Vol 4 Issue 2 March/April 2004

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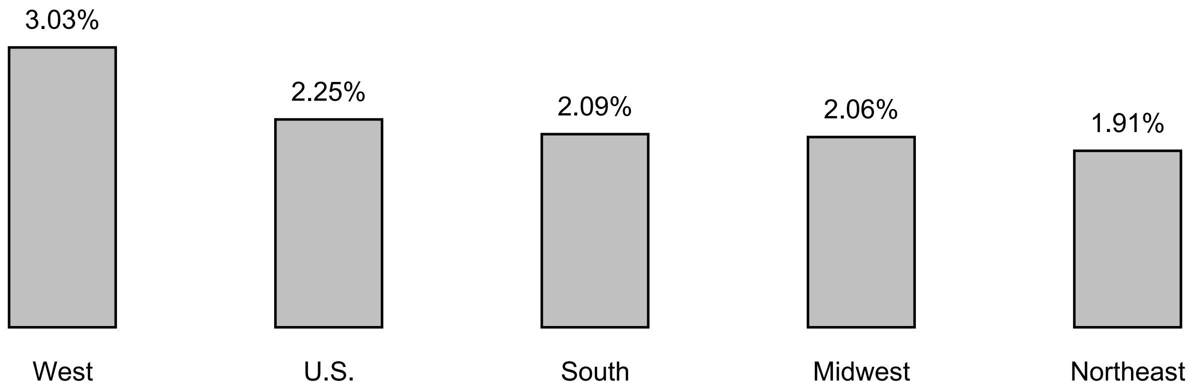
This issue is being distributed in May 2004. Readers should expect the next issue in June 2004.

Summary of the Contents

One attribute of a competitive economy is that some firms experience financial difficulties and a few do not survive. When a company is insolvent or otherwise economically distressed, bankruptcy law allows the firm an opportunity to attempt a fresh start by shielding the firm's remaining assets from collection efforts for its accumulated debts. Payments of workers' compensation benefits may be affected for bankrupt employers. Robert Aurbach provides a comprehensive analysis of self-insuring employers that file for bankruptcy, and concludes that the practical effects on injured workers can be devastating. Payments for ongoing medical and rehabilitation services and for cash benefits can cease. Aurbach proposes an amendment to the Federal Bankruptcy Code that would help ameliorate the adverse consequences for workers receiving workers' compensation benefits when their employers enter bankruptcy.

The national average of the employers' costs of workers' compensation was 2.25 percent of payroll in 2003. However, as discussed by Blum and Burton, these costs varied among employers based on the characteristics of the firms and their employees. Thus, as shown in Figure A, workers' compensation costs varied from 1.91 percent of payroll for employers in the Northeast to 3.03 percent of payroll in the West. Similar differences in costs were found among industries, ranging from 1.85 percent of payroll in the service-producing sector to 5.75 percent of payroll in mining and construction. There are also differences among occupations, among establishments of different size, and between unionized and nonunionized firms.

Figure A - Workers' Compensation Costs as a Percentage of Gross Earnings by Region



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Workers' Compensation and Bankruptcy: Reconciling Systems in Conflict

by Robert M. Aurbach[1]

Where the participation of workers in a state workers' compensation system is mandatory,[2] and employers are protected by an exclusive remedy provision, logic and a sense of justice dictate that an irreducible minimum requirement of that system must be the provision to those injured workers of whatever benefits the law promises. State courts generally will not support the relinquishment of common law remedies against the employer for an on the job injury without something being reliably offered in return, and state legislatures generally will not ignore either disabled constituents who have no remedy or the burden of those same constituents on societal safety nets. The state makes promises to its workers through workers' compensation laws, and the state is uncomfortable when those promises are broken.

If the employer has purchased a workers' compensation policy from a private insurance carrier, or if the employer's liability is underwritten by a state fund, the employer's financial condition as an ongoing business entity is not relevant to the payment of its injured workers. An employer can literally cease to exist, and the insurer or fund is still obligated to pay benefits, pursuant to the insurance contract, for as long as liability on claims incurred under the policy exists.[3] However, most states[4] allow some form of "self-insurance." Under such a plan, the employer or a group of employers, after having demonstrated sufficient financial strength and stability to satisfy state regulators, is permitted to assume its own risk of workers' compensation losses, subject to state regulatory oversight and requirements.[5] Where the employer assumes its own risk of loss, the economic vicissitudes of the employer can have a profound impact on the provision of benefits to injured workers, and the promise of prompt fair payment of benefits required by law is jeopardized.

When an employer is insolvent, or otherwise economically distressed, the Federal Bankruptcy Code offers a safe haven from creditors and provides an opportunity to the employer to apply its present assets to the debts that it has accumulated, including workers' compensation liabilities, and obtain a permanent injunction from the court against any further collection efforts addressing those debts. This "fresh start" (sometimes "second chance") philosophy in bankruptcy is at the heart of the structure and interpretation of the law, when the Chapter 11 reorganization provisions are invoked by the economically troubled company. To understand the impact of the Federal Bankruptcy Code on workers of a self-insured employer requires a basic understanding of the operation of the bankruptcy system.

About the Author

Robert Aurbach is a 1979 graduate of Cornell Law School and has served as General Counsel for the N.M. Workers' Compensation Administration since 1990. He has prior experience in private practice and as a state prosecutor and state Prosecutor Coordinator.

