From John Burton's Workers' Compensation Resources

Workers' Compensation Policy Review

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In This Issue:

Featured Topics

Summary of the Contents

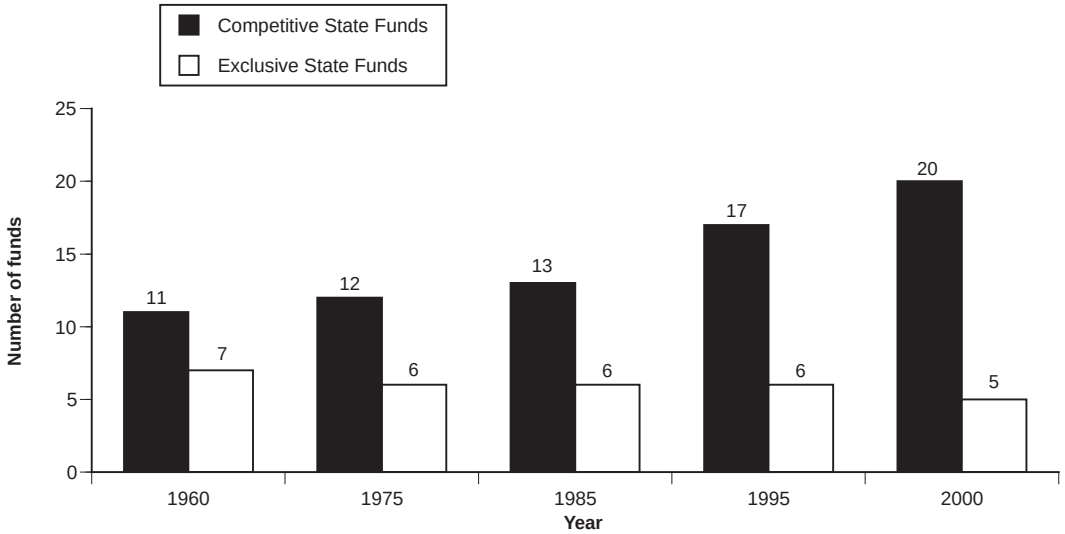
Workers' compensation costs increased rapidly from the mid 1980s to the mid 1990s, a trend that was examined in the January/February issue of *Workers' Compensation Policy Review*. In this issue, our articles take a look at some of the changes resulting from increased costs, such as the creation of several new state funds by states hoping to control or decrease costs, as shown in Figure A below. This activity and its effects are examined in the first article, "The Employers' Costs of Workers' Compensation under Alternative Insurance Arrangements."

Another response to rising costs has been the tightening of eligibility standards under workers' compensation. "Statutory Compensability Standards," the fourth article in this issue, provides a detailed review and classification of states' requirements for workers' compensation coverage of injuries and occupational diseases.

A possible consequence of tighter eligibility standards is that employers may no longer have the protection of the exclusive remedy provision of workers' compensation. This could open them to the threat of tort liability, the potential consequences of which are quantified in the third article, "The Costs of the Tort Alternative to Workers' Compensation."

Perhaps not due directly to increased costs, but reflective of a general trend of using the Internet to achieve business goals, all state workers' compensation agencies now maintain websites that perform a variety of functions. The accomplishments of these websites are reviewed and assessed on a number of defined criteria in the final article, "Workers' Compensation Agency Websites."

Figure A - Number of State Workers' Compensation Funds, 1960-2000



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The Employers' Costs of Workers' Compensation under Alternative Insurance Arrangements

by Terry Thomason, Timothy P. Schmidle, and John F. Burton, Jr.

In *Workers' Compensation: Benefits, Costs, and Safety under Alternative Insurance Arrangements,* we use a unique set of state-level data for forty-eight jurisdictions for twenty-one years (1975-95) to explore the effects of insurance arrangements on workplace safety, the structure of the workers' compensation insurance market, and the employers' cost of workers' compensation insurance (Thomason, Schmidle, and Burton 2001). In addition, we examine the trade-off between the benefit adequacy and affordability objectives of state workers' compensation programs and estimate the impact that the imposition of federal standards for benefit adequacy would have on workers' compensation costs. In this article, we summarize some of our findings concerning the employers' costs of workers' compensation insurance.

Background

One of the most important differences among states' workers' compensation programs concerns the insurance arrangements for providing workers' compensation coverage. State laws prescribe workers' compensation benefits, but these laws assign employers responsibility for providing benefits. Employers in turn obtain workers' compensation coverage for the provision of these benefits by one of three mechanisms, depending upon the options available in their state; they may purchase insurance from (1) a private insurance carrier, (2) a competitive state workers' compensation fund, or (3) an exclusive (monopolistic) state workers' compensation fund. In addition, self-insurance is available in almost every state (upon satisfying prescribed criteria). This co-mingling of private (insurance carrier) and public (competitive or exclusive state fund) approaches to providing workers' compensation benefits is a distinctive feature of workers' compensation in the United States.

Another important difference among state workers' compensation programs is the degree to which workers' compensation insurance pricing has been deregulated. The private provision of workers' compensation in the United States was highly regulated until recently. Carriers were subject to "pure administered pricing" whereby maximum permissible rates were largely determined by state rating bureaus, and rates charged by carriers were subject to prior approval by state insurance commissions. However, most states in recent years have dismantled, in varying degrees, the system of rate regulation for workers' compensation insurance pricing. In fact, a deregulatory movement begun by just a few states in the early 1980s has become so widespread in recent years that only a few jurisdictions continue to use the pure administered pricing approach.

There is substantial debate about the relative merits of public versus private provision of workers' compensation insurance and about the regulation of private-carrier-provided workers' compensation insurance. This debate has, for the most part, centered on questions concerning the availability and affordability of compensation insurance, since these two variables are relatively easy to measure. However, questions have also been raised regarding the "quality" of services provided to the parties to workers' compensation. Labor advocates, for example, have been particularly concerned that the profit motive causes insurers to unjustly deny claims or otherwise impede the delivery of benefits to workers, thus exacerbating the adverse consequences of workplace injuries or diseases.

Since space limitations prevent a coherent summary of all issues examined and the major findings that emerge from our analyses, we have chosen to focus on our results and conclusions with respect to only two of the research questions we addressed: (1) the relationship between the employers' costs of workers compensation insurance in a jurisdiction and the presence or absence of a state fund; and (2) the impact of the deregulation of the workers' compensation insurance market on employers' costs.

About the Authors

Terry Thomason was appointed Director of the Charles T. Schmidt, Jr. Labor Research Center at the University of Rhode Island in 1999. He had previously taught for eleven years at the Faculty of Management of McGill University in Montreal, Canada. He received his Ph.D. from the New York State School of Industrial and Labor Relations at Cornell University in 1988. Dr. Thomason has authored or coauthored reports on workers' compensation commissioned by the state of New York, the state of Washington, the state of Oregon, the Workers' Compensation Board of Nova Scotia, and the Royal Commission on Workers' Compensation in British Columbia. He is co-editor of *Research in Canadian Workers' Compensation* (IRC Press, 1995) and *New Approaches to Disability in the Workplace* (Industrial Relations Research Association, 1998), and he coauthored a volume of essays published by the C.D. Howe Institute in 1995 entitled *Chronic Stress: Workers' Compensation in the 1990s.*

Timothy P. Schmidle is a Senior Research Associate at the School of Industrial and Labor Relations, Cornell University, where he serves as a principal co-investigator of an evaluation of New York State's alternative dispute resolution pilot program for workers' compensation. He received his B.A. from Georgetown University, a Masters degree in public administration from Syracuse University, and his M.S. and Ph.D. from Cornell's ILR School. His dissertation was entitled "The Impact of Insurance Pricing Deregulation on the Employers' Costs of Workers' Compensation Insurance." Schmidle's current research interests include workers' compensation and educational policy and human resources issues in primary, secondary, and higher education. He previously served as Associate Editor of John Burton's *Workers' Compensation Monitor.*

Measuring Employers' Costs

We developed estimates of the employers' costs of workers' compensation for forty-eight U.S. jurisdictions during the period 1975-95. These costs are the average for seventy-one insurance classes that account for over 73 percent of the national payroll covered by workers' compensation insurance. The same classes are used for each jurisdiction in order to control for differences in industry mix that would otherwise distort the interstate comparisons.

Figure 1 depicts summary statistics of these costs estimates. As can be seen, on average the employers' cost of workers' compensation insurance rose markedly over the study period, from 0.95 percent of payroll in 1975 to 2.97 percent in 1995. The cyclical nature of insurance pricing is also evident from the figure. Finally, the data reveal that interstate variation in adjusted manual rates increased considerably between 1975 and 1990; thereafter, the variation generally declined during the last five years of our study period.

Deregulation and Employers' Costs

Economic theory fails to offer unambiguous predictions with respect to the impact of the regulation of rates in private insurance markets. In part this is because these effects depend on the behavior of the regulatory agency, which is driven by political rather than economic considerations. On one hand, a regulatory body that aligns itself with employer-consumers of workers' compensation insurance will suppress rates below competitive levels (at least in the short run). On the other hand, regulators who are more responsive to the insurance industry may help cartelize the market, resulting in supra-competitive rates. Even those regulatory agencies that pursue the public interest can inadvertently engender price distortions, due to lags in the rate-making process that delay the price response to changes in market conditions.

Empirical work, which has typically focused on other property-casualty insurance lines (principally, automobile insurance), has found, more often than not, that rates increased following deregulation, a result consistent with the hypothesis that regulators respond to consumer interests by suppressing insurance prices. However, these results are by no means consistent across studies, and the results from those studies examining workers' compensation insurance rates have been particularly mixed.

Deficiencies in this literature were an important impetus for our study, which improves on previous research in a number of ways. Empirical study of this topic presents very difficult challenges for the researcher, and it is likely that no empirical study will ever surmount all of these problems and completely dispose of the issue once and for all. Nevertheless, we believe that we improve on previous research in at least two important ways.

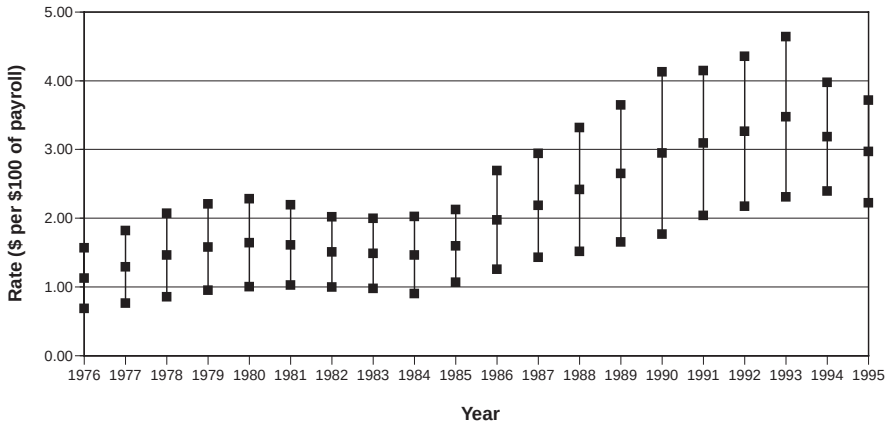
First, these earlier studies typically used relatively simple measures of the regulatory environment. Often, states in these studies were categorized solely as "regulated" or "deregulated" jurisdictions, or were identified when they had adopted "open competition," as shown in Figure 2.

We use a more complex characterization of the regulatory environment than most previous research in order to capture the actual practices of the state regulatory agency as well as interstate differences in statutory regimes. We categorize state insurance market regulatory regimes as either: (1) pure administered pricing, where all insurers must use an identical set of manual rates, which (a) include an allowance for benefit payments ("loss costs") as well as loadings for factors such as underwriting expenses, (b) were developed by a rating bureau, and (c) have been approved by the state regulatory agency; (2) comprehensive deregulation, where rating bureaus only publish loss costs and insurers are permitted to set their own rates without first seeking approval of state regulators; and (3) three forms of partial deregulation, where at least one of the elements of the pure administered pricing system has been dismantled.

Second, because workers' compensation insurance rates vary among employers both within and among jurisdictions, it is difficult to measure the costs of workers' compensation insurance actually paid by employers. Consequently, most previous research has relied on proxies such as the ratio of incurred losses to premiums written. We use a measure (as shown in Figure 1) that accurately reflects the workers' compensation insurance costs actually paid by representative employers in a particular state during a particular year.

Since workers' compensation insurance costs are affected by a variety of factors in addition to the regulatory environment, a simple comparison of costs under different regulatory regimes is inappropriate. Consequently, we estimated multiple regression equations predicting employers' workers' compensation costs as a function of the regulatory regime variables as well as a variety of controls. These controls included the levels of cash and medical benefits, the injury rate, and the proportion of the workforce covered by the state workers' compensation program as well as state and year dummies to control for unobserved state- and time-invariant factors affecting employer costs. In addition, we also attempted to examine the interaction among the regulatory regime, the state of the insur-

Figure 1 - National Adjusted Manual Rates (± 1 S.D.), 1975-95



ance market, and the behavior of the regulatory agency prior to deregulation.

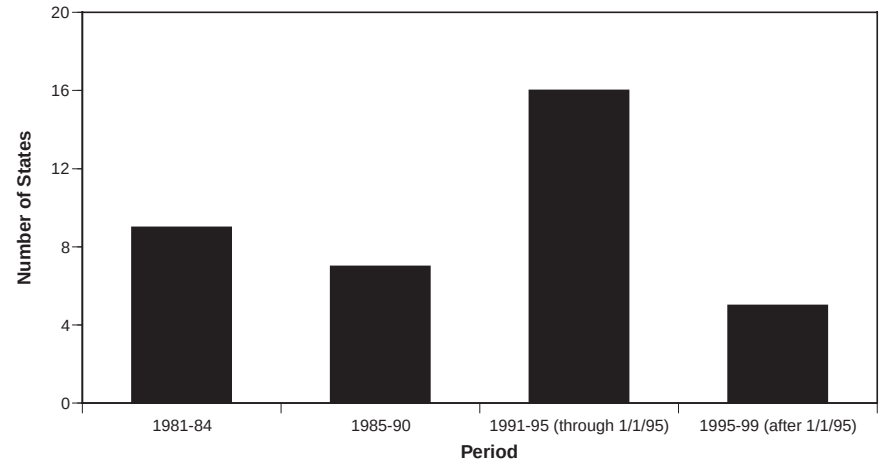
Empirical Results Concerning Deregulation

Most forms of partial deregulation are, on average, associated with higher employer costs for workers' compensation. On the other hand, the most comprehensive form of deregulation - loss cost systems that do not require prior approval - is, on average, associated with about an 11 percent reduction in employer costs. In addition, the impact of deregulation on costs depends not only on the statutory form of deregulation, but on the behavior of the regulatory agency prior to deregulation; where the regulatory agency has suppressed rates, deregulation is more likely to lead to increased costs. The behavior of the regulatory agency is apparently related to the state of the insurance market; regulatory agencies are more likely to suppress rates during a hard market, where insurance demand exceeds supply and prices are increasing, than during a soft one. Consequently, the impact of deregulation varies over the insurance cycle.

