits by changing the statutory formulae used to calculate them.
- Adopting medical guidelines that limit coverage to only the most severe cases.
- Reducing the number of employees covered by workers' compensation by expanding the definition of independent contractor.
- Controlling the processing of claims through administrative law changes in addition to statutory ones.
- Eliminating lawyers (read: claimants' lawyers) from the system through so-called alternative dispute resolution and other processes in which settlements are negotiated outside the framework of an adjudicatory system.
- Instituting managed care, with a shift to greater employer and carrier control over choice of treating physician which brings with it greater influence over the physician decisions that ultimately determine the levels of compensation provided to workers.
- Enacting anti-fraud provisions aimed primarily at claimant fraud and neglecting the much larger losses caused by employer fraud and the emerging problem of carrier fraud.

As described later, the business-based reform campaign in New York directed most of its energy to achieving three reforms: adoption of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* as the sole criteria for determining benefits; institution of managed care for all workers' comp cases; and elimination of *Dole v. Dow*, a 1972 state Appeals Court ruling, unique to New York, that allows a company being sued by a worker who was injured by defective equipment or products they manufacture to bring in the worker's em-

ployer as a co-defendant in the case. New York business interests also pressed, behind the scenes, for administrative law changes that would make it difficult for the majority of workers to collect the benefits to which they were otherwise entitled.

DEFINING THE WORKERS' COMPENSATION 'CRISIS: THE BUSINESS 'SPIN'

In each state where business has launched a workers' comp reform campaign, business leaders have attributed the need for "reform" to an economic "crisis." As business defines the "crisis," high workers' compensation premiums make businesses unprofitable, forcing them to close or move out of state. Thus the reform campaign responds to a perceived crisis among employers in their rates of profit. It then redefines the issue for the public as a jobs and economic development crisis, thereby enlisting support from legislators and the general public worried about layoffs and down-sizing. The fact that proposed reforms will pay for reductions in employers' premium rates primarily by reducing workers' benefits is not highlighted. Alternative methods of reducing costs — like preventing worker injuries, reducing employer and carrier fraud, and reducing excessive insurance company profits — are not considered.

The business drive to recast the workers' comp system to reduce costs, shake out the competition, and, ultimately, improve profitability has been repeated periodically in a "crisis-reform-crisis" cycle, with each "crisis" resolved by cost-cutting legislation that resets the conditions for profitability for insurers or employers or both. When costs rise again, or profits are no longer satisfactory, or employers simply sense an opportunity to raise profits by cutting labor costs, a new "crisis" is declared.

REDEFINING THE CRISIS: A PRO-LABOR PERSPECTIVE

From the perspective of labor and its allies, the real crisis in workers' compensation is the number of workers who suffer preventable injuries and then are denied adequate benefits. For labor, the business push for "reform" represents an effort to shift the costs of workplace injuries from employer-paid premiums to the injured workers themselves and to the taxpayers who ultimately pick up the tab when disabled workers must turn to welfare, Social Security disability, or Medicaid because they fail to receive adequate and timely medical and wage replacement benefits from the compensation system.

As Edward J. Cleary, president of the New York State AFL-CIO, said in describing the business proposals for workers' comp reform, "This isn't reform, it's robbery." (10)

But "robbing" workers isn't the only way to reduce the

costs of workers' compensation. As experience in several states has demonstrated recently, preventing workplace accidents and illnesses may be the most effective way to reduce workers' compensation costs. In Oklahoma, legislation requiring insurers to develop safety programs for all policy holders identified as extra hazardous resulted in an 18 percent drop over three years in work time lost due to injuries. In Texas, employers who completed a hazard prevention program cut accidents by 72 percent. Meanwhile, in New York State, the number of accidents is growing, not shrinking. (11)

Techniques for fostering safety through the workers' compensation system may include:

- Establishment of collectively bargained joint labor-management health and safety committees in unionized workplaces to oversee compliance with federal and state regulations and to develop workplace-specific prevention programs.

- Improving data collection so high-risk workplaces can be identified and targeted for enforcement and prevention programs.

- Mandating frequent inspections for employers with poor safety records.

- Awarding greater premium reductions to employers who comply fully with safety standards.

- Expanding public funding for education to prevent workplace accidents and illnesses.