He is a 1991 honors graduate of the International Association of Industrial Accident Boards and Commissions (IAIABC) Workers' Compensation College and has returned as a lecturer for the College on a variety of issues in 2002 and 2003. He has published articles on workers' compensation issues in the *IAIABC Journal*, *Larson's Workers' Compensation News*, and the *Inside OSHA* website. Bob was the author of an article on the intentional injury exception to the exclusive remedy doctrine in workers' compensation in the May/June 2003 issue of the *Workers' Compensation Policy Review*. He has served as chair of the IAIABC Standing Committee on Regulation and Enforcement, chair of the Task Force on Tribal Sovereignty and Co-chair of the Coverage and Compliance Committee, and is the current Editor of the *IAIABC Journal*. He has served as one of three U.S. delegates to the Working Group on Cross-Border Workers' Compensation Issues formed by the Commission on Labor Cooperation, North American Agreement on Labor Cooperation. He has also consulted with the Virgin Islands Department of Labor (drafting of administrative rules for the Workers' Compensation Division) and Navajo Nation (rewrite of the Tribal workers' compensation code).

Bob's recent research and writing has centered on the areas where workers' compensation and other programs interact, such as bankruptcy, tribal sovereignty, welfare to work, and PEO/leasing arrangements. He testified before OSHA and the U.S. Senate subcommittee on Employment, Safety and Training concerning conflicts between the OSHA Standard on Ergonomics and state workers' compensation programs.

Current Bankruptcy Law

There are two "Chapters" of the Bankruptcy Code that are commonly invoked by self-insured companies in economic distress: Chapter 7 liquidation proceedings and Chapter 11 reorganization. Chapter 7 liquidation is exactly what it sounds like: the company is placed in the hands of a Trustee, who tries to pick up the pieces when a company is no longer functional, and arranges for a sale of the assets of the company to accumulate funds to distribute to the creditors. The company ceases to exist as a going concern and the Bankruptcy Court distributes the assets pursuant to the statutory scheme of priorities among creditors that is contained in the Bankruptcy Code. At the end of the process, the court distributes whatever there is, and the company ceases to exist, leaving unsecured creditors with nothing to seek a remedy against.

Chapter 11 proceedings are a little different. Counter-intuitively, the company does not have to be "insolvent"[6] to seek the Bankruptcy Court's protection under this chapter. The company in economic difficulty remains run in the "ordinary course of business" by its present management (even though they may be responsible for the present economic circumstances) and the company is "reorganized" with the intent that the company emerges from Bankruptcy as a going concern. The reality of the situation is that relatively few companies successfully reorganize,[7] and that the procedure simply leaves management in charge of the company as an ongoing enterprise while buyers are found for the assets of the company.

The most significant requirement of the company in Chapter 11, other than the control of the Bankruptcy Court, is the requirement that the company obey state and local laws[8] in its operations, at least to the extent that such requirements are not explicitly superceded by the Bankruptcy Code. In either case, the creditors are given notice, as in any other bankruptcy, the debts are accumulated, and available resources are distributed to the creditors according to the same statutory scheme of priorities used in Chapter 7 proceedings.[9] Based upon anecdotal reports,[10] most companies who have operated as a self-insured employer for workers' compensation file bankruptcy petitions under Chapter 11 of the Bankruptcy Code, in an effort to maintain control of the company as the economic picture resolves itself.

Regardless of the chapter, once a petition for protection under the Bankruptcy Code is filed, an "automatic stay" against all court proceedings freezes the filing or pursuit of any court action against the debtor company absent permission from the Bankruptcy Court.[11] No court action may be filed against the company for any cause of action that arose prior to the petition, regardless of any permission given by state law or any inconvenience to the parties. Judicial or administrative claims arising under state workers' compensation laws may not be filed, or if filed, are frozen in place. Disputes arising in the normal course of the claim may not be resolved pursuant to the dispute resolution mechanism contained in state law, and the Bankruptcy Court is granted jurisdiction to resolve all such claims. The Bankruptcy Court may well be in a jurisdiction in another state, and is unlikely to be familiar with the requirements of state workers' compensation laws. Nonetheless, unless the court grants "stay relief" upon a motion and order by the requesting party, the Bankruptcy Code freezes all disputes in place from the date of the petition until the date of the order confirming the reorganization plan (or dissolution of the company under Chapter 7), which may be well over a year. In deciding requests for stay relief, the court balances the special expertise of the court that would be given jurisdiction over the dispute against the convenience of the transfer of jurisdiction to the debtor company – with the "fresh start" philosophy of the code firmly in mind.

The processing of disputes is not all that is frozen during this period. Payments upon debts subject to the Bankruptcy Court's jurisdiction (that is to say, all the liabilities that accrued prior to the filing of the petition) are frozen in place as well, to maintain assets for the eventual distribution according to the statutory priority scheme. Workers' compensation indemnity payments and payments to the health care providers providing services to injured workers are among the payments that are frozen. To be sure, many Bankruptcy Courts have attempted to manufacture a rough remedy for such claimants through the issuance of "First Day Orders." Such orders, which are voluntarily sought by the debtor company, allow it to continue to pay certain pre-petition obligations and "critical vendors," for the purpose of continuing its daily operations without generating unacceptable resistance from the people it employs and the companies that supply necessary resources. In most cases the theory advanced for such payments is "business necessity." In some instances, self-insured employers have voluntarily sought First Day Orders allowing the continued payment of workers' compensation benefits, at least to those employees who are still listed as current employees, on a theory that business necessity includes the maintenance of the morale of the workforce. Recent case law[12] strongly suggests that the courts are pulling back on the freedom of the courts to grant this type of relief, because it is not contemplated by the Bankruptcy Code, and it allows the debtor company to choose to give more favorable treatment to the creditors that it favors, in derogation of the statutory priority system.