What may we conclude from these results? Given the contradictory findings for partial and comprehensive deregulation, it is difficult to draw clear inferences concerning the nature of regulation, i.e., whether regulatory agencies are more likely to respond to employers and suppress rates or whether they are more likely to help the insurance industry cartelize the market. Our inability to do so leads us to conclude that regulators do neither, at least not consistently. Lags inherent in the regulatory process may be responsible for this inconsistency. However, it may also be due to the ebb and flow of political pressures over the course of the insurance cycle. As the market hardens, political pressures from employers may force regulators to become more concerned with the impact of insurance rates on the state's business climate. As a result, rates are suppressed. When the market softens once again, the political pressures ease and, concomitantly, regulators' concerns over the effect of workers' compensation rates vanish and rates are allowed to rise to competitive (and, perhaps, supra-competitive) levels.

Insurers respond to this pattern of regulatory behavior by increasing prices during the soft phase of the insurance cycle. This is easier to accomplish where the market has been partially deregulated. Anticipating rate suppression when the market hardens again, insurers in partially deregulated systems are likely to keep market rates higher than the competitive level during the soft phase of the cycle. In a partially deregulated environment, this is facilitated by the rating organization, which promulgates rates that serve as a pricing point for insurance carriers. This accounts for the asymmetry between comprehensive and partial deregulation. Comprehensive deregulation results in lower prices during both phases of the insurance cycle, while under partial deregulation, insurers take advantage of regulatory indifference to increase rates, during the soft phase, in anticipation of the coming crunch when the market hardens once again.

Figure 2 - Number of States Enacting Open-Competition Station Statutes, 1981-99



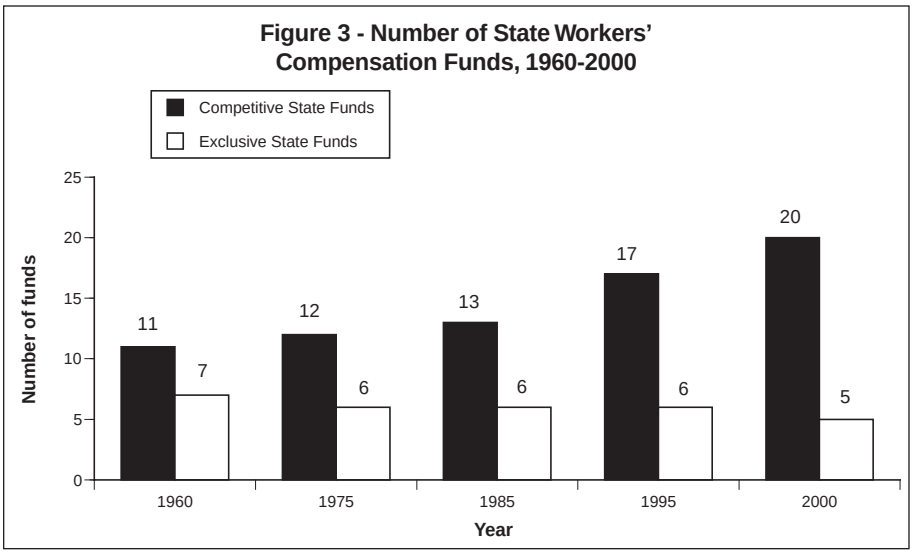
State Funds and Employers' Costs

From its origin in most states between 1910 and 1920, workers' compensation has relied on a mixture of state funds, private carriers, and self-insuring employers, and from the beginning there have been arguments concerning the merits of the various arrangements. State funds were lauded because of lower overhead (notably the absence of a broker's fee) and because proponents thought that profits were inappropriate in a mandatory social insurance program. Others praised private carriers because they promoted efficiency and because they were considered more compatible with our capitalist society. The arguments that prevailed varied from state: some jurisdictions created exclusive state funds, some authorized only private carriers to provide insurance, and some permitted private carriers to compete with state funds.

As shown in Figure 3, as of 1960 there were seven exclusive state funds, the youngest of which was the North Dakota fund (established in 1919). There were also eleven competitive state funds (those in competition with private carriers), the youngest of which was the Oklahoma fund (established in 1933). The numbers and types of state funds were relatively constant for half a century. Oregon converted its exclusive state fund into a competitive state fund that began operation in 1966; this represented the only change in state funds between the early 1930s and the early 1980s.

One of the significant developments in the workers' compensation insurance market in the last two decades was the emergence of several new competitive state funds. The pioneer of the modern movement towards state funds was Minnesota, which established a competitive state fund in 1984. Then, in the 1990s, five new competitive state funds began operation by January 1995, the last date we used in our study for interstate comparisons of the costs of workers' compensation insurance; three more states established state funds by 1998. However, in a contrarian move, the long-existing Michigan competitive state fund was privatized in 1994 and (again subsequent to the last date used in our study) the exclusive state fund in Nevada was privatized in 1999.

The state legislators' motives for establishing the new competitive state



funds in recent decades presumably were 1) to reduce costs of workers' compensation insurance in the state and/or 2) to provide an alternative source of insurance for employers who could not purchase policies in the voluntary market or who did not like the surcharges or other conditions imposed on policies purchased in the residual (assigned-risk) market.

Empirical Results Concerning State Funds

One of our research objectives was to determine the effects, if any, of state funds (new and old, and exclusive and competitive) on the costs of workers' compensation insurance. The employers' costs of workers' compensation insurance were available in our data set for selected years for three of the states with exclusive state funds, namely Ohio (1983-84 and 1987-95), Washington (1983-95), and West Virginia (1975-95). We also had data for all of the states with competitive state funds at any time during the 1975-95 period, except for California and Pennsylvania, where data were only available for 1986-95.

Since workers' compensation insurance costs are affected by a variety of factors in addition to the presence or absence of a state fund, a simple comparison of costs among states with exclusive state funds, competitive state funds, and only private carriers is inappropriate. Consequently, in a similar manner to our examination of the effects of the regulatory environment on costs, we estimated multiple regression equations predicting employers' workers' compensation costs as a function of the type of state fund (if any) as well as a variety of controls, such as the levels of cash and medical benefits, the injury rate, and the proportion of the workforce covered by the state's workers' compensation program.

Our regression results indicate that after controlling for factors that influence employers' costs, such as benefit levels, there are no statistically reliable differences in the costs of workers' compensation insurance between exclusive-state-fund jurisdictions and states that allow private carriers. This result suggesting that insurance costs in states with exclusive state funds are statistically indistinguishable from insurance costs in other states must be used cautiously for several reasons.

One important qualification is that at least two of the exclusive state funds in our database, Ohio and West Virginia, experienced substantial and persistent actuarial deficits during much of the study period. Since private insurers are unable to sustain such deficits in the long run, this suggests that our measure of compensation costs may underestimate the "true" employers' costs for these exclusive state jurisdictions. If so, average workers' compensation costs for these three exclusive-state-fund jurisdictions are probably either equal to or greater than the average costs in states that permit private carriers to underwrite workers' compensation costs.

Another caveat to our finding concerning exclusive state funds is that, as previously indicated, we only have data from three states and for two of those jurisdictions we lack data for the entire 1975-95 study period. As a result, it is possible that these results are peculiar to our sample or to a subset thereof. Simply put, one state fund outlier - a data point where costs are extraordinarily high or low relative to the rest of the data set - could bias our results substantially.[1]

We also ran regressions in which the observations were states that had competitive state funds or had only private carriers. The empirical results suggest that states with competitive state funds have workers' compensation insurance rates that are considerably higher - nearly 18 percent - than the insurance rates in states with only private carriers.[2] Although these results are consistent with prior research (see Krueger and Burton 1990; Schmidle 1994), they must come as an unpleasant surprise to state legislators, since a major impetus for creating the competitive state funds in recent years was to reduce employers' costs by providing competition for private carriers.

As with our results for the effects of exclusive state funds on the costs of workers' compensation insurance in a jurisdiction, our findings about the apparently higher costs associated with the presence of a competitive state fund are subject to qualifications.[3] One is that the causal arrow implied in our results - that competitive state funds lead to higher insurance costs - may point in the wrong direction: perhaps high costs cause states to create competitive funds rather than competitive funds lead to high costs. We think this alternative explanation is unlikely since the earlier study by Krueger and Burton (1990) found the same association between competitive state funds and higher insurance rates with observations that predated the movement to establishing competitive state funds that began with Minnesota in 1984.

Conclusions

Our empirical results concerning the effects of deregulation of the workers' compensation insurance market on the costs of workers' compensation insurance leads us to conclude that a completely deregulated market is a more efficient delivery system and is, therefore, preferable to either partial deregulation or administered pricing. The latter two alternatives seem to be associated with inefficiencies resulting from insurer inability to respond to market changes. Furthermore, anecdotal evidence from states such as Rhode Island and Maine suggest

that insurance rate regulation can sometimes have near catastrophic consequences for all of the stakeholders in the workers' compensation program.

We want to emphasize that our empirical results regarding state funds versus private carriers warrant a circumspect approach.[4] Policymakers should be skeptical about claims that the "reform" of introducing private carriers into a market, or of establishing exclusive or competitive state funds, will reduce the costs of workers' compensation insurance in a state. This is an important lesson from our research, especially since a number of states have introduced competitive state funds in the last two decades, presumably because they thought that costs would be reduced. Based on our findings, we conclude that such a strategy is naïve and misguided.

References

Krueger, Alan B., and John F. Burton, Jr. 1990. "The Employers' Costs of Workers' Compensation Insurance: Magnitudes, Determinants, and Public Policy." *Review of Economics and Statistics* 72(2): 228-240.

Schmidle, Timothy P. 1994. "The Impact of Insurance Pricing on the Employers' Costs of Workers' Compensation Insurance." Ph.D. dissertation, Cornell University.

Thomason, Terry, Timothy P. Schmidle, and John F. Burton, Jr. 2001. *Workers' Compensation: Benefits, Costs, and Safety under Alternative Insurance Arrangements.* Kalamazoo, MI.: W.E. Upjohn Institute for Employment Relations.

Endnotes

1. Other qualifications to our results concerning the costs of workers' compensation insurance in jurisdictions with exclusive state funds are discussed at Thomason, Schmidle, and Burton (2001, pp. 151-152).

2. In the course of preparing this article, we discovered a mistake in Thomason, Schmidle, and Burton (2001) at page 279, which indicates "we found that adjusted manual rates were 25 percent higher and net weekly costs were 24 percent higher in competitive-state-fund jurisdictions even after controlling for benefits, injury rates, and other factors that influence costs." There results are from preliminary regressions in which the number of states with competitive state funds was incorrect. The correct results are those presented in Thomason, Schmidle, and Burton (2001) at page 153, which indicates "that adjusted manual rates are nearly 18 percent higher in competitive-fund jurisdictions than in states without state funds, while net costs are nearly 19 percent higher." We fervently hope this is the only error in book.

3. The qualifications concerning the effect of competitive state funds on workers' compensation costs are provided at Thomason, Schmidle, and Burton (2001, pp. 155-156).

4. Other qualifications on our findings about public versus private provision of workers' compensation insurance are found at Thomason, Schmidle, and Burton (2001, pp. 286-87).

Workers' Compensation: Benefits, Costs, and Safety under Alternative Insurance Arrangements

The previous article is based on more extensive research contained in *Workers' Compensation: Benefits, Costs, and Safety under Alternative Insurance Arrangements* by Terry Thomason, Timothy P. Schmidle, and John F. Burton, Jr., published by the Upjohn Institute. The book examines the four principle objectives of workers' compensation and their achievement as influenced by market factors. How are adequate benefits, affordable costs, delivery system efficiency, and safety in the workplace accomplished under various insurance arrangements, and what impact does public policy have on the balance among these sometimes competing goals? To read more about the authors' research and results, order this book by calling 616-343-4430, or by visiting http://upjohninst.org.

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An Introduction to the Oregon Major Contributing Cause Study

By Edward M. Welch

In most state workers' compensation programs, the traditional legal rule was that a disability is compensable even if the work-related injury contributes to or aggravates a preexisting condition to result in the disability. The essence of the traditional legal rule can be stated as: "The employer takes the worker as the employer finds him or her."

In the last fifteen years, a number of states have amended their workers' compensation statutes in order to limit compensation when the current injury is not the sole or major cause of the disabling condition. One of the leading examples is Oregon. In 1990, the legislature enacted SB 1197, which *inter alia* provided that permanent benefits were compensable under the Oregon workers' compensation statue only if work was the "major cause" of the permanent disability or need for treatment. This provision is generally referred to as the major contributing cause (MCC) requirement. In 1995, the Oregon legislature enacted SB 369, which *inter alia* provided further restrictions on workers' compensation claims that involved a "combined condition."

In 1995, the Oregon Supreme Court held that when a disability is not compensable because work is not the major contributing cause, the worker may file a civil action (tort suit) against the employer. That decision was based on the exclusive remedy language of the statute. The legislature reacted immediately and changed the language to provide that a tort suit could not be brought by a worker who was not eligible for workers' compensation benefits because of the MCC provision. That provision was then challenged on constitutional principles in a case currently pending before the Oregon Supreme Court.