In addition to such injury and illness prevention initiatives, opportunities for reducing costs without short-changing workers include:

- Sharply cutting employer fraud so honest employers are no longer forced to pay the tab for those who fail to purchase coverage or submit false information in order to obtain lower premium rates.

- Identifying and cutting carrier fraud or abuse which may include overcharging employers, maintaining excessive reserves in order to earn greater profits on the invested funds, or improperly diverting necessary reserve funds to other uses. (12)

- Cutting employer premiums by reducing the profits of insurance carriers instead of the benefits of workers.

THE NEW YORK PRO-BUSINESS WORKERS' COMP 'REFORM' CAMPAIGN

The 1995-1996 campaign by New York business to reform workers' comp was spearheaded by a relatively new business lobby called the New York Compensation Action Network (NYCAN), which quickly claimed 6,000 members. Led by Lawrence Gilroy, the president of an insurance agency, NYCAN's persistent message was that workers' compensation costs were exorbitant and driv-

ing business out of the state. "Our neighboring states," NYCAN claimed, "sensitive to the plight of the private sector, have effected substantial reforms. ... New York can no longer compete with other states and will soon become an economic wasteland ... " Gilroy also claimed that "soaring medical costs and double-dipping lawsuits are driving business out of state and burdening those that stay with a heavy hidden tax." (13)

To support its call for reform, NYCAN commissioned an "economic impact" report on workers' compensation by three business consultants. Based on a series of unfounded assumptions and some questionable modeling exercises, the report concluded that legislative reforms would save \$1 billion in workers' compensation costs, generate 86,000 more jobs and \$140 million in additional tax revenues, and increase economic output in the state by \$3.3 billion in the first year. (14)

To build public and legislative support for its campaign, NYCAN made a concerted effort to mobilize and put up front small business owners with anecdotal examples of seemingly out-of-line costs for workers' compensation insurance. It also reached out to the "grassroots" with "kits" containing preprinted letters to legislators and scripts for talking points.

OTHER BUSINESS SUPPORT; INSURANCE JOINS IN

The National Federation of Independent Business (NFIB), the largest small-business lobbying group statewide, released a survey in 1995 claiming that 54% of entrepreneurs identified rising workers' compensation costs as the state's top economic problem. NFIB pledged its 32,000 members to "reform" and organized a lobby day for small business. (15)

Also supporting the business reform campaign was the influential Business Council of New York whose members include many Fortune 500 companies; the Council had been a primary player in the business drive for Workers' Compensation reform over the years. (16) The New York City Partnership and Chamber of Commerce issued a report arguing that New York's workers' compensation costs must be reduced. (17)

Insurance industry representatives also joined the campaign. The ITT Hartford Insurance Group, the second largest workers' compensation carrier in the state, sent an action alert to its 8,600 workers' compensation policyholders urging support for a 1995 bill seeking to eliminate the employer liability created by Dole v. Dow. Both the Independent Insurance Agents of America and the American Insurance Association also pushed the anti-Dole v. Dow bill as well as the broader 1996 legislation reform package.

GOVERNOR PATAKI'S ROLE

Beginning with his January 1996 "State of the State" speech, Governor Pataki made workers' compensation reform a top priority for the 1996 legislative session and he introduced his own bill incorporating most of the business coalition's agenda. Using his executive powers, Pataki fired the 34 state-employed doctors who evaluated workers' impairment claims, shifting that responsibility to private-sector doctors paid for by the insurance carriers. He also tried to kill funding for New York's Occupational Safety and Health Training and Education Program which provides unions, COSH groups, and employers with grants to prevent workplace accidents and injuries through safety education for workers. Established in 1986 in response to a union and COSH campaign, this program is paid for by a small assessment on workers' compensation premiums.

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LABOR CHALLENGES

THE BUSINESS COALITION

The labor-based coalition that organized to counter the business drive for reform included the New York State AFL-CIO and its affiliates, the state's COSH groups (from the New York metropolitan area, Syracuse, Rochester and Buffalo), the Syracuse-based Injured Workers of New York, the New York State Trial Lawyers Association and the New York State workers' compensation claimants' attorneys bar. The Center on Worker Injury Policy (CWIP), a newly formed research and publications group, acted as the clearing house and information center for the effort. The CWIP was established with the assistance of claimants' attorneys, some unions, and the Labor Research Association which publishes **Economic Notes** and **Trade Union Advisor**.