Once the Bankruptcy Petition is filed, the debtor company gives notice to known creditors of the pendency of the bankruptcy proceedings. The creditor may then be required to file a "Proof of Claim" before the Bankruptcy Court to obtain consideration of the debt owed to the creditor. Failure to file a Proof of Claim before the

date set by the court to cut off such filings (the "bar date") is usually fatal for the claim, absent a strong showing that there was a failure of due process in the operation of the rule. Thus, the workers' compensation claimant who fails to file a timely Proof of Claim often ends up with no remedy from the company in whose service he or she was injured, and falls to societal safety nets, such as any guaranty funds that may be in place, or the state and federal welfare systems.

After the bar date for proofs of claim, the debtor company chooses which claims to allow and which to contest. Contested claims are, absent stay relief, tried before the Bankruptcy Court (or a master appointed for the purpose) in the jurisdiction where the bankruptcy petition is filed. The inconvenience to the creditor is not considered in the choice of forums, nor is the typical lack of familiarity of workers' compensation practitioners with the Bankruptcy Court's unique rules and procedures. The court determines the validity of the claim, despite the level of familiarity it may have with the applicable state workers' compensation laws, and arrives at a "liquidated value" for the claim – that is a number that represents the total liability of the debtor company on the claim. The fact that the state workers' compensation system, with its common provision for lifetime medical benefits, may not allow for the accurate reduction of future medical expenses to a sum certain is not considered.[13] Nor are any state law provisions considered that limit or prohibit the settlement of the workers' compensation claim.[14]

Although the Bankruptcy Code has provisions for the payment of ongoing expenses of the debtor company during the pendency of bankruptcy proceedings, the payment of the debtor company's workers' compensation liabilities is not permitted in the absence of a court order, except as to injuries that occurred after the Bankruptcy Petition was filed. The reason for this distinction between pre-petition injuries and post-petition injuries is based on the provisions that define a claim as a "right to payment" or "equitable relief" and therefore define when a claim accrues. Workers' compensation claims are deemed by the Bankruptcy Code to be fully accrued on the date when the injury takes place, despite the fact that the extent of the employer's liability on the claim may not be fully known until the claim matures. The logic of this provision is subject to rational question. Elsewhere, the Bankruptcy Code treats obligations under the employer's health benefit plan as arising when incurred, and the payment of wages to workers receives favorable treatment, even to the extent of pre-petition wages (with some limitations).[15] Workers' compensation payments got left out of the mix somehow, and it appears that no published Bankruptcy Court opinion has attempted to explain or justify this oversight.

The assets of the debtor company are collected and the debts are collected, litigated, and quantified, and the debtor company devises a plan for reorganization of the company. Under the plan, the assets are distributed pursuant to the statutory priority scheme set forth in the code. Clearly, the code is devised to protect commercial creditors that have access to various mechanisms for securing the debt created when they advanced the debtor company goods or services. Involuntary workers' compensation "creditors," which have no ability to invoke the procedures for securing their claims in a commercial sense, fall to the lowest priority category – "general unsecured creditors" – and typically receive full payment of the liquidated value of their claims only if all classes of creditors with a higher priority have already gotten full payment of their claims. The payment may not even be in cash. The distribution can be made in stock in the company or other assets that may not be of immediate value to the injured worker. The reorganization plan is subject to a vote by the various classes of creditors and the approval of the Bankruptcy Court. It will generally set a "dividend" for each class of creditors amounting to a percentage of the liquidated value of the claims in that class that will get paid.

Once the court confirms the reorganization, the effect of the plan confirmation is to "discharge" all debts that were subject to the plan.[16] Plan confirmation thus acts as a permanent injunction against anyone who is subject to the bankruptcy proceeding from ever seeking to enforce any part of the debt against the debtor company, in any court or proceeding in the future. This "discharge" effectively extinguishes the workers' compensation liability of the debtor company, in derogation of state law. The discharge pertains to all pre-petition claims, but not to the post-petition liabilities accrued by the debtor company, so the date of accrual of a claim becomes a matter of critical importance. Under current law, the workers' compensation claims against the debtor company are treated as fully accrued as of the date of the petition.[17] Accordingly, claims for injuries that occurred pre-petition will be liquidated, paid a dividend and discharged. Claims arising from injuries that occur after the petition has been filed will be treated as state law intended, at least if the company survives reorganization long enough to pay those liabilities.

The practical effects on the injured worker can be devastating. Payments for the ongoing medical and other treatments intended to make the worker fit to return to work are stopped for pre-petition claims, in the absence of a First Day Order providing for their continuation, and medical providers often choose to cease providing services rather than incur debts that will be discharged in bankruptcy. Indemnity payments for such workers cease, and access to the state workers' compensation tribunal for resolution of disputes concerning compensability and the administra-

tion of the claim is cut off. The worker is forced to appear in Federal Court with rules and procedures that are often unfamiliar to his or her counsel, and the proceedings may take place in a location that is geographically distant from the place of the injury and the worker's domicile.[18] Failure to follow those rules or appear in a court across the country can result in forfeiture of any benefits. The claim is liquidated, even where such liquidation is in derogation of state law provisions concerning the worker's ongoing entitlement to indemnity and medical benefits, or any state law prohibition or limitation against settlement of workers' compensation claims. When payment on the claim is finally made, it is likely to be substantially less than that promised under state law, both because the claim is liquidated before it is mature, and because the dividend paid is likely to be pennies on the dollar of the liquidated amount.