The Oregon Division of Workers' Compensation contracted with the Workers' Compensation Center at Michigan State University in 1999 to study the effects of these amendments. The study, which was completed in 2000, involved the analysis of all the available data concerning Oregon workers' compensation claims, a review of over 1,500 claim files, an analysis of the costs saved for employers and the benefits lost to workers as a result of these amendments, a legal analysis of how other states have dealt with similar issues, and an attempt to estimate the costs that would be involved should the tort alternative be made available to workers whose claims were denied on this basis.

This and the next issue of the *Workers' Compensation Policy Review* will include a series of articles based on the Oregon Major Contributing Cause study. The current issue contains the analysis by Jeff Biddle and me of the costs of the tort alternative to workers' compensation. The portion of the legal analysis by Sara Harmon dealing with changes in workers' compensation statutes affecting the eligibility for benefits is also presented in this issue.

The next issue of the *Workers' Compensation Policy Review* will contain Sara Harmon's legal analysis of recent court decisions affecting the compensability of workers' compensation benefits. That issue will also contain the analysis by Terry Thomason and John Burton examining the effect of the Oregon MCC provision on the workers' compensation benefits paid to Oregon workers and on the costs of the program for Oregon employers.

The articles in the *Workers' Compensation Policy Review* omit some of the technical appendices contained in the report submitted to the Oregon Division of Workers' Compensation. For those readers interested in all the details, the complete report is available at www.cbs.state.or.us/external/wcd/docs/finalmcc.pdf.

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Ed has written *Employers' Guide to Workers' Compensation,* an analysis of the legal and practical aspects of workers' compensation, published by the Bureau of National Affairs. He has also written *Workers' Compensation in Michigan: Law and Practice.* This book has become the standard legal textbook on workers' compensation in Michigan. He has edited *Workers' Compensation Strategies for Lowering Costs and Reducing Workers' Suffering* and published many articles related to workers' compensation.

Ed has served on numerous boards and associations, and in 1990, he received the outstanding achievement award in workers' compensation, from the National Association of Manufacturers, the Alliance of American Insurers, and the American Insurance Association. (Not bad for a former claimants' attorney.)

The Costs of the Tort Alternative to Workers' Compensation

by Jeff Biddle and Edward M. Welch

Background

Workers' compensation is often described as a great compromise. Workers gave up their right to file civil or "tort" actions when they were injured on the job by their employer's negligence in return for a no fault system, which provided limited benefits regardless of fault. It has been almost ninety years since this system was adopted by most U.S. states. However, so far as we know, there have been no recent attempts to estimate what damages workers would receive if the tort alternative were available for some or all work related-injuries. This article is adapted from a recent study (Welch et. al. 2000) that required us to make a rough estimate of these damages.

In most jurisdictions, the work-related injury does not have to be the sole "cause" of a disability for the condition to be compensable. It is ordinarily enough if the work injury contributes to, combines with, or aggravates a preexisting condition. In 1990, Oregon amended its law to provide that benefits could be denied if work was not the "major contributing cause" of a disability. This MCC provisions were further refined with other amendments in 1995.

Advocates for workers argued that if the workers' compensation system does not provide a remedy for a certain class of individuals with work-related injuries, then it cannot be the exclusive remedy and thus the injured workers are not barred from filing a tort suit. In 1995, the Oregon Supreme Court ruled in the *Errand vs. Cascade Steel Rolling Mills,* 888 P.2d 544 (Or. 1995), that workers whose injuries or illnesses were found to be not compensable under the major contributing cause standard could sue their employers in civil court. In 1995 the legislature responded to this decision by explicitly stating that the workers' compensation system was the only recourse of a worker with a work-related injury or illness, even if that injury or illness was found to be not compensable under the major contributing cause standard. As this is being written, another case arguing that such workers should be allowed to sue their employers is pending before the Oregon Supreme Court (*Smothers v. Gresham Transfer, Inc.,* 941 P.2d 1065 (Or. Ct. App. 1997), *petition for review allowed,* 328 Ore. 40 (1998)). This challenge to the exclusive remedy principle is based on Oregon constitutional principles.

In 1999, the Oregon Division of Workers' Compensation authorized a comprehensive study of the effects of the major contributing cause amendments. As part of that study, we attempted to estimate the financial implications of allowing workers who were denied workers' compensation benefits under the major contributing cause standard to file civil actions against their employers. In this article, we summarize that analysis and expand on it to consider the consequences of abandoning workers' compensation entirely and returning to a civil system.

Limitations

We emphasized during the Oregon study, and reiterate here, that the best we can provide in this analysis are very rough estimates. There are many factors that must be taken into consideration in attempting to estimate the benefits and costs that would result from allowing workers to file civil actions against their employers. Some of these considerations, which impose serious limitations on our ability to make such estimates, are discussed below.

First, workers' compensation is a no fault system. The worker is entitled to benefits from the employer regardless of who is at fault in causing the injury. Any tort-based compensation system would require the worker to prove that the employer was at least partially at fault. Thus even if workers' compensation was no longer the exclusive remedy, workers could only sue successfully if they could establish that the employer was in some way at fault. We have no way of knowing for sure how often employers are in some way at fault for injuries covered under the workers' compensation system. However, the studies we discuss later involve a similar situation. That is, the starting populations in these studies include people with injuries for whom the causes of the injuries were unknown, rather than people who were selected because someone else appeared to be at fault for their injuries.

A second limitation on our ability to make predictions about the effects of adopting a tort approach to work injuries pertains to the type of legal principles for the negligence suits that would be utilized. When workers' compensation laws were passed during the first part of the 20th century, employers sued in civil actions could invoke "contributory negligence" as a defense to liability. Under this standard, if the worker were in any way at fault, he or she could not succeed in a suit against the employer. By the end of the 20th century, the tort laws in most states, including Oregon, had developed some form of "comparative negligence" standard. Under such a standard a victim can sue another party for negligence even if the victim is partially at fault; however,

About the Author

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the damages are reduced based on the comparative negligence of the parties.

It is not 100 percent clear that the comparative negligence approach would apply to a work-related injury, since that would have to be decided by the legislature or the courts. For this analysis, however, we have assumed that comparative negligence would be the basis for tort suits. The data we rely on for our analysis are very meager and they are based on the tort system, as it is presently constituted. Accordingly, any attempt at analysis requires us to assume that the civil law applicable to torts arising from work-related injuries would be the same as the law that is generally applied to other tort actions today.

Another limitation of our study is that major contributing cause claims in the Oregon workers' compensation program are neither typical of all work-related injuries nor typical of the non-work-related injuries that are discussed in the other studies we rely upon. By definition, these MCC claims all involved situations in which the worker suffers from both a work injury and some other condition, which contributed to his or her disability or need for medical treatment. Furthermore, they only involved situations in which, at least in the judgment of the carrier, the work-related injury was not the major contributing cause of the workers' disabilities. It seems logical that courts or juries in these cases are likely to award smaller damages than in identical cases in which the work injuries were the sole source of the disabilities. As with numerous other issues in this analysis, we have not applied any numerical adjustment due to this factor. It should, nevertheless, be kept in mind.

Finally, we want to make clear that our analysis is mainly concerned with estimating the damages that would be awarded to workers if a tort approach were adopted. This is different from estimating either the cost to employers or the benefits that workers would receive by relying on tort suits. Any system designed to provide compensation for injured workers involves transaction costs (as described below), so that the benefits received by employees are less than the costs to employers. The extent to which the benefits to workers fall short of the costs to employers depends on the efficiency of the delivery system for providing compensation.

It is generally agreed that tort claims take much longer to process and involve transaction costs that are much higher than those involved in workers' compensation cases. Many, but certainly not a majority of, workers' compensation cases involve attorneys. It seems likely that all civil actions would involve attorneys on the part of both employers and workers. It would be difficult to estimate the cost for employers' attorneys, but it is safe to assume that the cost of dealing with a civil suit for compensation would be at least as great as the cost of dealing with an appeal of a denied workers' compensation claim. In general we can assume that attorneys for workers would charge a fee equal to one-third of the recovery. This is higher than the attorney fees usually charged in workers' compensation cases. In addition to fees there would be costs in processing the cases. Here again the costs in civil cases are usually higher than the costs in workers' compensation cases. We do not attempt to estimate these transaction costs associated with a hypothetical tort system for compensating workers, but the presence of these costs must be borne in mind when thinking about how much injured workers would receive and employers would pay by use of the tort suit approach.

There are a number of quantitative measures underlying our damage estimates that we will discuss below. These include the number of potential tort claimants, the percentage of such claimants that are likely to file a suit, and the damages that would be awarded. We want to emphasize, however, that our attempt to estimate these quantities must be rough and tentative, because there are few real world situations one can look at that are comparable to the hypothetical situation in which a denied workers' compensation claimant contemplates suing his or her employer. A few other states have situations somewhat similar to the MCC provisions in Oregon that limit compensability. In those, however, the exception is usually narrower (often confined to a class of disability such as mental claims). Moreover, as far as we know, no one has done any economic analysis of the effects of the limitations on compensability in those states. Indeed, as with Oregon, those statutes are of fairly recently origin and the first court challenges are still working their way through the system. Accordingly, it would be too early to conduct an analysis of the outcomes.

Another possible source of useful information is the state of Texas, where employers are allowed to "opt out" of the workers' compensation system. Unfortunately, we are not aware of any study that has estimated the cost in civil judgments for employers who chose to opt out.

In addition, under the Federal Employers' Liability Act (FELA), employees injured while working for railroads must seek compensation through a tort-based process. However, a routinized procedure has developed that makes it relatively easy for the injured worker to receive compensation, so that the case of the injured railroad worker is not exactly analogous to the case of the denied Oregon claimant who would have to turn to the courts for compensation. Still, as discussed below, it is possible to make use of some information from the FELA experience.

In general, however, we can only speculate concerning some of the factors affecting the potential costs to employers, and make only very rough estimates of others. Nevertheless, we believe that our discussion and the estimates we offer will be of some value to the parties in Oregon, and that this article will offer some insights of interest to people everywhere.

Potential Claimants

We assume that the number of workers who could potentially sue their employers, should the tort option become available in Oregon for workers who have work-related injuries but who are denied access to the workers' compensation program, is best approximated by the number of workers whose claims are currently denied on the basis of major contributing cause. There is a potential problem with this assumption.

Some workers' compensation claims that are currently denied by carriers might not be denied if the tort option became available. We assume that most workers would not file a civil action unless their workers' compensation claim had been denied. As discussed, it appears

that the costs to employers would be substantially higher in civil actions than in workers' compensation claims. Accordingly, it is possible that at least some employers would choose not to deny some claims involving major contributing cause in order to avoid civil actions.

More specifically, it seems likely that employers would want to develop methods for predicting whether a particular claimant who could be denied would sue following denial, and the likely cost of the suit to the carrier in legal fees, settlements, and/or judgments. If this estimate exceeded the estimate of the benefit costs saved by denying the claimant (net of the administrative costs of making the denial), the employer would not deny the claim; otherwise they would.

Similar considerations would apply if workers' compensation were completely replaced with a tort system. Many non-subscribing employers in Texas and most railroads offer employer-sponsored disability benefits that are intended to provide some benefits to workers so that they will not feel the need to file civil actions.

We acknowledge the importance of all of these above factors, but for the reasons discussed above, we were unable to place any quantitative values on them.

The Propensity to Sue

What fraction of denied claimants would actually seek compensation through the tort system? Arguably, many would not sue their employer. Some of the denied claimants would feel that the employer was not at fault, or at least that they could not prove negligence on the employer's part. Others simply might not want to incur the additional time, trouble, and legal costs of a civil suit.

As noted above, there are few real world situations one can examine to infer how many of Oregon's denied workers' compensation claimants might choose to sue their employers, because this option is not available to workers whose claims are denied in most other states. There are, however, estimates available of the percentage of people with non-work related injuries who initiate a suit against the party that they feel was at fault, and these provide perhaps the best available source of information on the propensity to sue by the hypothetical individual whose workers' compensation claim was denied, but who had the option to sue. The best such estimates are based on the study by Hensler et. al. (1991), which involved interviews conducted during 1988 and 1989 of a group of over 2500 randomly selected individuals who had experienced a disabling injury during the previous year. Of those interviewed, 540 were injured in non-work, non-motor vehicle accidents that took place on another's property or involved a consumer product, that is, situations in which there might be someone to sue.[1] Of these 540 accident victims, only 5 percent took action of any sort to collect from another party to the accident, and only 1 percent hired a lawyer (Hensler et. al. 1991, table 5.4). Of the 239 people in this group considered to have more serious injuries, only 9 percent considered taking action, and only 2 percent hired a lawyer (Hensler et. al., table 5.6). One reason uncovered by the study for the relatively low number of people seeking compensation from others for their accident-related losses was that even among those injured by a product or on the property of another, over half felt the accident to be largely their own fault (Hensler et. al. 1991, tables 6.9, 6.10).

The Hensler et. al. study also included victims of automobile accidents. These potential claimants are in a different situation than people injured by a product or on the property of another, in that almost all drivers have automobile insurance, which provides a fairly simple and widely understood method for seeking compensation. Still, only 54 percent of the surveyed people injured in motor vehicle accidents even considered seeking compensation from another for their injury related losses, and only 39 percent actually took some sort of action to seek compensation.

A similar study by Kritzer, Bogart and Vidmar (1991) was based on interviews with individuals who had suffered injuries or property damage leading to losses of more than $1,000, and who believed the incident causing the losses to be largely the fault of another - clearly a group more likely to sue than those in the Hensler et. al. study. There were eighty cases of non-work-related, non-motor vehicle incidents. Of these eighty people, 72 percent made some attempt to get compensation from the party or parties believed to be at fault, but only 15 percent hired a lawyer.

We can only speculate about how comparable in terms of litigiousness the injury victims in these studies are to the hypothetical worker who has the option to bring a tort suit following the denial of his or her workers' compensation claim. Since workers' compensation is a no-fault system, there is no guarantee that the denied claimants will feel the employer is actually at fault for their losses. They may be more prone to sue than the people in the studies, as they would have already invested a lot of time and effort into getting workers' compensation from the employer, and may fall prey to the sunk cost fallacy that having come so far they should not give up. On the other hand, they may feel exhausted and want to "cut their losses."