The NYS AFL-CIO not only coordinated the coalition but also mobilized local unions to lobby their local legislators and it established an 800 hotline number where workers could register their opposition to comp reform. Local unions responded to the call to get involved. In New York City, for example, the Central Labor Council mobilized 500 volunteers at 100 subway stations to distribute literature urging the public to use the AFL-CIO hotline to contact Governor Pataki.

The COSH groups, with their state-wide network, played a critical role in educating local union leaders and rank-and-file activists about the issues at stake in workers' comp reform. Building on relationships developed in

earlier struggles, they also educated local legislators, both Republicans and Democrats, about labor's perspective on the so-called "crisis".

Participation by workers' compensation attorneys in the coalition was essential; they had the necessary knowledge of the complex workers' comp system and the highly technical language in which the proposed legislative reforms were cast to analyze those reforms and explain their potential economic impact on workers. The New York State Trial Lawyers Association, which represents attorneys handling third-party liability suits and has been a major financial contributor to both political parties, actively lobbied legislators and the Governor's office.

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BREAKING THE WALL AROUND WORKERS' COMPENSATION

The labor coalition's most pressing objective was to raise the visibility of the workers' compensation system and the legislative debate that would shape the

lives of New York workers. Widespread public opposition to the proposed reforms would be necessary to counter the power of the business lobby in the back rooms of the state government.

In most states, including New York, workers' compensation is a public system providing virtually universal coverage, but it functions like a private agreement between employers and insurers, with little scrutiny by the public or the press. No other state-regulated and -mandated system of a similar size attracts so little attention. Injured workers themselves generally get little sympathy from the media — despite its usual hunger for stories about victims — because they have been stigmatized as frauds, cheats, or malingerers.

One obstacle to more effective public oversight is the fact that the workers' compensation system has its own language of highly technical terms borrowed from the medical profession, the insurance industry, and the idiosyncratic state bureaucracy. Very little of the language translates easily into lay terms. Other problems include the complexity of the state regulations governing the system and the lack of systematic data collection by public agencies or sources independent of the insurance industry. Together these factors make it difficult for lay people, including the workers the system presumably serves and the journalists who attempt to report developments, to

understand how the system works or evaluate proposals for reform. This inaccessibility helps to insulate state regulators and the insurance industry from prying eyes.

To combat this insularity and make workers' compensation a public issue, the labor coalition developed a multi-pronged approach that included extensive research, an aggressive campaign to disseminate research findings to legislators, media, and unions, and a focused effort to involve injured workers in the lobbying campaign in order to give the cold statistics of the legislative battle a human face.

PUTTING A SPOTLIGHT ON INJURED WORKERS

At the urging of Catherine Nolan, chair of the New York State Assembly Committee on Labor, the COSH groups, and recently formed injured workers groups brought injured workers to Albany to meet with legislators and testify at public hearings. Through contact with these workers, legislators and reporters learned about seriously injured workers receiving compensation benefits that do not cover even the most basic living expenses, injured workers waiting months for hearings and facing hostile employers and insurance investigators, supervisors pressuring workers not to file compensation claims for workplace injuries and employers using unsafe equipment. Many legislators backed away from an uncritical endorsement of the proposed reforms once they saw that there was another side to the workers' compensation story than the one they had been hearing from business. Contact with injured workers also reminded legislators that their constituents include workers as well as business men and women.

When the NYS AFL-CIO investigated one of the employers who complained at a Senate Labor Comminee hearing about soaring premium costs and frivolous workers claims, it discovered that one of the injured workers cited by the employer was a 62-year-old woman — Alice Hayes — who had had both her arms amputated after they were caught in a machine which she was being forced to operate unsafely by the willfully negligent actions of her employer. The federation produced a dramatic brochure about the case —illustrated with a photo of the injured Ms. Hayes — which highlighted the inadequacy of workers' compensation benefits received by seriously injured workers. Thousands of copies were distributed throughout the state.

CHALLENGING THE BUSINESS MONOPOLY ON COMPENSATION STATISTICS

In New York, as in most states, the insurance industry has a virtual monopoly on compensation statistics. During the legislative debate on comp reform, the Workers' Compensation Board, which has never been fully comput-

erized, was unable to provide complete, current statistics on even the most basic issues. As a result, New York legislators did not have the information they needed to evaluate the business coalition's claims about workers' compensation premiums, benefits, or costs.