The justification of this treatment of injured workers in derogation of state law is the "fresh start" philosophy of bankruptcy. "Fresh start" is based on the generally salutary idea that a company that finds itself in economic distress should be allowed an opportunity to do what it can to take care of its debts and then start anew as a contributing part of the economy. Such a philosophy is well and good, if it doesn't leave injured workers as the unintended victims.[19]

Regulatory Responses to the Threat of Bankruptcy

State regulators face a difficult set of circumstances when attempting to prevent or mitigate the harsh consequences of bankruptcy on injured workers in their states.[20] Regulators usually have great discretion with regard to the companies that they permit to assume the risk of their own losses, and as such, the regulator shoulders the political responsibility for the consequences of such choices. At the same time, the self-insured employers represent the largest, and therefore most politically powerful, companies in the state, and can exert considerable political pressure both through contributions and other traditional political avenues and through the threat of their impact on the job market and tax base within the state. Thus, the regulator has several tools to control exposure to the harsher aspects of bankruptcy, yet also has a political responsibility to exercise control using those tools, while being in a political environment where such restrictive regulation is often unavailable as a practical matter.

The regulator may place very stringent controls on the availability of the self-insurance option, with the unintended consequences of suppressing the growth of smaller businesses that may be able to contribute significantly to the state's economy and incurring the wrath of local legislators who are always on the lookout for opportunities for job growth for their constituencies. This approach, however, relies upon a snapshot of the health of a company at the time of application, and thus is limited by the changes in condition that occur after that. Once granted, self-insurance status is regarded as a privilege protected by due process provisions.

The regulator may require strict and continuous scrutiny of the economic well being of the self-insurers, but this approach demands resources that are often not available, and is regarded as intrusive and non-productive by the regulated companies. Moreover, such a strategy only serves to limit the number of claims caught up in a subsequent bankruptcy to those incurred before the warning criteria set by the regulator are triggered, and does nothing to protect those injured workers that were injured while the company was economically healthy.

The regulator may require the posting of security in a form that is never subject to the control of the Bankruptcy Court[21] and is set in an amount that is at, or in excess of, the claims reserves on the outstanding claims at any time. This approach is hampered in its effectiveness by several factors. The claims reserves are very often set lower than appropriate[22] partly due to the desire of the company to have its security requirements set as low as possible. The regulation of reserves and security is always after the incursion of liability such that adequate reserves and security today can become totally inadequate tomorrow if a serious multi-worker accident occurs in the interim. The use of the security is to insure that a self-insurer will honor its commitments, but in practice it is not unusual for a formerly self-insured company to abandon its security in lieu of honoring the promise to pay. In such event, the regulator is required to provide for the administration of the claims and distribution of the funds on hand, often at substantial additional cost. Setting of security requirements at a significant multiple of loss reserves and readjusting the required security frequently can avoid most of these problems, but only at the cost of persistent complaints by the self-insurers that their working capital is being excessively restricted, effectively raising the cost of business in the state unacceptably. The political weight of such complaints can be considerable.

The regulator can also impose requirements that address the probability that a catastrophic event will incur sufficient workers' compensation liability that the company is driven into bankruptcy by it, such as excess insurance at statutory limits. Again, the complaints of business that the regulation ties up working capital can be expected, this time with the additional complaint that such protections are disproportionately expensive for the small increment of protection against bankruptcy that they provide.

States can, and often do[23] provide guaranty funds to pick up the liabilities of self-insured companies that cannot fulfill their responsibilities.

Most such funds are comprised of contributions from the self-insured companies, and are often undercapitalized for the magnitude of the risk that they purport to insure, again due to the political pressures attendant the freezing of operating capital. The result of this risk spreading is that self-insured guaranty funds effectively make participant companies the economic guarantors of the economic adventures of other members, including, potentially, their competitors.[24] Claims against guaranty funds result in political pressures on regulators that operate differently in different states, depending on the expectations of the participants and the histories of the funds. Some states routinely expect that self-insured liabilities will be paid from the funds, and that fund participants will be assessed to replenish the fund, and some states treat a claim against the fund as anathema. The inconsistency of approach between the states also acts as an issue upon which national or regional self-insurers often attempt to exert political influence.

In the face of these conflicting pressures, the system for securing the claims of injured workers of self-insured employers has been inconsistent at best. Some states have been relatively good at setting up systems and educating themselves concerning bankruptcy, resulting in little harm to workers. More often, the attempt by a self-insurer to obtain a "fresh start" in bankruptcy results in the promises made to workers by state workers' compensation laws being broken in wholesale fashion, and the lives of the individuals caught in the process being drastically and adversely affected.

A Proposed Solution

Most of the broken promises to injured workers that arise from bankruptcy and the greater part of the regulatory intrusions imposed by workers' compensation administrators to mitigate them find their source in one specific feature of the Bankruptcy Code. The rule that a bankruptcy claim for a workers' compensation injury is fully accrued on the date of the accident results in the harshest features of bankruptcy's interface with the workers' compensation system. The rule is also essentially arbitrary. Workers' compensation professionals treat workers' compensation liabilities as an ongoing stream of new obligations for many purposes.[25] Reserves on claims are constantly reevaluated, various systemic adjustments and contrivances are utilized to respond to the uncertainty of lifetime liability for medical treatment, and researchers often choose to study claims that have "matured" for several years, or that have been closed, when seeking to analyze the effects of different provisions of state laws. Moreover, the Bankruptcy Code offers special treatment to some kinds of promises to disadvantaged classes where the parties are unable to utilize the commercial security mechanisms to protect their interests. So, for instance, claims for child support obligations are treated under the Bankruptcy Code as accruing when the individual payment was due,[26] rather than having occurred at the birth of the child or the issuance of the divorce decree that contained a specific court order to make support payments. The analogy to child support payments has additional instructive points of congruity – child support payments are often designed to vary over time with changing conditions and often include provisions for contributions for medical expenses unknown at the time of the divorce decree.