It seems to us that the studies suggest a range of about 5 percent to 40 percent as the proportion of potential litigants who would actually sue. Further, the actual proportion would approach the upper end of this range only if the process of seeking damages through the court system following a denied claim developed to the point that it was widely understood by workers and perceived by them to be fairly straightforward, as a result of the activity of labor unions, for example, or aggressive marketing by trial lawyers.

The Amounts of Damages

Once again, it is hard to find appropriate data on the average damages arising from a lawsuit involving a work-related injury, because in the United States most injured workers are compensated through a workers' compensation system. As mentioned above, under federal law (FELA), railroad employees with financial losses arising from work-related injuries must seek compensation through civil action. Although a standard set of procedures has been developed to facilitate the settlement of these claims by workers and employers, it is still the case that both parties know that a jury trial will take place should a settlement not be reached, and this affects the behavior of both parties and the ultimate settlement outcomes (Transportation

Research Board, 1994, p. 61). Likewise, should denied claimants in Oregon be given the right to sue the employer, it is reasonable to suppose that many of these suits would be settled, but settlements would depend on expectations of the potential outcomes of a jury trial.

The study by the Transportation Research Board (1994) used several alternative empirical approaches in an attempt to determine the relationship between the values of settlements received by injured railroad workers and the amount of benefits they would have received had they been covered by workers' compensation. One approach compared a random sample of workers' compensation claims from thirteen states to a sample of settlements paid by one railroad to its injured employees over a four-year period. The claims were grouped by injury type and showed, for example, that the average railroad worker with a head injury received 52 percent of what was received by the average workers' compensation claimant with a head injury, while the average railroad worker with a neck injury received 104 percent of the benefits received by the average workers' compensation claimant with a neck injury. Taking an unweighted average of these ratios for the six injury types considered gives a figure of 102 percent — the railroad workers received slightly more than similarly injured workers' compensation claimants.

A second approach used detailed information on a sample of thirty-eight injury cases from the files of one railroad, and calculated what the injured workers in these cases would have been entitled to under the workers' compensation systems of Washington State and Michigan. Separate calculations were made for injuries involving less than ninety days of lost work, more than ninety days of lost work, and no return to work. Most workplace injuries fall into the first category, but most of the costs associated with workers' compensation claims arise from injuries falling in the second and third categories.

The study found that:

> The greatest disparity between the FELA payments and the state estimates was for the return-to-work claims with fewer than 90 days lost. Estimates of the percentage of the FELA settlement that would be paid in each of the systems are 9 for Michigan (and) 11 for Washington State. . .
>
> For the return-to-work claims with more than 90 days lost, the results are more uniform. Injury compensation under FELA is, for the most part, in the range of 3 to 6 times the workers' compensation estimates for each claim, and the average of the sub samples is 2.5 to 4 times the estimates.
>
> FELA benefits for the no return-to-work claims are on the average 1.5 to 3 times the level of the estimates for the workers' compensation system (Transportation Research Board 1994, p. 135).

The study authors felt that the results for the cases with fewer than ninety days of time loss were driven by data anomalies, so we will ignore those results. Thus, we conclude that the ratio of benefits paid to railroad workers under a tort system to benefits paid to similarly injured workers' compensation claimants falls in a range between one and six.

Another observable class of civil suits in which workers attempt to recover losses arising from work-related injuries is so-called third party suits against people other than the employer who might have been partially at fault for the injury, such as manufacturers of defective tools or equipment. The problem with such data is that it usually includes only the outcomes of those suits that were decided by a court or jury and not those that were settled. Also, one usually does not know how much the injured worker was entitled to in workers' compensation benefits as a result of the work-related injury that led to the third party suit.

However, we developed a data set that partially addresses these two problems. In Oregon, if an injured worker files a third party suit and receives an award of damages or a settlement, the worker is required to reimburse the workers' compensation carrier for part or all of the workers' compensation benefits he or she has received. Occasionally, a dispute will arise between the worker and the carrier as to how much money the worker is required to pay back to the state. These disputes are settled by the Oregon Workers' Compensation Board.

By conducting a West Law search, we were able to identify all board decisions in such cases that were issued from 1987 through 1999. In 120 of these cases we were able to identify the civil award or settlement and to estimate with reasonable accuracy the value of workers' compensation benefits paid to the individual. There were several positive features of these data. First, they included the results of civil suits that were settled out of court, as well as those that led to a jury award. Second, they showed for a set of about 120 work-related injuries both the value of the benefits the worker was entitled to under the workers' compensation system and the value of compensation the worker was able to receive through the tort system for *the same injury*. Third, they were all cases from Oregon, which increased the comparability of the cases. Fourth, they were cases in which the injured workers felt it worthwhile to pursue a tort action, arguably making them similar to the hypothetical set of cases in which a denied workers' compensation claimant would find it worthwhile to sue.

An important disadvantage of the data set is that it only included cases in which there was a dispute about how much money the injured worker had to return to the carrier, and this may make the sample unrepresentative of all third party suits in unpredictable ways. It is also true that in some of these cases the amounts of workers' compensation benefits were not exactly specified. We believe, however, that we were able to make reasonable estimates in the cases that were included in our sample. We acknowledge these limitations but believe this is the best available source of comparable damages awarded in tort suits and workers' compensation claims.

We recorded for all the cases the size of the tort suit award as a percentage of the amount of workers' compensation benefits received. This percentage ranged

from 15 percent to over 2,000 percent, but for half of the cases it fell between 141 percent and 422 percent. The unweighted average of the percentage over all cases was 388 percent, and when we simply divided the total amount paid out in awards and settlements by the total amount paid out in workers' compensation benefits, we obtained a figure of 307 percent.

These results are quite consistent with our conclusions concerning the results of the FELA study discussed above: that the injured worker who seeks compensation through a tort system will on average receive a settlement or award that is between 100 percent and 600 percent of what he or she would receive in workers' compensation benefits. Indeed, in light of the additional information provided by the data from Oregon third party suits, we believe it is safe to narrow somewhat this range to 150 percent to 400 percent.

Up to this point, we have mainly focused on the damages awarded in tort actions. It is appropriate to reiterate that this is different from both the costs to employers and the benefits received by workers. The costs to employers would be greater than these damages because there would be additional attorneys' fees and costs. The benefits to workers would be less than these damages because they too would pay attorneys' fees and other costs. In this sense a tort system would be less efficient than the workers' compensation system. It is also generally agreed that tort systems are slower and more costly to the public than workers' compensation systems. This adds to the inefficiency.

Also, in examining the benefit to workers of allowing denied claimants to sue their employers, the uncertainty involved in the outcomes of civil actions should be mentioned. Insurance companies dealing with dozens or hundreds of civil suits could be content to concern themselves with the average size of judgments or settlements when considering the costs of tort actions - unusually large settlements or awards will in time be balanced out by unusually small ones. For individual injured workers, however, the uncertainty as to whether his or her award or settlement will be very large or very small can be more troublesome. And the data both from the Transportation Research Board study of FELA and from the Oregon third party suits show that the individual worker pursuing a tort action faces a great deal of uncertainty. The Transportation Research Board study cites classes of injuries for which payments to workers under FELA are less than they would have received under a typical workers' compensation system, and in the Oregon third party data, after netting out attorneys' fees, 22 percent of the claimants received less from their lawsuit than they had received in workers' compensation benefits.

Oregon Estimate

We estimate how much benefits awarded to workers would change if claimants whose claims were denied under major contributing cause were given the right to sue their employer in civil court. The method of constructing this estimate is described in the appendix; it combines our estimates discussed above concerning the frequency with which these workers would file civil actions and the likely awards in civil actions with other information from the Oregon study. The estimate is expressed as a percentage of the workers' compensation benefits awarded to workers. The denominator is the workers' compensation benefits paid for all disabling claims in the system, as it currently exists. The numerator is the total damages that would be awarded in civil actions by denied claimants.

We conclude that if workers' compensation claimants who were denied benefits based on major contributing cause were allowed to sue their employers in civil court, the damages they would receive would range between half a percent and 10 percent of the value of the total benefits paid on all accepted disabling claims.

We emphasize again that this estimate is very rough. Even the boundaries of the range should be regarded as approximate. The 10 percent figure assumes that 40 percent of potential plaintiffs would sue, and would receive on average in award or settlement four times as much as their workers' compensation benefits would have been, had their claim not been denied. The half percent figure assumes that only 5 percent would sue, and would receive only 1.5 times as much on average as they would have received in workers' compensation benefits.

It should also be noted that the cost estimates are based in large part on what is currently going on in the Oregon system - current denial rates, DCS rates, etc. These could change considerably after the introduction into the system of such a dramatic change as a tort option for denied claimants.

Generalizing to the Entire System

The range of percentages given in the proceeding section attempts to describe the potential increase in benefits awarded if a specific subset of Oregon claimants (those denied based on major contributing cause) were allowed to file civil actions, and it expresses it as a percentage of all benefits currently being paid in Oregon. What if the workers' compensation system was completely abandoned and workers were allowed to file civil actions in all workers' compensation claims? In an exercise that is admittedly extremely speculative, we can use our Oregon analysis to estimate this by applying our estimate of the propensity to sue to the entire population of injured workers, and then multiplying it by our estimate of the average ratio of court awarded damages to benefits under the workers' compensation system.

Table 1

	Range
How many people who can sue, do?	5% to 40%
How do civil awards compare to workers' compensation awards?	150% to 400%
How much would total benefits awarded in Oregon increase if workers denied under the MCC standard were allowed to sue?	0.5% to 10%
How would total benefits awarded under a tort system compare to those under the workers' compensation system overall?	7.5% to 160%

A conservative guess at the cost of the tort alternative would assume the lowest point in our range of estimates for the propensity to sue (5 percent) multiplied by the lowest point in our range of estimates of the average ratio of court awarded damages to workers' compensation benefits (150 percent). This leads to a conclusion that the tort alternative would result in injured workers receiving awards equal to 7.5 percent of what they now receive from the workers' compensation system.

If, however, we multiply the numbers from the high end of two ranges (a 40 percent propensity to sue times tort damages that average 400 percent of what workers' compensation benefits would have been), we conclude that the tort alternative would award injured workers as a group damages that are 1.6 times as large as what they currently receive from the workers' compensation system.

We believe that the higher end of this range is more likely than the lower end. We feel that if a state were to eliminate its workers' compensation system in favor of a tort based system (rather than simply offering the tort alternative to a small class of denied claimants) the propensity of an injured worker to sue would in the long run rise to or beyond the high end of our range of estimates. As is the case today for railroad workers injured in work-related accidents, the procedures to be taken by an injured worker requiring compensation would become routinized and widely understood. A large majority of injured workers who believed their employer to be at least partially at fault (and thus a smaller share of all injured workers) would begin the process of seeking damages through the tort system, although most would probably receive settlement before trial.

We again emphasize that this does not take into consideration any loss of efficiency to the system. Moreover, as we also previously noted, because of attorney fees and litigation costs, the total costs to employers would be greater than the damages awarded and the benefits received by workers would be less. In addition, it is very likely that the benefits awarded under the civil system would be paid significantly later than benefits paid under the workers' compensation system.

References

Hensler, D.R, M.S. Marquis, A.F. Abrahamse, S.H. Berry, P.A. Ebener, E.G. Lewis, E.A. Lind, R.J. MacCoun, W.G. Manning, J.A. Rogowski, and M.E. Vaiana. 1991. *Compensation for Accidental Injuries in the United States.* Santa Monica CA: RAND.

Kritzer, H.M., W. A. Bogart, and N. Vidmar. 1991. "The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States." *Law and Society Review* 25 (3): 449-543.

Transportation Research Board (1994) *Compensating Injured Railroad Workers Under the Federal Employers' Liability Act.* Washington: National Academy Press.

Welch, E. M., J. Biddle, J. F. Burton Jr., S. T. Harmon, and T. Thomason. 2000. *Final Report: Oregon Major Contributing Cause Study.* Oregon Department of Consumer and Business Services.

Endnotes

1. We ignore the work-related injuries, because those individuals had access to the workers' compensation system.

Appendix

In order to arrive at a figure representing potential tort damages to denied claimants as a percentage of the benefit payments made on all disabling claims, we made a number of assumptions and approximations. Given the very approximate nature of the key proportions and ratios that go into estimating the potential tort costs, these additional approximations are of second order importance.

First, we assume that denied nondisabling claims would not lead to civil suits.

Second, based on table 3.7 of Welch et. al. (2000), we assume that in the post SB 1197 period, approximately 85 percent of disabling claims are accepted or settled, and the other 15 percent denied and not settled. Most denied claims are whole claim denials; we will treat the partially denied and wholly denied claims identically. So, the number of claimants with claims that end up denied and not settled is assumed to be .15/.85 = .176 times the number of claimants whose claims are ultimately accepted or settled.

We assume that the pool of potential civil litigants consists of those whose claims were denied for MCC and not settled. According to Welch et. al. 2000, about 35 percent of the claims that were filed after 1993 and that were ultimately denied and not settled involved MCC denials. So,

Potential Litigants = (.176) X (.35) X (Number of Accepted and Settled Claims)

We argue that the proportion of potential litigants that would actually sue is between .05 and .4. Call this proportion S, so that

Number of Civil Suits = S X (potential litigants) = S X (.176) X (.35) X (Number of Accepted and Settled Claims)

Next, let R stand for the ratio of what a worker pursuing a civil lawsuit would receive relative to what that worker would receive in workers' compensation benefits if his or her claim were accepted. We have argued that R would probably range between 1.5 and 4. Then,

Damages in Average Civil Suit = B*(Cost of average litigant's potential WC benefits),

where the potential WC benefits are the workers' compensation benefits the litigant would have received had their claim not been denied.

According to a statistical model developed by John F. Burton, Jr. and Terry Thomason (Welch et. al. 2000, sec. 7), the benefit payments made to the average Oregon worker with a disabling claim during the 1990s was about $17,000. (This is in 1996 dollars, and from the model that allows for a trend.) The same model predicts that the average claimant denied for MCC in the 1990s would have received $15,500 had their claim been accepted. If we make the assumption that the average litigant's potential WC benefits were the same as the potential benefits of the average claimant denied for MCC, we could say that the cost of average litigant's potential WC benefits equaled 15,500/17,000 or .91 times the cost of the average disabling claim.