To meet the needs of legislators, media, unions, and the general public for reliable information, the newly organized Center for Worker Injury Policy (CWIP) collected and analyzed a wide array of data including all of the statistics cited by the business coalition plus data ignored in their propaganda. Materials consulted included statistics from insurance industry publishers and consultants, employers' associations, federal and state governments, business publications, specialized databases, and customized state-by-state and line-by-line reports, as well as studies on workers' compensation*by independent analysts and academics.

Using this material, CWIP was able to put together an accurate financial picture of the workers' compensation system in New York State with a focus on the private carriers. CWIP's research challenged the business propaganda which blamed rising premiums on out-of-control benefits by demonstrating that New York State's benefits were relatively low as compared with other states, and that premiums had been increasing far more rapidly than payments to workers. In fact, between 1987 and 1993, workers' compensation premiums paid by New York employers to private carriers rose 106 percent — helping to explain the fervor of employers' demands for premium cuts — while benefits paid to workers increased only 45 percent. (18) CWIP also highlighted the fact that the private carriers in New York pay out in benefits only half the money they collect in premiums. (19)

To communicate its research findings, the CWIP launched a weekly one-page newsletter in January 1996 that was faxed to state legislators, labor and community leaders and the media. It also published a series of white papers to provide legislators with a more detailed analysis of each legislative reform proposal and its potential impact on New York workers. The very first fax, transmitted on New Year's Day, demonstrated that New York had the lowest maximum weekly disability benefits in the region. It stunned legislators who had unquestioningly accepted the business claim that New York's benefits were too high.

As the fax newsletter and reports continued, they had an increasing impact on the workers' comp debate. CWIP received so many requests for copies of the newsletter that the initial mailing list tripled within a few months. While many newspaper articles and editorials continued to repeat statistics supplied by the business coalition, others reflected questions raised by CWIP's materials. CWIP's

aggressive education campaign also forced the insurance industry and its business allies to defend, for the first time, the information they had been providing to the legislature and media.

WORKING WITH THE MEDIA

To reinforce CWIP's work, the NYS AFL-CIO developed an aggressive media campaign that included press conferences and meetings by top leadership with editorial boards across the state. Members from the different groups within the labor coalition spent hours talking with journalists, leading them step-by-step through the workers' compensation system and helping them evaluate the claims coming from the business groups lobbyists and public relations staff. Coalition members also helped reporters identify injured workers whose cases illustrated different problems in the Workers' Compensation system.

The media outreach work paid off. As *Newsday*, *The Daily News*, *The New York Observer* and the major upstate papers began tracking the legislation and the controversy surrounding it, workers' compensation finally became a public issue. Generally, there was a distinction between editorials, which continued to buy the business coalition's line that workers' compensation costs drive employers out of the state, and articles by reporters and columnists that tended to be more critical of the business coalition's rhetoric.

The impact of the labor coalition's educational work was most clearly reflected in those articles and editorials that suggested alternatives to the business approach. The *New York Daily News* suggested that an injury prevention strategy would make more sense than Pataki's approach to cutting costs only "after a worker is maimed." Using information circulated by CWIP, the *Daily News* also pointed out that insurance carrier profits and huge CEO salaries were large drains on the system. (20) The *Albany Times Union* joined the AFL-CIO's call for the carriers to "open their books" and for an independent study to resolve "conflicting data on a serious state issue." The *Times Union* also noted that the Compensation Insurance Rating Board's recent recommendation for a 12.1 percent rate cut "seems to signal that the system is far from the brink of insolvency." (21) The business coalition's crisis propaganda was beginning to lose credibility.

**REFORMS ENACTED:
LABOR BEATS BACK THE WORST CUTS**

When the labor coalition's defense of workers' comp threatened to undercut Governor Pataki's pledge to enact reforms before the end of the 1996 session, he announced that he would not sign the new State budget — already long delayed — until his workers' compensation reform bill was approved by the Democratic-majority assembly. His stance underlined the importance accorded by the governor to satisfying the business lobby. School districts were forced to float short-term bonds to cover costs during the budget impasse and talk of a shutdown of government services grew. Ultimately, as the state moved into crisis with the latest budget in its history, the Governor's strategy proved to be effective; the state assembly agreed to some of Pataki's reform proposals and the full legislature adopted the Omnibus Workers' Compensation Reform Act of 1996.