A surgical change to the Federal Bankruptcy Code to make benefits under state workers' compensation laws accrue when they are due and payable, together with some small technical amendments to make the rest of the Bankruptcy Code consistent with that treatment, removes most of the harshest aspects of the interface between the promises of workers' compensation and bankruptcy's "fresh start" philosophy. Those benefits due before the petition in bankruptcy is filed will continue to be treated under the Bankruptcy Code as they are now. For the self-insured employer, the payments have usually been kept current to the eve of bankruptcy, in an effort to keep the state from revoking the self-insured status of the company.[27] Payments that are due after the petition for bankruptcy protection has been filed will be treated as claims that arose post-petition. Those claims incurred during the course of Bankruptcy Court jurisdiction will be treated as administrative expenses and paid as part of the ongoing business expenses of the company.[28] These post-petition liabilities will also be exempt from the Bankruptcy Court's discharge order – that is, only benefits actually due and payable before the filing of the petition can be extinguished by operation of law. Obviously, claims that arise after the bankruptcy case is completed will be treated as ongoing undischarged expenses of the newly reorganized company, as they are under present law.

The effect of such changes on injured workers will be profound. Medical providers will be assured that the services they provide to injured workers post-petition will be paid as ongoing administrative expenses of the company under bankruptcy protection. They need not fear that their provision of continued services to the worker will either be uncompensated or will be subject to their own derivative claim as a creditor of the debtor company. With these economic concerns removed, except perhaps for the last month's billings, the cessation of medical treatment to injured workers resulting from bankruptcy should be significantly less common. Similarly, the flow of indemnity payments for workers who are losing time or have permanent disability should suffer only a brief interruption, if any. Payments during the administration of the bankruptcy estate will reduce the total outstanding debt of the company, and if it fails to reorganize and liquidate, the existing security held

by the regulator will be more likely to cover the outstanding debt. Post-petition payments will still be required, and state workers' compensation agencies have the existing requirement to obey state laws[29] as a tool for the enforcement of the obligation.

An additional change is proposed to grant automatic relief to the automatic stay in bankruptcy for adjudication of disputes and determination of the liquidated amounts of workers' compensation claims before the local workers' compensation tribunal. This forum is much more convenient for the worker, and it ensures that, in the event of a liquidation of the debtor company's assets arising from either Chapter 7 or Chapter 11 proceedings, the court that determines the liquidated value of the claim will at least be familiar with the workers' compensation law applicable to the case. Moreover, compensability determinations and claims handling disputes will be resolved in a timely fashion (without waiting to the end of the bankruptcy case or the granting of a special motion for particular stay relief) and without putting the worker to the additional expenses of hiring a bankruptcy specialist and traveling to a remote jurisdiction for court proceedings.

The final piece of the package is a small change to the administrative expense provisions of the Bankruptcy Code that will allow payments of workers' compensation benefits as an ongoing cost of business of the debtor company and will allow state guaranty funds and similar entities standing to claim, where they have advanced benefits to their workers.

The impacts of these proposals will be profound. Provision of medical and indemnity benefits will no longer be delayed until the bankruptcy case is over, and the adjudication of compensability and claims handling disputes will no longer require special stay relief or submission of the issue to a remote court operating under unique rules and procedures. Statutory benefits will be provided to injured workers, at least during the pendency of the bankruptcy case. The need to liquidate workers' compensation claims, in derogation of state law, will be limited to companies that will cease to exist at the end of the bankruptcy case, and even then the liquidation will be conducted under circumstances that are fairer to injured workers. The court that will resolve disputes and conduct liquidation proceedings will be both geographically available to the worker and possess specialized expertise in local workers' compensation law. Finally, the workers' compensation claims of companies that continue in existence cannot be discharged as to the ongoing stream of benefits to the workers injured in their service.

The social policies advanced by the proposed changes significantly outweigh the relatively minor impediment of additional administrative and undischargeable expenses upon the bankruptcy estate. One significant social policy advanced is that of federal-state comity. The states have been left in control of their workers' compensation systems, except for those workers in the federal workers' compensation system. The conflict between federal law and state law with regard to the treatment of injured workers creates undesirable strain upon state societal safety nets, as a direct result of federal law. As the removal of those strains upon the states can be accomplished with minimal impact upon the "fresh start" philosophy of bankruptcy, adjustments which accomplish this end improve the relationship between the states and the federal government without impinging on either's sovereignty. But less abstractly, the changes prevent an employer from hiding from workers' compensation liabilities incurred in the normal course of business by utilizing bankruptcy as a strategic economic gambit – something that was never intended by Congress. The changes also will allow regulators to partially reduce their reliance on costly regulatory oversight, security requirements, and other strategies designed to offset the threat of bankruptcy. To be sure, regulators will still need to ensure that a sufficient level of control and security exists to deal with the company that will not emerge from reorganization. However, that level of control will be less dictated by fear, and therefore less burdensome upon the companies that are allowed to self-insure, allowing a greater proportion of working capital to be devoted to economic growth. Finally, the state made promises to workers when it passed laws that required their participation in workers' compensation systems: that in exchange for the relinquishment of their common law tort remedies, they would be granted a reliable, efficient, no-fault remedy. Having taken away the rights of workers, the provision of the benefit given in exchange seems a matter of fundamental fairness.

Current Steps Toward Change

Statutory language sufficient to accomplish the changes discussed above is attached as Appendix A.[30] The proposed language is endorsed by the National Council of Self-Insurers (NCSI) and a Resolution in support of the proposed language was passed at the Spring 2004 meeting of the National Association of Attorneys General (NAAG). It is attached as Appendix "B" The International Association of Industrial Boards and Commissions (IAIABC) sent a letter supporting the Resolution to NAAG. Future plans include presentation of the language to the National Association of Governors and to organized labor in anticipation of lobbying for an appropriate amendment to the Bankruptcy Code.