*(**COSTS** continued on p. 27)*

Statutory Compensability Standards[1]

by Sara T. Harmon

Introduction

Historically, accidental injuries have been compensable under workers' compensation laws if they arise out of and in the course of employment. For occupational diseases, there has usually been an additional requirement, i.e., there must be a greater risk of contracting the specific condition as a result of the worker's particular employment.

Under traditional standards, for either an accidental injury or an occupational disease, a workers' compensation claim is compensable if the work contributed to or aggravated a preexisting condition. That is, the general rule has been that the work does not have to be the sole, major, or primary cause of a disability in order for the worker to receive workers' compensation benefits. In essence, the employer "takes the worker as he finds him," preexisting infirmities and all.

In recent years, however, this traditional notion has been displaced or modified by legislation in a number of states, raising the compensability bar for workplace accidents and occupational diseases. A review of the national legislative trends suggests a continuum. At the higher end are the four states that have a "major contributing cause" requirement that applies to all types of conditions—Arkansas, Florida, Oregon, and South Dakota. At the other end of the spectrum, there are many states that have retained the traditional standards. In the middle are a number of states that have imposed a variety of constraints on compensability.

What follows is a review of the various statutory standards that diverge from the traditional norms, broken into categories loosely ranked from highest standard to lowest standard. The focus is primarily on causation standards, not burdens of proof, presumptions, or evidentiary requirements. However, there is some discussion of those factors because the causation standard cannot be adequately addressed in a vacuum.

The actual statutory language is often critical to a clear understanding of compensability standards. The danger in not looking at the precise language is that different standards may be incorrectly lumped together and variations may not be understood. In addition, states sometimes have different standards depending on the particular physical or mental condition involved. Therefore, numerous short quotations have been provided in the text as well as statutory citations.

Causation standards

Sole Cause. In Kansas, emphysema is compensable only if it is caused by employment "solely and independently of all other causes...." K.S.A § 44-5a01.

In Colorado, "'[a]ccident', 'injury', and 'occupational disease' shall not be construed to include disability or death caused by or resulting from mental or emotional stress unless it is shown by competent evidence that such mental or emotional stress is proximately caused solely by hazards to which the worker would not have been equally exposed outside the employment." C.R.S. 8-41-302.

Predominant or Primary Cause. For most psychiatric injuries, the California statute requires proof by a "preponderance of the evidence that actual events of employment were predominant as to all causes combined...." When a violent act is involved, a "substantial cause" standard is imposed. Cal. Lab. Code § 3208.3.

For psychological conditions, Idaho requires that the injury be the "predominant cause as compared to all other causes combined...." Idaho Code § 72-451.

Louisiana has a "predominant and major cause" requirement with respect to heart-related or perivascular injuries. La. R.S. 23:1021.

For mental/mental conditions (where both the cause and result are mental), Maine requires proof that "[t]he work stress, and not some other source of stress, was the predominant cause of the mental injury." 39-A M.R.S. § 201.

Under the Massachusetts statute, "[p]ersonal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment." Mass. Ann. Laws ch. 152, § 1.

The Montana statute limits compensability for "cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction" to cases where the accident is "the primary cause of the physical condition in relation to other

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Ms. Harmon chaired the Adjudication Committee of the International Association of Industrial Accident Boards and Commissions (IAIABC) from 1989 to 1991, and was a member of the IAIABC Administration and Procedure Committee from 1991 to 1994. She was a founding member of Washington Women in Workers' Compensation. She has done extensive public speaking on workers' compensation issues. On December 10, 1997, she began working for the New Mexico Workers' Compensation Administration as a Mediator. She is also one of the Seminar Leaders for Michigan State University's certification program for workers' compensation professionals.

factors contributing to the physical condition." "Primary cause" is defined as "a cause that, with a reasonable degree of medical certainty, is responsible for more than 50% of the physical condition." Mont. Code Ann. § 39-71-119.

In North Dakota, a physical/mental condition is compensable only "when the physical injury is determined with reasonable medical certainty to be at least fifty percent of the cause of the condition as compared with all other contributing causes combined, and only when the condition did not preexist the work injury." N.D. Cent. Code § 65-01-02 (a) (6). A similar approach is used for mental/physical conditions, i.e., "[i]njuries due to heart attack or other heart-related disease, stroke, and physical injury caused by mental stimulus." They are compensable only "when caused by the employee's employment with reasonable medical certainty, and only when it is determined with reasonable medical certainty that unusual stress is at least fifty percent of the cause of the injury or disease as compared with all other contributing causes combined. Unusual stress means stress greater than the highest level of stress normally experienced or anticipated in that position or line of work." N.D. Cent. Code § 65-01-02 (a) (3).

Major Contributing Cause. The preponderant or primary cause standards reviewed above all relate to very limited and specific types of conditions. Four states have gone further and enacted a general major contributing cause (MCC) standard that is not limited to specific conditions and that is essentially the same as a primary or preponderant cause standard—Oregon (1991), Arkansas (1993), Florida (effective 1994) and South Dakota (1995).

The Arkansas MCC standard reads as follows: "If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment." Ark. Code § 11-9-102 (4)(F)(ii)(b). The Arkansas statute defines "major cause" as "more than fifty percent (50%) of the cause." Ark. Code 11-9-102 (14)(A).

The Florida MCC standard provides: "If an injury arising out of and in the course of employment combines with a preexisting disease or condition to cause or prolong disability or need for treatment, the employer must pay compensation or benefits required by this chapter only to the extent that the injury arising out of and in the course of employment is and remains the major contributing cause of the disability or need for treatment." Fla. Stat. § 440.09 (b). In addition, the term "arising out of" employment is defined as follows: "'Arising out of' pertains to occupational causation. An accidental injury or death arises out of employment if work performed in the course and scope of employment is the major contributing cause of the injury or death." Fla. Stat. § 440.02 (35). The Florida courts have interpreted "major contributing cause" to mean "the most preponderant cause." *Orange County MIS Dep't v. Hak,* 710 So. 2d 998, 999 (Fla. 1st DCA 1998).

The Oregon standard reads as follows: "(A) No injury or disease is compensable as a consequence of a compensable injury unless the compensable injury is the major contributing cause of the consequential condition. (B) If an otherwise compensable injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable only if, so long as and to the extent that the otherwise compensable injury is the major contributing cause of the disability of the combined condition or the major contributing cause of the need for treatment of the combined condition." ORS § 656.005 (7)(a)(A) and (B). Determining "the 'major contributing cause' involves evaluating the relative contribution of different causes of an injury or disease and deciding which is the primary cause." *Dietz v. Ramuda,* 130 Or. App. 397, 401, 882 P.2d 618 (1994), *rev. dismissed,* 312 Or. 416, 898 P.2d 768 (1995).

The South Dakota MCC standard is very similar to Oregon's. It provides: "(a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment." S. D. Codified Laws 62-1-1 (7)(a) and (b). South Dakota requires workers to prove that, of multiple potential causes, the employment is "a greater contributing cause" of "the condition complained of." *Brady Memorial Home v. Hantke,* 597 N.W. 2d 677, 681 (S.D. 1999).

The Oregon MCC standard applies to both injuries and occupational diseases. The Arkansas MCC standard applies only to injuries. For occupational diseases, Arkansas imposes the higher "clear and convincing evidence" burden of proof. In Florida and South Dakota, the MCC standard applies only to injuries. A lower standard applies to occupational diseases. Fla. Stat. § 440.151 and S.D. Codified Laws § 62-8-1.

Massachusetts uses a modified major cause analysis, which does not rise to the level of predominant cause. The statute provides: "If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment." Mass. Ann. Laws ch. 152, § 1.

Substantial Contributing Cause. Arizona excludes heart and perivascular conditions from coverage, unless "some injury, stress or exertion related to the employment was a substantial contributing cause of the heart-related or perivascular injury, illness or death." A.R.S. § 23-1043.01

For most psychiatric injuries, the California statute imposes a "predominant" cause standard. However, if a worker's psychiatric injuries "resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the

evidence that actual events of employment were a substantial cause of the injury." The statute goes on to define "substantial cause" to mean "at least 35 to 40 percent of the causation from all sources combined." Cal. Lab. Code § 3208.3.

Missouri uses a substantial factor test to determine compensability of both injuries and occupational diseases. Neither is compensable unless it is "clearly work related." That means that the work must be a "substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor." Missouri also has a provision with respect to repetitive motion conditions which places responsibility on a prior employer if "the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury...." § 287.020 R.S.Mo. and § 287.067 R.S.Mo.

In situations where an occupational disease aggravates a preexisting condition or where an occupational disease is subsequently aggravated by a non-occupational condition, Nevada places the burden on the employer to prove, by a preponderance of the evidence, that the occupational disease is not a substantial contributing cause of the worker's condition. If the employer is not able to meet that burden of proof, then the worker's condition is compensable. Nev. Rev. Stat. Ann. § 617.366.

Under the North Dakota statute, a preexisting condition is excluded from coverage unless "the employment substantially accelerates its progression or substantially worsens its severity." N.D. Cent. Code, § 65-01-02.

Under the Texas statute, heart attacks are compensable only if "the attack can be identified as occurring at a definite time and place and caused by a specific event occurring in the course and scope of the employee's employment." Additionally, the preponderance of the medical evidence must indicate, "that the employee's work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack." There are also some constraints on the extent to which a heart attack caused by a mental stimulus will be compensable. Tex. Lab. Code § 408.008.

If the employment substantially increases the risk of sexual assault, an injured worker in Virginia may receive workers' compensation benefits and also sue the assailant, even if that person is the employer or co-employee. Va. Code Ann. § 65.2-301.

Significant Contribution. In Maine, "[i]f a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner." 39-A M.R.S. § 201.

Michigan covers mental disabilities and conditions of the aging process "if contributed to or aggravated or accelerated by the employment in a significant manner." MSA § 17.237(301).

The Mississippi statute applies the significant contribution test to all injuries. Only injuries that are "contributed to or aggravated or accelerated by the employment in a significant manner" are compensable. Miss. Code Ann. § 71-3-3.

Material Contributing Factor. The New Jersey statute provides as follows: "In any claim for compensation for injury or death from cardiovascular or cerebral vascular causes, the claimant shall prove by a preponderance of the credible evidence that the injury or death was produced by the work effort or strain involving a substantial condition, event or happening in excess of the wear and tear of the claimant's daily living and in reasonable medical probability caused in a material degree the cardiovascular or cerebral vascular injury or death resulting therefrom. Material degree means an appreciable degree or a degree substantially greater than de minimis." N.J. Stat. § 34:15-7.2 .

In addition, the term "compensable occupational disease" includes diseases "which are due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment." N.J. Stat. § 34:15-31.

Compensability of Particular Conditions Limited or Excluded

Compensability of Aging Process. Some states have specifically eliminated compensability for the natural aging process, conditions caused by daily living, the ordinary diseases of life, or degenerative conditions.

Under the Arkansas statute, the ordinary diseases of life to which the general public is exposed are not compensable. Ark. Code Ann. §11-9-601.

A number of states have occupational disease provisions requiring that the disease have its "origin" in a risk connected with the employment—Arizona, Georgia, Indiana, Iowa, Kansas, Missouri, Virginia, and West Virginia.

In Kansas, the terms "'[p]ersonal injury' and 'injury' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living." K.S.A. § 44-508.

In Kentucky, a compensable injury or disease is defined as "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. 'Injury' does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment." KRS § 342.0011.

Louisiana defines a compensable accident as "an unexpected or unforeseen actual, identifiable, precipitous event

happening suddenly or violently, with or without human fault, and directly producing at the time objective findings of an injury which is more than simply a gradual deterioration or progressive degeneration." La. R.S. 23:1021.

Michigan limits compensability for conditions of the aging process to situations where the condition is "contributed to or aggravated or accelerated by the employment in a significant manner." MSA § 17.237(301).

In Missouri, "[o]rdinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment." § 287.020 R.S.Mo.

In Nebraska, "disability or death due to natural causes but occurring while the employee is at work" are specifically excluded from compensability, as are "injury, disability, or death that is the result of a natural progression of any preexisting condition." R.R.S. Neb. § 48-151.

Under the New Hampshire statute, "[c]onditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable only if contributed to or aggravated or accelerated by the injury." RSA 281-A:2.

The New Jersey statute provides that "[d]eterioration of a tissue, organ or part of the body in which the function of such tissue, organ or part of the body is diminished due to the natural aging process thereof is not compensable." N.J. Stat. § 34:15-31.

North Dakota excludes from compensability "[o]rdinary diseases of life to which the general public outside of employment is exposed or preventive treatment for communicable diseases." N.D. Cent. Code, § 65-01-02

Ohio excludes from compensability "[i]njury or disability caused primarily by the natural deterioration of tissue, an organ, or part of the body." ORC Ann. 4123.01.

South Carolina's occupational disease statute begins with a fairly typical definition, but then provides: "No disease shall be deemed an occupational disease when: (1) It does not result directly and naturally from exposure in this State to the hazards peculiar to the particular employment; (2) It results from exposure to outside climatic conditions; (3) It is a contagious disease resulting from exposure to fellow employees or from a hazard to which the workman would have been equally exposed outside of his employment; (4) It is one of the ordinary diseases of life to which the general public is equally exposed, unless such disease follows as a complication and a natural incident of an occupational disease or unless there is a constant exposure peculiar to the occupation itself which makes such disease a hazard inherent in such occupation; (5) It is any disease of the cardiac, pulmonary or circulatory system not resulting directly from abnormal external gaseous pressure exerted upon the body or the natural entrance into the body through the skin or natural orifices thereof of foreign organic or inorganic matter under circumstances peculiar to the employment and the processes utilized therein; or (6) It is any chronic disease of the skeletal joints." S.C. Code Ann. § 42-11-10.

Virginia restricts compensability for ordinary diseases of life such as hearing loss and carpal tunnel syndrome. Va. Code Ann. § 65.2-400. The worker must prove entitlement by clear and convincing evidence. § 65.2-401.

In Wyoming, illnesses and communicable diseases are not covered unless "the risk of contracting the illness or disease is increased by the nature of the employment." Wyoming also excludes preexisting conditions. And an injury resulting "primarily from the natural aging process or from the normal activities of day-to-day living, as established by medical evidence supported by objective findings" is not compensable. Wyo. Stat. § 27-14-102.