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Twelve days after he signed the new law, Pataki announced that the State Insurance Department had approved a record 18 percent average cut in employer premiums, effective October 1, 1996, reflecting expectations of reduced compensation costs as a result of the newly enacted reforms. State officials claimed that the reductions would reduce premiums to \$3.7 billion from \$5 billion a year — well beyond the business coalition's demand for \$1 billion in savings. (22) Further rate reductions of 4 percent were announced in 1997.

Although Pataki and the business lobby claimed victory, many of the business coalition's key proposals were defeated or amended to reduce their impact. The labor-based coalition was able to prevent the sharp cuts in workers' benefits that would have resulted from adoption of the American Medical Association guidelines as the sole criteria in evaluating disability. It also blocked the business drive to eliminate employer liability in third-party lawsuits although such liability was greatly restricted. Wholesale extension of managed care was defeated but, as explained below, the managed care pilot program already in effect was expanded and a less regulated form of managed care through preferred providers organizations was made legal, a setback for labor. Business also succeeded in pushing through, without any public debate, a number of administrative law changes, as described below, that will make it difficult for unorganized and

unrepresented workers to collect the benefits to which they are legally entitled. On the positive side, the new law increases the premium credits employers may receive for safety investments, strengthens some workplace safety and loss prevention programs, and includes new provisions to curb employer fraud. In a related development, the legislature restored funding — which Pataki had tried to cut — for the Occupational Safety and Health Training and Education Grant Program described earlier.

Since many of the reforms proposed or enacted in New York are also being considered in other states, it is worth taking a more detailed look at the business coalition's legislative package and its implications for workers.

CUTTING PERMANENT PARTIAL DISABILITY: THE AMA GUIDES

The most brutal and far-reaching reform proposed by the business coalition and the Republicans would have mandated the use of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* as the sole criteria in setting benefits for injured workers. Proponents claimed that adopting the *AMA Guides* would save employers \$900 million. Virtually all of the cost reductions would have come directly from deep cuts in income-replacement for workers collecting permanent partial disability.

In specifying that the *Guides* be the exclusive criteria for determining compensation awards, the Republicans were taking an extreme position. As the labor coalition was able to demonstrate, the AMA itself emphatically warns against using the *Guides* in this way. (23) Ultimately, Pataki — who had introduced a less extreme version of the business coalition's *AMA* guide proposal — was forced to drop his plan and New York workers were spared the impairment ratings changes that have reduced permanent disability benefits in states that have adopted use of the *Guides* in modified form. (24) Defeating the *AMA Guides* proposal was the most important victory for the labor coalition in the campaign.

ELIMINATING EMPLOYER LIABILITY IN THIRD-PARTY LAWSUITS

In New York as a result of the 1972 *Dole v. Dow* court ruling, a company sued by a worker who was injured while using defective equipment or products negligently pro-

duced by that company may, in turn, bring the worker's employer into the case as a codefendant who might share liability if the employer was also negligent. Although *Dole* suits are brought for only a tiny fraction of comp claims (less than one half of one percent of the 2 million claims filed between 1982 and 1992) (25), the large awards for injured workers in some of those cases have aroused the ire of employers and insurers and they have tried repeatedly to overturn *Dole v. Dow* with legislation.

For individual injured workers who qualify for *Dole* suits, the financial awards can add significantly to the often limited workers' comp benefits they receive. In addition, all workers have a stake in preserving the principle underlying *Dole v. Dow* because the threat of employer liability in third-party lawsuits creates a strong financial incentive for employers to use equipment and chemicals in a responsible way.