Mark Twain once said, "Always do right – it'll gratify some people, and astound the rest." The reconciliation of the promise of state workers' compensation systems with the "fresh start" philosophy of bankruptcy, represented by these proposed amendments, will likely do both.

ENDNOTES

1. The views of the author are his own and do not necessarily reflect those of the New Mexico Workers' Compensation Administration or any other organization or entity. The basic description of Bankruptcy Code provisions and Bankruptcy Court procedures contained herein is not intended as a guide to practice before the Bankruptcy Court, and any person or entity with a matter pending in bankruptcy is strongly urged to seek professional guidance and assistance.

2. Workers' compensation is compulsory for employers and their workers in all states but Texas.

3. The insolvency of a private insurance carrier or state fund presents separate issues, which are beyond the scope of this article.

4. North Dakota is the only state that does not allow employers to self-insure their workers' compensation obligations.

5. Most self-insurers are large national companies that appear to be strong and stable. Thus, even diligent regulators do not always anticipate bankruptcies among these companies.

6. Insolvency here is used in the classical sense of the company's liabilities being in excess of its assets.

7. At a recent conference sponsored by the National Association of Attorneys General, it was suggested that as many as 80 percent of all Chapter 11 bankruptcies result in the debtor entity ceasing to exist as an ongoing entity.

8. 28 USC 959(b).

9. Debtors must distribute resources to creditors that are at least what they would have received under Chapter 7. 28 USC 1129.

10. In New Mexico, for instance, there has never been a Chapter 7 filing by a self-insurer in the history of the regulation of self-insurance by the agency.

11. 11 USC 362.

12. *Capital Factors, Inc. v. Kmart Corp.*, 2003 WL 22282518 (N.D.Ill., Sep 30, 2003) and *Capital Factors, Inc. v. Kmart Corp.*, 291 B.R. 818 (N. D.Ill. 2003). Affirmed, *In re Kmart,* 7th CA, February 24, 2004.

13. Nor in any proceeding that we are aware of has the growing concern about set asides for Medicare been addressed in the settlement of future medical claims in bankruptcy.

14. These provisions are deemed preempted by the operation of Federal law.

15. 11 USC §507.

16. 11 USC 1141 (d) (1) (A).

17. 11 USC §502(b).

18. The procedure for the debtor's "objections" to claims allows the debtor to bury the claim of an individual worker in an "omnibus objection" that may be many pages in length. Unwary workers, whether or not they have counsel, may lose rights by not understanding the significance of the documents that are served on them until time limits for response have passed.

19. A plausible explanation for the treatment of injured workers in the Bankruptcy Code is the lack of a significant lobbying force operating on their behalf. Certainly, nothing in the legislative history of the Bankruptcy Code suggests that Congress ever explicitly intended these impacts on injured workers.

20. Recent bankruptcies by multi-billion dollar companies that appeared to be financially stable months before bankruptcy petitions were filed, such as Kmart, have demonstrated to regulators that there are no "safe" companies with regard to self-insurance and that safeguards against the possibility of bankruptcy are a wise precaution with respect to all companies that they allow to self-insure.

21. Surety Bonds and Irrevocable Letters of Credit are the most commonly used financial instruments that have this feature.

22. For instance, an audit of claims in one state in the Mississippi Chemical bankruptcy recently disclosed that the claims reserves were nearly 25 percent below that of proper claims reserves, as determined by an independent auditor chosen by the self-insurer.

23. Arkansas, California, Colorado, D.C., Florida, Georgia, Illinois, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Virginia, Washington, Wisconsin.

24. To be sure, the guaranty fund itself then obtains a claim before the Bankruptcy Court for the reimbursement of its expenditures. Those claims are often hampered by a relative lack of expertise in bankruptcy matters among some guaranty fund administrators, the requirement that the state give up any 11th amendment immunity that it may have to assert such claims, the distance and cost involved in prosecuting such claims, the lack of a coordinated response among the states in Bankruptcy Court proceedings, and the relative lack of concern exhibited by many bankruptcy judges for such claims.

25. Including for accrual of claims for statute of limitation purposes, in some states. *See Coslett V. Third Street Market* 117 N.M. 727, 872 P.2d 656 (N.M. App. 1994).

26. In any event, such claims are not dischargeable.

27. In the event that the employer was (illegally, in most states) uninsured, greater arrearages may have been incurred. But since these companies are almost always smaller and employ fewer workers, the magnitude of the harm systemically is less significant.

28. Or at least at the time of plan confirmation 11 USC 1129(a).

29. 28 USC 959(b).

30. The author acknowledges the assistance in drafting and disseminating the language rendered by the informal drafting group, consisting of the author, Bob Steggert, National Council of Self-Insurers; Greg Krohm, International Association of Industrial Accident Boards and Commission; Mike Trier, Iowa Division of Workers' Compensation; Glenn Morton, Nebraska Workers' Compensation Court; Jim Jacobsen and Stuart Bluestone, New Mexico Attorney General's Office; and others. Particular recognition is due to drafting committee members John Rea, Acting Director, and John Siqueiros, Senior Legal Counsel, California Department of Industrial Relations, who participated in the conversation where this approach to the necessary statutory changes was conceived, Eric Oxfeld, UWC-Strategic Services, for his continued insights and comments during the development of the language, and most importantly, to Karen Cordry, National Association of Attorneys General bankruptcy counsel, whose technical expertise was invaluable in matching the language to the intent. The assistance of Renee Blechner and Linda Garza and the expertise of Jim Jacobsen and Karen Cordry aided greatly in the preparation of this article.