Reduction of Benefits Due to Preexisting Condition. An important component of the major contributing cause standard in Arkansas, Florida, Oregon, and South Dakota is that compensability is barred when an injury affects a preexisting condition, unless the injury is a major contributing cause of the condition complained of. New Hampshire and Wyoming appear to go further. The New Hampshire statute excludes from occupational disease coverage any disease that existed at the commencement of the employment. RSA 281-A:2. Wyoming does not cover "any injury or condition preexisting at the time of employment with the employer against whom a claim is made." Wyo. Stat. § 27-14-102.

Under the Georgia statute, "'injury' and 'personal injury' shall include the aggravation of a preexisting condition by accident arising out of and in the course of employment, but only for so long as the aggravation of the preexisting condition continues to be the cause of the disability; the preexisting condition shall no longer meet this criteria when the aggravation ceases to be the cause of the disability." O.C.G.A. § 34-9-1.

Prior to 1971, the Idaho statute covered occupational diseases "or aggravation thereof." In 1971, the aggravation language was deleted. Recently there has been litigation concerning whether the aggravation of a preexisting disease is compensable as an occupational disease.

Many other states address preexisting conditions in a different fashion. They have a statutory mechanism for reducing benefits, rather than eliminating compensability entirely, when a preexisting condition is involved. Typically, the worker is only entitled to benefits based on the disability attributable to the employment, not the disability attributable to the preexisting condition.

In Alabama, if "the degree or duration of disability resulting from an accident is increased or prolonged because of a preexisting injury or infirmity, the employer shall be liable only for the disability that would have resulted from the accident had the earlier injury or infirmity not existed." Code of Ala. § 25-5-58.

Arizona, Delaware, Florida, Iowa, Kansas, Maryland, Michigan, and Utah all have statutory sections which provide that when an occupational disease combines in some fashion with another condition, the worker is only entitled to the compensation that would be payable if the occupational disease were the sole cause of the disability or death.

In California, if an injury or disease aggravates a prior disease, compensation is limited to the proportion of disability "reasonably attributed" to the work-related injury. Cal. Lab. Code § 4750.5.

In Connecticut, "for aggravation of a preexisting disease, compensation shall be allowed only for that proportion of the disability or death due to the aggravation of the preexisting disease as may be reasonably attributed to the injury upon which the claim is based...." Conn. Gen. Stat. § 31-275.

The Idaho statute provides: "In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease." Idaho Code § 72-406.

Under the Mississippi statute, once the worker reaches maximum medical recovery, compensation benefits are reduced if a preexisting condition is a "material contributing factor in the results following injury." Compensation is reduced by the proportion which the preexisting condition "contributed to the production of the results following the injury." Miss. Code Ann. § 71-3-7.

In Nebraska, the "aggravation of a preexisting occupational disease" is compensable but the employer is liable "only for the degree of aggravation of the preexisting occupational disease." R.R.S. Neb. § 48-151.

Specific Conditions Excluded from Basic Coverage or Benefits Limited. Many states either exclude or place restrictions on the compensability of certain types of conditions. Traditionally, there have been limitations on hernias. And either by statute or case law, there have frequently been limitations on the compensability of heart conditions. Restrictions on a variety of conditions have increased in recent years.

The list of states which exclude or limit compensability of mental conditions includes Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, Utah, Washington, and Wyoming.

Arkansas limits benefits in heart and lung cases to situations where "it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment or, alternately, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm." In addition, contagious or infectious diseases are excluded from coverage unless "contracted in the course of employment in, or immediate connection with, a hospital or sanitarium in which persons suffering from that disease are cared for or treated." Ark. Stat. Ann. § 11-9-114.

In Colorado, "'[a]ccident', 'injury', and 'occupational disease' shall not be construed to include disability or death caused by heart attack unless it is shown by competent evidence that such heart attack was proximately caused by an unusual exertion arising out of and within the course of the employment." C.R.S. 8-41-302.

Under the Florida statute "A...disability or death due to the accidental acceleration or aggravation of a venereal disease or of a disease due to the habitual use of alcohol or controlled substances or narcotic drugs, or a disease that manifests itself in the fear of or dislike for an individual because of the individual's race, color, religion, sex, national origin, age, or handicap is not an injury by accident arising out of the employment." Fla. Stat. § 440.02.

In addition, the Florida statute excludes from coverage "tuberculosis arising out of and in the course of employment by the Department of Health at a state tuberculosis hospital, or aggravated by such employment, when the employee had suffered from said disease at any time prior to the commencement of such employment." Fla. Stat. § 440.151.

The Georgia statute limits the compensability of heart and vascular conditions. Alcoholism is not compensable. Drug addiction is not compensable unless it results from treatment for a compensable injury. O.C.G.A. § 34-9-1. Partial loss of hearing due to noise is not compensable. O.C.G.A. § 34-9-280.

Kentucky restricts the compensability of black lung disease to workers who have at least a 20 percent respiratory impairment. KRS 342.732.

Louisiana excludes "[d]egenerative disc disease, spinal stenosis, arthritis of any type, mental illness, and heart-related or perivascular disease" from occupational disease coverage. La. R.S. 23:1031.1.

In Nevada, "[c]oronary thrombosis, coronary occlusion, or any other ailment or disorder of the heart, and any death or disability ensuing therefrom, shall be deemed not to be an injury by accident sustained by an employee arising out of and in the course of his employment." Nev. Rev. Stat. Ann. § 616A.265. Nevada also limits the compensability of "tenosynovitis, prepatellar bursitis, and infection or inflammation of the skin," requiring that "for 90 days next preceding the contraction of the occupational disease the employee has been: (a) A resident of the State of Nevada; or (b) employed by a self-insured employer, a member of an association of self-insured public or private employers, or an employer insured by a private carrier that provides coverage for occupational diseases." Nev. Rev. Stat. Ann. § 617.430.

Virginia excludes conditions of the "neck, back or spinal column" from occupational disease coverage. Va. Code Ann. § 65.2-400.

Burdens of Proof

Preponderance of Evidence. Whether explicitly stated in the statutory scheme or not, in most states the worker must prove compensability by a preponderance of the evidence. A good working definition of that term is contained in several statutes. For example, the Minnesota statute defines the preponderance of the evidence as "evidence produced in substantiation of a fact which, when weighed against the evidence opposing the fact, has more convincing force and greater probability of truth." Minn. Stat. § 176.021. The Kansas statute has a similar

definition: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." K.S.A. § 44-508.

Utah and Louisiana have notable variations on the preponderance of the evidence standard. Louisiana requires that a worker meet a somewhat higher burden in certain occupational disease cases. By statute, there is a rebuttable presumption that a disease contracted during the first twelve months of employment with a particular employer is non-occupational. That presumption can only be overcome "by an overwhelming preponderance of evidence." La. R.S. 23:1031.1. Utah limits compensability of mental conditions and places the burden on the worker to prove both medical and legal causation by a preponderance of the evidence. Utah Code Ann. § 39A-2-402.

Clear and Convincing Evidence. A few states impose a heightened burden of proof. In occupational disease cases, Arkansas requires the worker to prove the causal connection between employment and the disease by clear and convincing evidence. Ark. Stat. Ann. § 11-9-601.

Florida requires clear and convincing evidence for "mental or nervous injuries" and a "mental or nervous injury due to stress, fright, or excitement only" is not compensable. Fla. Stat. § 440.09.

Idaho not only limits the kinds of mental conditions that are compensable, it also requires the worker to prove by clear and convincing evidence that the psychological injury "arose out of and in the course of the employment from an accident or occupational disease...." Additionally, the injury must be the "predominant cause as compared to all other causes combined...." Idaho Code § 72-451.

Kansas limits compensability for emphysema to the situation where "it is proved, by clear and convincing medical evidence to a reasonable probability, that such emphysema was caused, solely and independently of all other causes, by the employment with the employer against whom the claim is made, except that, if it is proved to a reasonable medical probability that an existing emphysema was aggravated and contributed to by the employment with the employer against whom the claim is made, compensation shall be payable for the resulting condition of the workman, but only to the extent such condition was so contributed to and aggravated by the employment." K.S.A. § 44-5a01.

Louisiana requires clear and convincing evidence for mental and heart-related conditions. La. R.S. 23:1021.

The Maine statute provides that: "Mental injury resulting from work-related stress does not arise out of and in the course of employment unless it is demonstrated by clear and convincing evidence that: A. The work stress was extraordinary and unusual in comparison to pressures and tensions experienced by the average employee; and B. The work stress, and not some other source of stress, was the predominant cause of the mental injury." 39-A M.R.S. § 201.

Under its occupational disease statute, Oregon requires clear and convincing evidence to prove a mental disorder arose out of and in the course of employment. ORS § 656.802.

In South Dakota, claims for mental disability resulting from mental stress are not compensable. "A mental injury is compensable only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence." S.D. Codified Laws § 62-1-1.

Under the Virginia statute, ordinary diseases of life are only compensable if the worker proves entitlement by clear and convincing evidence. Va. Code Ann. Sec. 65.2-401.

Under the Wyoming statute, a mental injury is not covered "unless it is caused by a compensable physical injury, it occurs subsequent to or simultaneously with, the physical injury and it is established by clear and convincing evidence...." Wyo. Stat. § 27-14-102.

Presumptions

Statutory presumptions with respect to compensability are not the primary subject of this review. However, it is worth noting that a number of states have presumptions of compensability with respect to workplace deaths and certain conditions suffered by law enforcement personnel and firefighters. There are also a variety of statutory presumptions regarding whether an injury is compensable if alcohol or illegal drug use are implicated.

The Hawaii statute is unusual in that it establishes a rebuttable presumption, "in the absence of substantial evidence to the contrary...[t]hat the claim is for a covered work injury." HRS § 386-85.

The Illinois statute establishes a rebuttable presumption that a coal minor who is suffering from pneumoconiosis and worked as a coal miner for 10 years or more has a compensable occupational disease. § 820 ILCS 310/1.

Louisiana has established a rebuttable presumption that a disease is not compensable if the employment exposure was for less than twelve months. The presumption can only be overcome by the overwhelming preponderance of the evidence. La. R.S. 23:1031.1.

The South Dakota statute has a specific provision addressing liability in the event that a claim is denied under workers' compensation because it is not work-related. Such "injury is presumed to be non-work-related for other insurance purposes, and any other insurer covering bodily injury or disease of the injured employee shall pay according to the policy provisions." S.D. Codified Laws § 62-1-13.

Objective Findings

A number of states have enacted an "objective findings" requirement. The list includes Arkansas, Florida, Kentucky, Louisiana, Missouri, Montana, Nebraska, Nevada, North Dakota, Oregon, and South Dakota. But the provisions do not necessarily all read the same. For example, the South Dakota standard simply states that: "In any proceeding... evidence concerning any injury shall be given greater weight if supported by objective medical findings." S.D. Codified Laws § 62-1-15. That is quite different

*(**STATUTORY** continued on p. 28)*

Workers' Compensation Agencies Websites

by Monroe Berkowitz[1]

Introduction

The World Wide Web is revolutionizing the world and state workers' compensation agencies are not immune to its influence. As of early 2001, all state workers' compensation agencies have websites, each with a wealth of information about its programs.[2] The agencies' website addresses that were evaluated are listed in the Appendix of this article.[3]

A number of years ago we examined annual reports of the state agencies and graded them on a number of criteria.[4] That article caused a bit of controversy and we like to think resulted in some positive gains. Agencies without annual reports began to issue them, and other agencies took various steps to improve the presentation and content of their reports.

Evaluating the reports required us to make assumptions about the role and function of the annual report. We thought that it was essential that agencies use their annual reports to let stakeholders know about agency activities during the year. If new legislation was on the books, the annual report was an ideal way to tell the world what effects it had. The annual report seemed an obvious instrument to report to the legislature and to the public about the safety and health status of the working population as well as the trends in the number and type of claims filed.

At the outset of our evaluation of annual reports, we recognized that the printed report had its limitations. It had a finite number of pages and the editors of the report had to pick and choose what to include and what to exclude. Too lengthy a report might turn away readers; too short a report might turn out to be superficial and not worthy of perusal.

A workers' compensation agency website is free of at least some of these constraints. Editorial judgment is still necessary, perhaps even more so than in the case of the printed document, but there is no question that the world of the hyperlink is different than the universe of the printed page. Changes in the law can be summarized and commented upon in the body of the website, but there is no reason why the full text of the changes, or even the full text of the law, cannot be available. The hyperlink from the website takes the reader to other sites or downloads where the changes or the law can be accessed without difficulty.

Much the same is true of the Board or Court decisions. Significant decisions that change the direction of the law, or that reverse previous thinking, can be highlighted, but the full text of all decisions can be available on the web and accessed via a hyperlink to another web page, site, or downloadable document. The editorial decisions about which cases to select, or which aspects of particular decisions to emphasize are still there, but the readers can skip over these excerpts and go to the full text of the decisions. If they have the time and the interest, they are able to make their own judgments about importance.

Criteria and Grading

Websites are clearly a revolutionary channel of communication and can be evaluated on a number of criteria. In this first examination we have confined our attention to fourteen different content items and a miscellaneous category. Table 1 shows these content categories at the top of each column. For each of these items, we devised grading criteria that are reproduced in Table 2. We have not attempted to make judgments about the more technical aspects of the websites such as their navigability or interactivity, although these are also important qualities of any website. In future examinations of these websites we hope to be able to delve into these matters.

Mission Statement. Turning to content, the first item evaluated is the Mission Statement. As is true of each of the content items, the grades given range from 1, the highest, to 5, the lowest. A grade of 1 is given if the agency's Mission Statement exists and if it is well defined, clear and concise, and if it can easily be found from the main page. At the other extreme, a grade of 5 is given if the Mission Statement does not exist or if it cannot be found. The middle grade is given if the Mission Statement exists and can be found but if is not well defined, clear and concise. The grades 2 and 4 are not specifically defined but are reserved for the intermediate situations.