The labor coalition was able to force a compromise that preserves *Dole* in prin-

ciple but limits it to cases involving death or "grave injury," including loss of a limb, paralysis, total blindness or deafness, or brain damage resulting in permanent total disability. These restrictions will eliminate an estimated 90% of the third-party lawsuits in New York in which employers are impleaded and are expected to cut more than half of the \$300 million employers pay annually for *Dole* insurance. (26)

MANAGED CARE

Business and the Republicans also pushed hard for the expansion of managed care to cover all workers in the comp system. Although perhaps not readily apparent, this proposal has a strong anti-labor character. In the workers' comp system, doctors not only render treatment but also are called upon to make decisions — such as assessing degree of disability or existence of permanent impairment and prescribing when and under what restrictions injured workers may return to work — that, in effect, determine the level of benefits workers will receive. Thus, it is critical that workers retain the right to be examined by a physician of their choice rather than a physician paid by the insurer or the employer.

In 1993, in response to an earlier business drive to introduce managed care in the workers' compensation sys-

“National corporations with deep pockets, working in tandem with smaller local businesses to reduce workers’ compensation benefits, can overwhelm opponents in a single state. After ‘reform’ has been achieved, business lobbyists can leverage the victory by portraying the ‘reformed’ state as a new competitive threat to its neighbors.”

tem, labor had succeeded in limiting the initiative to a pilot program covering 25 percent of the work force. Labor also had negotiated a series of guidelines to protect workers' rights under the pilot and to ensure the establishment of injury prevention programs and the collection of data for evaluation purposes. Now, as business once again pushed for broad managed care, the labor coalition argued that it was premature to expand the managed care pilot before completion of an evaluation already underway by the New York State School of Industrial and Labor Relations at Cornell University. The labor-based coalition also called attention to the lack of solid evidence from other states that the use of managed care in workers' compensation programs reduces costs. Indeed, at least one study has indicated that restrictions on the injured workers' choice of doctor — a key feature of managed care — is associated with substantially higher medical benefit expenditures. (27)

Although, the pro-labor coalition managed to block extension of managed care to every workers' compensation case, the legislature approved an expansion of the managed care pilot for up to 50 percent of the work force. Even more troubling than this expansion was the addition of a provision allowing insurance carriers or self-insured employers to contract with Preferred Provider Organizations (P.P.O.) for the delivery of medical services for workers' comp. This provision allows managed care outside of the regulatory guidelines negotiated by labor for the managed care pilot. Although unionized employers must collectively bargain over this issue, the two-thirds of New York's workers who are unorganized could be forced into P.P.O.s by their employers.

ADMINISTRATIVE LAW CHANGES: SHORT SHRIFT FOR WORKERS

Business' biggest victories may have come in the legislature's approval of a number of critical changes in administrative procedures for processing claims that will make it more difficult for the majority of injured workers to collect the benefits to which they are theoretically entitled. These procedural changes give carriers or self-insured employers much more power in their direct dealings with injured workers who are not represented by attorneys.

The most dramatic change allows employers or their insurance carriers to obtain written agreements in which workers waive certain rights to wage replacement and medical care. Workers who are not represented by an attorney may not fully understand the potential impact of such an agreement and may not realize that they can refuse to sign.

Another anti-worker procedural change expands the so-

called "conciliation process" in which workers' claims may be settled without a hearing before a judge. First introduced in 1990 in response to business pressure, conciliation originally was applied to cases involving allegedly minor injuries requiring no more than eight weeks of lost work time. Later it was extended to cases involving up to 16 weeks of lost work. As a result of the new legislation, the conciliation process will be applied to cases involving up to 52 weeks of lost time — nearly all claims. Although workers receive a letter notifying them of the decision resulting from the conciliation review and have a month to challenge it, the approximately 70 percent of workers who do not have lawyers often do not understand what is at stake and let the settlement stand.

A third procedural change permits an insurance carrier or self-insured employer to pay temporary compensation benefits for up to one year "without prejudice." This means the company admits no liability and can stop paying benefits at any time within a year if it so chooses. The temporary payment provision also states that "the injured employee may be required to enter into an agreement to ensure the continuation of payments of temporary compensation." Many advocates for injured workers fear that carriers will use these provisions along with the waiver of rights to manage claims in a coercive manner.