APPENDIX A

PROPOSED LANGUAGE

11 USC 502 (k)
A claim, or a request for administrative expense, made by an employee (or related person or entity), a governmental unit, or a state self insurance guaranty association, and arising under applicable nonbankruptcy laws relating to workers' compensation, shall be determined and shall be allowed under subsection (a), (b) or (c) of this section, disallowed under subsection (d) or (e) of this section, reconsidered under subsection (j) of this section, or paid under section 503(b)(1)(A) or 507 as if such claim or request -

[*Explanatory note: Related person is meant to include surviving spouses and dependants, entity is meant to include the worker's estate.*]

(1) if for or related to indemnity benefits, wage loss, payments in lieu of wages, or other related payments under the workers' compensation laws, arose on the date upon which the indemnity benefits, wage loss, or payments in lieu of wages, would be due and owing pursuant to such laws;

[*Explanatory note: Other related payments is meant to include survivor and dependent benefits, funeral benefits, and permanent disability benefits that are not necessarily "wage loss" benefits, such as benefits specifically paid for permanent physical impairment or disfigurement.*]

(2) if for or related to medical, rehabilitation or similar services (whether paid directly to the employee or to a provider of such services) that are provided to a workers' compensation claimant, arose on the date that the services were provided to such claimant pursuant to such laws; and

(3) in either case, if the debtor is being liquidated under Chapter 7 or 11, any claim or request for future benefits or services shall, be deemed to accrue not later than the final date upon which distributions are made to creditors.

[*Explanatory note: This section has been added to deal with the issue of where a debtor is liquidating – we do want to accelerate all costs that will come due after the liquidation so that the debtor can obtain its share of any such distributions. If the debtor is reorganizing, then the timing provisions above will take care of future manifestations of illnesses or injuries.*]

11 USC 503(b)(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case, and payment obligations treated pursuant to section 502(k) as arising after the commencement of the case.

[*Explanatory note: Payment obligation is used here, because this is a section dealing with the priority of payments. It has no relevance to anything that isn't a payment obligation, even if there are workers' compensation obligations that aren't payments.*]

11 USC 507(a)(3) Third, allowed unsecured claims arising within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, but only to the extent of $4,000* with respect to each affected individual or corporation, as the case may be, for

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual, and payments of a kind described in Section 502(k) owed to that individual or corporation; or ...

11 USC 507(a)(4)

Fourth, allowed unsecured claims for

(A) contributions to an employee benefit plan

(1) arising from services rendered . . . , or

(B) payments to a self-insurance guaranty fund, to the extent of $4,000 per employee,* for payments of a kind described in Section 502(k) arising within 180 days before the fate of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first.

* As adjusted for inflation, pursuant to Section 104(b) – currently $4,650.

11USC 362 (b)(19)

under subsection (a) of this section, of the commencement or continuation of proceedings by a governmental unit under applicable nonbankruptcy law relating to workers' compensation benefits solely for the purposes of determining any disputes relating to rights or benefits under such laws

11 USC Section 101 (Definitions) - add new definition as follows:

"self-insurance guaranty fund" shall mean any entity created under the laws of any State, Commonwealth, District, Territory, municipality or foreign state for the purpose of ensuring the payment to injured workers, their dependents or survivors, of workers' compensation claims upon the failure or the inability of a self-insured employer to pay such claims.

APPENDIX B

Adopted

National Association of Attorneys General
Spring Meeting
March, 2004
Washington, DC

RESOLUTION

URGING REFORM OF TREATMENT OF WORKERS' COMPENSATION CLAIMS IN BANKRUPTCY

WHEREAS, the bankruptcy system currently treats wage and benefit claims of employees as deserving of special protection, including priority treatment for such claims during the immediate prebankruptcy period, and administrative expense status during the case; and

WHEREAS, state workers' compensation systems have been established to ensure that workers who are injured or made ill in the course of their employment are provided guaranteed rights of medical treatment and partial wage replacement, in exchange for a bar on their being able to bring suit against their employers; and

WHEREAS, the Bankruptcy Code ("the Code") provides no specific treatment or protection for these claims where the worker was injured or made ill prior to a bankruptcy filing, despite their functional resemblance to the wage and benefit claims that are protected by the Code; and

WHEREAS, the result is that claims of such workers, particularly against self-insured employers, are treated as prepetition claims without priority, potentially may not be paid during the pendency of the case resulting in loss of income and medical treatment during that period, and may be subject to being discharged by entry of the debtor's plan, despite the promises of continued protection made in the workers' compensation laws; and

WHEREAS, the claims of governmental entities for reimbursement of services provided to employees of self-insured employers (or illegally uninsured employers) may also be determined to be non-priority claims after sufficient time passes from the original date of the injury, despite the ongoing payments being made for the workers' wages or health care benefits; and

WHEREAS, claims of employees injured or made ill in the service of a debtor are entitled to equal consideration in bankruptcy with those of the employer's able-bodied employees, and

WHEREAS, application of the automatic stay to the workers' compensation system unduly complicates the process of resolving and liquidating these claims, and impedes the ability of the existing state agencies and courts to utilize their expertise in this area;

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

1. Supports amendment of the Bankruptcy Code to provide that

a) workers' compensation claims shall be deemed to accrue as payments become due under applicable state law,

b) such claims shall be treated like wage and benefit claims accruing at the same time in terms of being given priority and administrative expense status, and

c) proceedings by a governmental unit to determine liability, and liquidate the amounts owed, for workers' compensation claims shall not be subject to the Bankruptcy Code's automatic stay; and

2. Authorizes its Executive Director to transmit these views to the Administration, appropriate members of Congress, and other interested associations and individuals.

www.workerscompresources.com

John Burton's Workers' Compensation Resources currently provides two services to workers' compensation aficionados. The first is this bi-monthly publication, the *Workers' Compensation Policy Review.* The second is a website at www.workerscompresources.com. Access to portions of the website is currently free. Other parts of the site are available to subscribers only.