On the whole, most states did well in presenting their missions prominently on their sites. Thirty-six states earned the best grade of 1. One state, Delaware, received a grade of 3, and one state, Mississippi, received a 4. Thirteen states received a grade of 5 since their Mission Statements could not be located.

Overview Statement. Much the same grading criteria are used for the second item, the Overview Statement. The Overview Statement serves some of the same purposes as does the Mission Statement, but there are differences. We assume that every website should have a summary statement, preferably at the outset, that tells what the website is all about. In the cases of these websites of the workers' compensation agencies, the person opening the website should be informed what workers' compensation is all about and something of what they can expect to find at the website.

As with the Mission Statement, most states did an adequate job of providing an Overview Statement for their website users. While twelve states had no overview statements and received scores of 5, thirty-one states earned the grade of 1, with an additional four states receiving a 2. Three states earned the passing grade of a 3, with one state receiving a grade of 4.

Date Last Updated. The Date Last Updated has the great advantage of an objective scale. If updated within the last month, it was given the highest grade. Updating within three months earned a grade

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Table 1
Workers' Compensation Website Evaluation

	Mission Statement	Overview Statement	Date Last Updated	Statistical Information	List of Publications	Forms	Contact Information	Special Funds	Text of Law	Explanation/ Application of the Law	Recent Legislative Changes	Court Decisions	Board Decisions	Rules and Regulations	Miscellaneous	Total Grade
Alabama	5	1	1	5	4	4	3	5	5	1	5	5	5	1	5	55
Alaska	1	5	5	5	5	1	2	1	1	1	5	1	1	1	4	39
Arizona	1	2	3	1	5	1	3	1	1	5	5	5	5	1	4	43
Arkansas	1	3	5	5	5	1	2	1	5	1	5	5	1	1	2	43
California	1	1	1	1	1	2	3	1	1	1	1	5	1	1	1	22
Colorado	5	1	1	1	1	1	2	1	1	1	1	5	5	1	1	28
Connecticut	1	1	1	5	1	1	3	1	1	1	1	5	1	1	4	28
Delaware	3	5	5	5	5	5	4	5	5	5	5	5	5	1	4	67
District of Columbia	5	2	5	5	5	1	3	5	5	5	5	5	5	5	5	66
Florida	1	4	5	1	1	1	2	1	1	1	5	5	5	1	1	35
Georgia	1	1	5	1	1	1	3	1	3	1	1	5	5	2	4	35
Hawaii	1	5	5	1	3	5	3	5	1	5	5	5	4	1	3	52
Idaho	1	1	1	1	5	1	3	5	1	1	1	1	1	1	2	26
Illinois	5	3	1	1	1	1	3	5	2	1	3	1	5	1	2	35
Indiana	5	5	5	5	5	1	3	1	1	2	1	5	5	5	4	53
Iowa	5	5	2	5	1	1	2	1	1	1	1	4	1	1	3	34
Kansas	1	1	5	1	5	1	3	5	5	1	5	5	1	5	3	47
Kentucky	1	1	1	1	1	1	3	1	1	1	1	5	5	1	3	27
Louisiana	5	5	5	1	1	1	3	1	5	1	5	5	5	1	3	47
Maine	1	5	1	1	1	1	3	5	1	1	5	1	1	1	4	32
Maryland	1	1	1	1	1	1	1	5	5	1	1	5	5	5	2	36
Massachusetts	5	1	5	5	1	1	1	5	1	1	5	5	1	1	3	41
Michigan	1	5	1	1	1	1	1	1	1	1	1	1	1	1	1	19
Minnesota	1	1	5	1	1	1	1	1	1	1	5	5	5	1	3	33
Mississippi	4	1	5	1	5	1	2	5	1	1	5	3	5	1	2	42
Missouri	1	5	4	5	2	1	2	1	1	1	5	5	5	1	4	43
Montana	1	1	5	1	5	1	3	5	1	1	1	1	5	1	2	34
Nebraska	1	1	1	1	1	1	2	1	1	1	5	1	5	1	2	25
Nevada	1	1	5	1	1	1	3	5	1	1	1	5	5	1	3	35
New Hampshire	5	1	5	5	5	1	3	1	4	1	1	5	5	4	4	50
New Jersey	1	1	2	1	1	1	3	1	1	1	1	1	1	1	2	19
New Mexico	1	5	1	1	1	1	3	5	2	1	2	5	5	1	3	37
New York	1	1	5	5	1	1	3	5	1	5	1	1	5	1	3	39
North Carolina	1	1	1	5	1	1	3	5	1	1	5	1	1	1	1	29
North Dakota	1	1	1	1	1	1	2	5	5	1	1	5	5	1	3	34
Ohio	1	1	5	5	1	1	2	5	5	1	5	5	5	5	1	48
Oklahoma	1	3	5	3	5	5	3	3	2	1	5	5	5	5	4	55
Oregon	1	1	1	1	1	1	1	1	1	5	1	1	1	1	2	20
Pennsylvania	1	1	1	5	1	3	2	1	1	1	1	5	5	5	1	34
Rhode Island	1	1	1	5	2	5	2	5	1	5	5	5	5	5	5	53
South Carolina	1	1	3	1	2	3	3	1	1	3	5	5	5	1	3	38
South Dakota	5	2	4	5	5	1	3	5	5	1	5	5	5	1	4	56
Tennessee	1	1	5	5	5	1	2	1	3	1	5	5	5	1	4	45
Texas	1	1	1	1	1	1	3	5	1	1	1	4	1	1	2	25
Utah	1	5	5	5	3	3	1	1	1	1	3	1	1	1	3	35
Vermont	5	5	1	5	1	1	3	1	1	1	1	4	1	1	4	35
Virginia	1	1	5	5	5	1	3	1	1	1	5	1	1	1	4	36
Washington	1	1	1	1	1	1	2	1	1	1	1	4	1	1	1	19
West Virginia	1	1	1	1	1	1	3	5	3	1	5	5	5	1	2	36
Wisconsin	5	2	2	1	1	1	3	1	1	1	1	1	1	1	2	24
Wyoming	5	1	5	5	5	3	2	5	1	1	5	5	5	1	5	54

Table 2
Grading Criteria

Mission Statement
1 Mission statement exists, well-defined, clear, concise, and easily found from main page
2
3 Mission statement exists, but not well-defined. Found within the page.
4
5 Mission statement does not exist.

Overview Statement
1 Overview statement exists, clearly defined, concise.
2
3 Overview statement exists, not explicit and within page.
4
5 Overview statement does not exist.

Date Last Updated
1 updated within last month
2 updated within last three months
3 updated within last six months
4 updated within last year
5 date updated not given

Statistical Information
1 statistics of case type, number of cases per year, etc. Complete statistics.
2
3 statistics exist, but incomplete
4
5 statistics do not exist

List of Publications
1 exists, downloadable
2 exists, accessed by mail
3 exists, but no accessibility
4
5 does not exist

Forms
1 exists, downloadable
2
3 list exists, but not downloadable; can be accessed by mail
4
5 does not exist

Contact Information
1 phone, fax, e-mail, toll-free number, mailing address, and disability services
2 phone, fax, e-mail, toll-free number, and mailing address
3 any two, three, or four of the above
4 any one of the above
5 none of the above

Special Funds
1 fund's name and description
2
3 fund's name
4
5 does not exist

Text of Law
1 full text on the web page for viewing
2
3 exists, but not full text, can be accessed by mail
4
5 does not exist

Explanation/Application of Law
1 exists in the form of rate tables, assessment rates, maximum and minimum benefits, computation tables, etc.
2
3 exists, but not in detail and not well-defined
4
5 does not exist

Recent Legislative Changes
1 exists and details of change provided
2
3 exists, but no details provided
4
5 does not exist

Court Decisions
1 exists in full detail of cases over a number of years
2
3 listed, but no details given
4 no explicit link, but can access through link to state home page
5 does not exist

Board Decisions
1 exists with details of case
2
3 listed, but no details given
4 no explicit link, but can access through link to state home page
5 does not exist

Rules and Regulations
1 listed, with detailed link to it on website
2 listed, but can only be accessed by mail order
3 mentioned, but no accessibility
4 vaguely touched upon in the overview statement
5 not listed

Miscellaneous
1 Spanish services, FAQ, newsletter, annual report, claims searches, etc.
2 any three or four of the above
3 any two of the above
4 any one of the above
5 none of the above

of 2; within the last six months, the grade of 3; updating within the last year was given the grade of 4; and a grade of 5 was reserved for those sites for which an updating date could not be located. Admittedly, the choice of the time periods is essentially arbitrary, but we hope reasonable. As with the other grading criteria, we welcome comments and suggestions for changes.

On the whole, the states did well on their updating practices. Twenty-one of the states earned the highest grade since they had updated their sites in the last month. An additional three states earned the grade of 2 since their updating occurred within the last three months. Two states had updated within the last six months and earned a grade of 3. The remaining states earned the lower grades, with twenty-three states receiving a grade of 5 since the date of their last updating could not be found.

Statistical Information. Since we come to the examination of websites from the perspective of the Annual Report, we are most interested in the presentation of statistical information, but found it difficult to devise purely objective criteria. In this first attempt to evaluate how websites handle statistics, we use essentially a three-point scale, reserving the other two grades for intermediate cases. We give a grade of 1 where there are reasonably complete data as to number of work injury cases per year and information on case type and disposition. We would like to see cases aggregated according to year of injury and compared in what has been called a "comparable vintage" method. But we settle for far less here and give the highest grade if there are reasonably complete data, no matter how the cases are aggregated.

If there are no data on statistics at the website, the grade is a 5, and if there are some data, but these are obviously incomplete in one way or another, the grade is a 3. An interesting dichotomy emerged for this category of states either providing statistical information in a fairly complete form, or else providing no statistical information through their websites at all. Twenty-eight states had a grade of 1, indicating reasonably complete statistical information. However, twenty-two states earned a grade of 5, in spite of what we thought was a most liberal standard. Only one state, Oklahoma, earned a grade of 3.

Obviously the website offers a wonderful opportunity to report on the activity of the agency as summarized in the statistical record of cases handled. We intend to devote a future article to this subject. In that article, we will explore the different methods of aggregating and reporting on cases handled within the agency. We will also investigate the extent to which the agencies fail to report on data on and the extent to which the apparent deficiencies can be attributed to the agencies' failure to compile the statistics in the first place.

Publications. We thought it important that the website had a list of the publications available from the agency, and that these publications, in general, should be downloadable. Twenty-nine states achieved a grade of 1 for achieving that goal. We had no way of judging the completeness of the list of publications but graded the agencies on the basis of how the publications could be accessed. A grade of 2 was given if the list of publications was present at the site and they could be accessed by mail. One grade lower, a 3, was given if the list was published but without any information about accessibility. The lowest grade was given (sixteen states) if there were no list of publications.

Forms. We examined each site to determine if the forms the parties needed to process a case were accessible and downloadable. Having forms available on the web is certainly one of the benefits of the new technology. Forms can be a nuisance to stockpile and to keep on hand, especially for the worker or the small employer. Forms change, and it is difficult to know what is current and what is outmoded. Having the current form on the web and easily accessible is a real timesaving convenience.

In our scoring scheme, a grade of 1 was given if the forms are present and downloadable; the middle grade of 3 was given if the forms were present but not downloadable and a 5 if the forms were not present. In most states, forty-one out of the fifty-one states with websites, the forms were on the website and were downloadable. Only four states had the lowest grade since we could not locate their forms on the website.

This availability of the forms when needed illustrates how the websites differ from the annual reports. The websites are, or certainly could be if the agencies took maximum advantage of all the web's features, a positive aid in the filing and processing of cases. Thus, the website becomes more than an informational medium and more than a public relations tool, although, certainly, it serves both these ends as well.

Contacts. The use of the web to process cases is also relevant for the next category, "contact information." Robert W. McDowell, Webmaster of the North Carolina Industrial Commission comments, in an e-mail to the author, states that "contacts" is one of the four things he looks for when examining a website. McDowell writes: "CONTACTS: Can I easily find the name, title, mailing address, telephone number, and e-mail address of the key officials whom I may wish to contact if I am a claimant, employer, insurance carrier, third-party administrator, or attorney representing any of these parties? Agencies that omit their MAIN mailing address and phone numbers from their home page do a disservice to all visitors. I also hate to ransack a site to turn up this information."

In our scoring system for Contacts, we give the highest score to the agency that lists the phone, fax, toll-free telephone number, e-mail address, and disability services of the principal office and the key officials. The next highest score goes to the agency that lists the phone, fax, e-mail, toll-free number and mailing address. A grade of 3 is given for any two, three, or four of the above; a 4 is given for any one of the above and a 5 for none of the above.

Only six states scored in the highest category, but another fifteen states scored 2. Not surprisingly, no state scored in the lowest category. All of them had some contact information, with the majority of states (twenty-nine) scoring a 3 for having some combination of selected contact information on their websites.

Special Funds. In the next several categories we move into the realm of the provisions of the law. We begin with whether the sites provide any information about any of the special funds provisions contained in the state's legislation. If the fund's name is listed without any further information (one state), we assign the middle grade of 3. If the fund's identification is supplemented by a description of the fund, that earns the highest grade (twenty-

Table 3
Workers' Compensation Website Scores

State	Rating
Alabama	55
Alaska	39
Arizona	43
Arkansas	43
California	22
Colorado	28
Connecticut	28
Delaware	67
District of Columbia	66
Florida	35
Georgia	35
Hawaii	52
Idaho	26
Illinois	35
Indiana	53
Iowa	34
Kansas	47
Kentucky	27
Louisiana	47
Maine	32
Maryland	36
Massachusetts	41
Michigan	19
Minnesota	33
Mississippi	42
Missouri	43
Montana	34
Nebraska	25
Nevada	35
New Hampshire	50
New Jersey	19
New Mexico	37
New York	39
North Carolina	29
North Dakota	34
Ohio	48
Oklahoma	55
Oregon	20
Pennsylvania	34
Rhode Island	53
South Carolina	38
South Dakota	56
Tennessee	45
Texas	25
Utah	35
Vermont	35
Virginia	36
Washington	19
West Virginia	36
Wisconsin	24
Wyoming	54
Average Score	38

seven states), and if no information about the fund is present, we assign the lowest grade. In this category, twenty-three states have no mention of their funds and apparently do not consider their websites as the appropriate medium to dispense information about this aspect of their operations.