POST-CRISIS OPPORTUNITIES: GOING ON THE OFFENSIVE WITH PRO-WORKER REFORMS

New York's employers may be placated temporarily by the premium cuts approved by the State Insurance Fund after the reform legislation was enacted, but the cycle of "crisis-reform-crisis" has not been broken in New York. The labor coalition has only a brief period, before business declares the next "crisis," to convince legislators and the public that the most effective path to lower premiums lies in workplace safety programs rather than legislative assaults on injured workers. Labor also needs to highlight the gap between premiums collected and benefits paid so the public comes to recognize that controlling insurance company profits may provide an alternative method for reducing comp costs. Although establishment of an exclusive state fund that eliminates the private insurers does not appear to be a politically viable proposal at this time, it may be possible to create a groundswell for the demand, already voiced by the labor coalition, that the insurers open their books and allow the public to learn how the "missing" billion dollars is allocated. Even some employers might support this demand in their eagerness for premiums cuts.

The New York State AFL-CIO has begun to lay the groundwork for a pro-worker workers' compensation reform initiative. In January 1997, it organized a retreat on

workers' compensation for representatives of its local affiliates and last May it released **Restoring the Promise: Reform of the Workers' Compensation System in New York State**, a report containing 30 specific recommendations for legislative and administrative reform. These recommendations include

- An immediate increase in workers' compensation maximum benefit levels coupled with the indexation of the benefit level to 100 percent of the state's average weekly wage.

- Establishment of a right of reinstatement for injured workers who lose their jobs due to their disability.

- For injured workers cleared by doctors for a return to work with restrictions, a right to a modified work assignment or to temporary total benefits if the employer cannot provide appropriate working conditions.

- Establishment of a medical trust fund drawn from compensation premiums to provide payment for prompt medical care for workers whose claims are contested.

- Accelerated computerization of the entire system.

Recommended initiatives to prevent accidents include mandatory workplace safety and health committees and the amendment of the criminal law "to allow for prosecution of willfully negligent employers whose unsafe practices result in bodily injury or illness."

The AFL-CIO report also recommends reforms in the governance of the workers' compensation system to provide greater public accountability and a stronger voice for both workers and employers in a system now dominated by insurers. One proposal calls for an equal number of labor and business representatives on the Workers' Compensation Board. Another recommends establishing an oversight committee with a majority of employer and worker representatives for the State Insurance Fund and a similar committee for the Compensation Insurance Rating Board with the power to approve or modify its decisions.

CONCLUSION

What are the lessons of the battle over workers' compensation in New York? The business community's drive to cut workers' compensation costs by cutting back workers' benefits in state after state can be stopped — or at least blunted — if pro-business "reform" campaigns are challenged by labor-based coalitions that include unions, injured workers, and safety and health activists along with workers' compensation professionals like lawyers and occupational health specialists. These labor-based coalitions must be prepared to challenge the business community's monopoly on statistical information about workers' compensation and its domination of the media. This requires establishing first-class research operations and develop-

ing an aggressive strategy for educating legislators, news reporters, and editorial writers about the complexities of the workers' compensation system and about its human costs. Spotlighting the stories of injured workers can help to challenge the typical business propaganda which describes workers' compensation reform as a crusade to help both employers and workers by saving jobs and encouraging economic development. The class nature of the pro-business reform proposals — which shift the costs of workplace illnesses and injuries from employers and insurance carriers to workers and taxpayers — must be exposed and the debate over workers' compensation must be forced out of the back rooms of state government into the public arena.

Although the New York labor-based coalition defeated the most brutal anti-worker reform proposals pushed by the business community, it was forced to play a defensive game against their well-financed lobbying efforts and their substantial political clout in the Republican administration. The labor side never had the opportunity to field an aggressive pro-labor compensation reform program that would protect workers — and cut costs for employers — by preventing accidents and injuries in the workplace. This leaves labor and its allies vulnerable to the next business assault on the compensation system.

Organized labor and its allies in New York and throughout the country must begin now to move far beyond reactive campaigns to defend the compensation system against business assaults. They must take the offensive and initiate broad-based campaigns with twin goals: justice for injured workers and safe jobs for all.

In New York, the defense of the workers' compensation system involved some efforts by unions and OSHA groups to educate rank-and-file workers about the issues at stake in the business reform proposals, but the labor-based campaign remained primarily a "treetops" rather than a grassroots effort. It focused primarily on influencing decision-makers in the legislature and media. What is needed now is a sustained movement-building effort that cultivates rank-and-file workers in their workplaces and communities and involves them in a struggle to create a workers' compensation system that not only provides true economic security to injured workers but also makes prevention of workplace accidents and illnesses its top priority.

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