Text of the Law. We next consider the presence of and access to the text of the law. If the full text exists and can be accessed, then we assign a grade of 1. If some mention of the law is present with perhaps a summary and some mention of how a copy of the law can be obtained, we assign a grade of 3. If the text does not exist and no mention is made of it, the grade assigned is a 5. Ten of the states make no mention of their laws' provisions and receive the lowest grade. However, setting forth the text of the law is an obvious use of the website and thirty-four states receive the highest grade. The remaining seven states receive a grade of 2, 3, or 4.

Explanation/Application of the Law. The text of the law by itself can be rather sterile. The next category, Explanation/Application of the Law, is a rather broad one. Our judgment of this category necessarily has to be subjective. If no explication of the law is present, we assign the lowest grade (seven states). The highest grade is given if some illustration and application of the provisions of the law is present in the form of tables, assessment rates, maximum and minimum benefits, computation tables and the like (forty-two states). One state receives a grade of 2, and one state is graded as a 3 for having some explanation but not any detailed or well-defined examination of how its laws are applied.

Recent Legislative Changes. The website can be used to great advantage in pointing out what is new. Certainly, one of the areas where recent changes are important is in the actions of the legislature in amending the basic statute. We give the highest grade if recent legislative changes are listed and details of the changes are explained (twenty-two states). An additional state was assigned a grade of 2. Two grades of 3 were given, but there were twenty-six states with a grade of 5. The lowest grade was assigned where there was no mention of recent legislative changes. We recognize that we are unable to distinguish cases where the websites fail to list changes that have taken place and those states where the legislature made no changes in the law.

Court and Board Decisions. In these categories evaluating the presentation of Court and Board decisions, we can feel more comfortable that some action has been taken and that some decisions have been issued. If no mention is made of these decisions, we can be more confident than in the case of legislative changes that the developers of the website simply omitted mentioning them. Sites where they do not exist earn the lowest grade. When it comes to Board decisions, thirty-one states received a 5, one less than when it comes to Court decisions. If these decisions exist with some explanation of the details, the grade is a 1. Nineteen states in the case of Board decisions had 1's, and that premier grade was given to fourteen jurisdictions in the case of Court decisions. The intermediate grade of 3 was reserved for cases where decisions are listed but without details. A 4 was assigned if the Board or Court decisions can be found elsewhere on the Internet, but if the workers' compensation site does not lead the user there. A resourceful user, for example, might navigate to the state's home page to look for such information if they wanted to search for it; a simple link on the workers' compensation page could immediately improve this situation.

Rules and Regulations. Any of the parties having business with the agency must be concerned not only with the text of the law and the Court and Board decisions interpreting the statute, but also with the rules and regulations issued by the administering agency. If these rules and regulations are listed and accessible through the website, we give the grade of 1 (forty-one states). If they are listed but accessible only by mail or phone request, the grade is a 2 (one state). Mention of the rules and regulations but no provision for accessibility would earn a grade of 3, although no states received this grade. The lower grade of 4 is given if the rules and regulations are given some mention, possibly in the overview statement, but without specific listing or means of access (one state). Finally the lowest grade of 5 is assigned if no rules or regulations are mentioned (eight states).

Miscellaneous. The last category is reserved for a variety of provisions. In essence, it is a way to give extra credit, as it were. If the site has Spanish or other foreign

Table 4
Workers' Compensation Website Grades

State	Rating	Grade
Michigan	19	A
New Jersey	19	A
Washington	19	A
Oregon	20	A
California	22	A
Wisconsin	24	A
Nebraska	25	A
Texas	25	A
Idaho	26	A
Kentucky	27	A
Colorado	28	A
Connecticut	28	A
North Carolina	29	A
Maine	32	B
Minnesota	33	B
Iowa	34	B
Montana	34	B
North Dakota	34	B
Pennsylvania	34	B
Florida	35	B
Georgia	35	B
Illinois	35	B
Nevada	35	B
Utah	35	B
Vermont	35	B
Maryland	36	B
Virginia	36	B
West Virginia	36	B
New Mexico	37	B
South Carolina	38	B
Alaska	39	B
New York	39	B
Massachusetts	41	C
Mississippi	42	C
Arizona	43	C
Arkansas	43	C
Missouri	43	C
Tennessee	45	C
Kansas	47	C
Louisiana	47	C
Ohio	48	C
New Hampshire	50	D
Hawaii	52	D
Indiana	53	D
Rhode Island	53	D
Wyoming	54	D
Alabama	55	D
Oklahoma	55	D
South Dakota	56	D
District of Columbia	66	F
Delaware	67	F

language service, a list of Frequently Asked Questions, a newsletter, an annual report, claims searches, or extras of this sort, we give it a grade of 1. That grade was given to eight states. Some of the valuable extras we found include the capability to file claims, apply for coverage, and process electronic payments online.

We recognize that the list and the number of items is arbitrary but we give the grade of 2 if the site has any three or four of the above (twelve states), a 3 for any two (thirteen states), a 4 for any one (fourteen states), and a 5 if none of the above items can be identified (four states).

Conclusions

The major findings of these evaluations are presented in Tables 3 and 4. Table 3 lists the total scores for each state and the average overall score of 38. Table 4 provides the same information but ranks states in scoring order and assigns an overall grade of A, B, C, D or F to each of the states. Each semester, professors at academic institutions have this unenviable task of assigning final grades based on a variety of factors. Here we have only the raw scores compiled as indicated.

Fifteen categories were scored for each state agency's website. Thus the best score possible, achieved if the state earned a 1 in each of the categories, would be 15. The worst score, 75, would be given if the state earned a grade of 5 in each category. This exercise is like a game of golf, with the lowest scorer being the winner. The letter grades were assigned as follows: scores below 30 received an A; from 30 to 39 is a B; from 40 to 49 is a C; from 50 to 59 is a D; and 60 or above received an F.

Thirteen states, Michigan, New Jersey, Washington, Oregon, California, Wisconsin, Nebraska, Texas, Idaho, Kentucky, Colorado, Connecticut, and North Carolina, all received the highest grade of A. These are all excellent sites according to our scoring categories. As shown in Table 4, there is still room for improvement among the ten states that scored in the D and F categories. Yet even during the course of this study we observed improvements in the sites, both in the number of states supporting them and in the content offered. Many changes will undoubtedly be made as states continue to find that more and more people access their sites and demand up-to-date information, the ability to access the latest rules and regulations, and downloads of the most current forms that are used.

Websites may be just the beginning of the use of electronic media for workers' compensation issues. Perhaps we can look forward to an immediate response to safety problems, two-way communication between stakeholders and the agency, and perhaps even the advent of virtual trials. But if websites are just the beginning, they may be the best place to start. We continue to welcome your comments as to the appropriate scoring categories as well as the methods used to evaluate within each category.

Appendix

State	Website Address (URL)
Alabama	http://www.dir.state.al.us/wc.htm
Alaska	http://www.labor.state.ak.us/wc/wc.htm
Arizona	http://www.ica.state.az.us/
Arkansas	http://www.awcc.state.ar.us/
California	http://www.dir.ca.gov/DWC/dwc_home_page.htm
Colorado	http://workerscomp.cdle.state.co.us/
Connecticut	http://wcc.state.ct.us/
Delaware	http://www.delawareworks.com/divisions/industaffairs/workers.comp.htm
District of Columbia	http://does.ci.washington.dc.us/workerscomp.html
Florida	http://www.fdles.state.fl.us/wc/
Georgia	http://www.ganet.org/sbwc/
Hawaii	http://www.state.hi.us/dlir/hiosh/index.htm
Idaho	http://www2.state.id.us/iic/index.html
Illinois	http://www.state.il.us/agency/iic/
Indiana	http://www.state.in.us/wkcomp/index.html
Iowa	http://www.state.ia.us/iwd/wc/index.html
Kansas	http://www.hr.state.ks.us/wc/html/wc.htm
Kentucky	http://dwc.state.ky.us/
Louisiana	http://www.ldol.state.la.us/owca.asp
Maine	http://www.state.me.us/wcb/
Maryland	http://www.charm.net/~wcc/
Massachusetts	http://www.state.ma.us/dia/
Michigan	http://www.cis.state.mi.us/wkrcomp/home.htm
Minnesota	http://www.doli.state.mn.us/workcomp.html
Mississippi	http://www.mwcc.state.ms.us/
Missouri	http://www.dolir.state.mo.us/wc/index.htm
Montana	http://erd.dli.state.mt.us/WorkCompClaims/WCChome.htm
Nebraska	http://www.nol.org/home/WC/
Nevada	http://dirweb.state.nv.us/
New Hampshire	http://www.expi.com/dol/dol-wc/index.html
New Jersey	http://www.state.nj.us/labor/wc/Default.htm
New Mexico	http://www.state.nm.us/wca/
New York	http://www.wcb.state.ny.us/
North Carolina	http://www.comp.state.nc.us/
North Dakota	http://www.ndworkerscomp.com/
Ohio	http://www.bwc.state.oh.us/
Oklahoma	http://www.oklaosf.state.ok.us/~okdol/workcomp/index.htm
Oregon	http://www.cbs.state.or.us/wcd/
Pennsylvania	http://www.li.state.pa.us/bwc/
Rhode Island	http://www.dlt.state.ri.us/
South Carolina	http://www.wcc.state.sc.us
South Dakota	http://www.state.sd.us/state/executive/dol/dlm/dlm-home.htm
Tennessee	http://www.state.tn.us/labor-wfd/wcomp.html
Texas	http://www.twcc.state.tx.us/
Utah	http://www.labor.state.ut.us/indacc/indacc.htm
Vermont	http://www.state.vt.us/labind/wcindex.htm
Virginia	http://www.vwc.state.va.us/
Washington	http://www.wa.gov/lni
West Virginia	http://www.state.wv.us/bep/wc/default.HTM
Wisconsin	http://www.dwd.state.wi.us/wc/default.htm
Wyoming	http://wydoe.state.wy.us/wscd/

Endnotes

1. I wish to acknowledge the contributions of Rittik Chakrabarti and Ashim Gupta, research assistants in the Bureau of Economic Research at Rutgers University. They not only spent weeks searching for the sites but they were most helpful in devising the criteria and applying these criteria to the individual states. Without their aid and assistance, this article could not have been written. Needless to say I bear the responsibility for any errors or omissions.

2. When the initial research for this article was being compiled, four states still did not have workers' compensation websites as of December 1, 1999 (Delaware, Hawaii, North Dakota, and Virginia). This article reviews the websites for all 50 states and the District of Columbia. We have not included an appraisal of the websites for the Federal Employees Compensation Act or the Longshore and Harbor Workers program. A preliminary draft of this article was posted online in July 2000, with an opportunity for states to comment on the criteria and their own grades. We received feedback from fourteen states and are grateful for their input. All of their comments were considered and have contributed to this final version of the article. While this research has taken place over the course of more than a year, all sites and grades were reviewed by Florence Blum and Elizabeth Yates at Workers' Compensation Policy Review within the February - March 2001 timeframe, just prior to the publication of this article. This should ensure that this article is as up-to-date as print media reviewing electronic media can be.

3. Our thanks to Robert McDowell of the North Carolina Industrial Commission for supplying us with a comprehensive and updated list of these websites during our research.

4. Berkowitz, Monroe and Guy Pascale. 1993 "Annual Reports of Workers' Compensation Agencies." *John Burton's Workers' Compensation Monitor* 6, No. 3 (May/June):1-7.

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*(**COSTS** continued from p. 14)*

However, it is probably the case that the typical litigant would have more potential workers' compensation benefits than the average claimant denied for MCC, because the more the damages (lost earnings and medical expenses) associated with the injury, the more likely the denied claimant would be to sue. So, we will round .91 up to 1, and say that:

(Cost of average litigant's potential WC benefits) = (cost of average WC disabling claim)

The total damages should denied claimants be allowed to sue can be written as:

(Number of Civil Suits) X (Cost of average Civil Suit)

Making substitutions from the equations above, this can be rewritten as

[S X (.176) X (.35) X (Number of Accepted and Settled Claims)] X

B X (cost of average WC disabling claim)

Next, note that:

(Total cost to employers for benefits paid on disabling claims) =

(Number of Accepted and Settled Claims) X (cost of average WC disabling claim).

That allows us to write that:

Total damages in Civil Suits =

S X (.176) X (.35) X B X (total cost to employers for benefits paid on disabling claims),

which expresses potential damages from tort costs as a fraction of total benefit paid on disabling claims.

Using the lower bounds of our estimated ranges of values for S and B thus leads to the conclusion that the cost in damages of allowing denied claimants to sue would be

.05 X .176 X .35 X 1.5 = .0046

or about half a percent of the total cost of benefits paid on disabling claims. Using the upper bound values for S and B raises that percentage to

.4 X .176 X .35 X 4 = .098

or about 10 percent of the total cost of benefits paid on disabling claims.

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(***STATUTORY*** *continued from p. 20)*

from the Oregon requirement that compensability must be "established by medical evidence supported by objective findings." ORS § 656.005.

Conclusion

Statutory causation standards vary throughout the nation. This survey provides an overview of many different approaches. In the last decade, four states have enacted a major contributing cause standard that applies to a broad sweep of cases and eliminates compensability unless the work is the primary or preponderant cause of the worker's condition. Those states are Oregon (1991), Arkansas (1993), Florida (effective 1994) and South Dakota (1995). An important component of the MCC standard is to deny workers' compensation benefits when the worker has a preexisting condition and employment is not a major contributing cause of the condition complained of. In contrast to the MCC standard, many states choose to reduce benefits rather than bar compensability when a preexisting condition is involved. A number of states also use a more surgical approach, reducing or eliminating compensability for certain specific types of cases, rather than adopting an across-the-board exclusion.

Raising the compensability bar has had significant implications for the exclusive remedy. A number of courts have held that an employee can sue an employer in tort when the worker is unable to meet the heightened causation standard under the workers' compensation law. Several of those court decisions will be reviewed in the May/June 2001 issue of the *Workers' Compensation Policy Review.*

Endnotes

1. This is not a review of how the courts have interpreted statutory compensability standards. The views expressed here are the author's alone.