The website offers several other valuable features:

- Summaries of the contents of *Workers' Compensation Policy Review* and an Author's Guide for those interested in submitting articles for consideration of publication.
- An extensive list of international, national, and state or provincial conferences and meetings pertaining to workers' compensation and other programs in the workers' disability system.
- Posting of Job Opportunities and Resumes for those seeking candidates or employment in workers' compensation or related fields.
- The full text of the *Report of the National Commission on State Workmen's Compensation Laws.* The report was submitted to the President and the Congress in 1972 and has long been out of print.

For more information about the website, and to make suggestions about current or potential content, please contact website editor Elizabeth Yates at webeditor@workerscompresources.com.

Workers' Compensation Costs In 2003: Regional, Industrial, and Other Variations

by Florence Blum and John F. Burton, Jr.

The employers' costs of workers' compensation vary among industries and regions, according to 2003 data published by the Bureau of Labor Statistics (BLS), which is part of the U.S. Department of Labor.[1] The BLS data also indicate that workers' compensation costs differ by occupation, by establishment size, and by union-nonunion status. Though most of these variations are not surprising, some of the patterns evident in the data are unexpected.

The BLS data used in this article provide information on the employers' costs per hour worked for wages and salaries and for benefits (including workers' compensation and other legally required benefits). The BLS data are now published every quarter, and we calculated the 2003 annual average by averaging the BLS results for March, June, September, and December of 2003. The BLS data are based on samples that varied from 6,850 to 8,500 establishments in the private sector and 800 establishments in the state and local government sector.[2]

Cost Differences by Region

Workers' compensation costs as a percentage of wages and salaries are shown for four regions and the United States in Figure A.[3] Employers' workers' compensation costs are above the national average in one region, and below the national average in three regions.[4] What is perhaps surprising is the ranking of the regions, and in particular the finding that the Northeast is the region with the lowest workers' compensation costs (as a percentage of gross earnings).

The derivation of the national and regional figures shown in Figure A helps explain these findings. The BLS data used to construct Figure A are shown in Table 1. *Total remuneration* per hour worked averaged $22.69 for employers in private industry throughout the United States in 2003 (row 1).[5] The $22.69 of total remuneration includes *gross earnings* that averaged $18.47 per hour (row 2) and *benefits other than pay* that averaged $4.22 per hour (row 6).

The gross earnings figure includes wages and salaries as well as paid leave and supplemental pay. The term *gross earnings* and *payroll* are used interchangeably in this article.

Benefits other than pay include employer contributions for insurance, retirement and savings, legally required benefits, and other benefits.[6] *Workers' compensation*, which averaged $0.42 per hour worked (row 9A), is one of the *legally required benefits* that are included in the BLS's total figure of $1.93 per hour for that category (row 9).

We used the BLS data in rows (1), (2), and (9A) of Table 1 to compute the figures listed in rows (11) and (12) of that table. For the private sector in the United States in 2003, workers' compensation expenditures ($0.42) were 1.83 percent of total remuneration ($22.69) and 2.25 percent of gross earnings (or payroll) ($18.47).

The same procedure used to calculate workers' compensation as a percentage of gross earnings (row 12 of Table 1) for the United States - namely, to divide the workers' compensation expenditures per hour (row 9A) by gross earnings per hour (row 2) - was used to calculate the regional results for workers' compensation as a percentage of gross earnings shown in Figure A and in row (12) of Table 1. Thus, for the Northeast, workers' compensation expenditures of $0.40 per hour were divided by gross earnings of $20.78 per hour to produce the figure of 1.91 percent - which is workers' compensation costs as a percentage of gross earnings in the Northeast in 2003.

An alternative way to measure regional differences in workers' compensation costs is shown in Figure B.

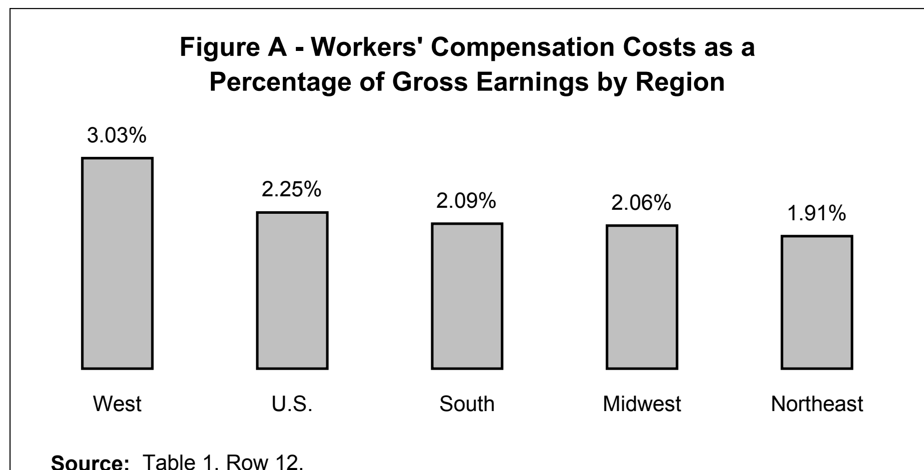


Table 1
Workers' Compensation Costs by Region in 2003 for Employers in Private Industry
(In Dollars Per Hours Worked)

		U.S.	Northeast	South	Midwest	West
(1)	Total Remuneration	22.69	25.56	20.30	22.80	23.66
(2)	Gross Earnings	18.47	20.78	16.63	18.48	19.23
(3)	Wages and Salaries	16.35	18.18	14.83	16.30	17.13
(4)	Paid Leave	1.47	1.80	1.28	1.44	1.52
(5)	Supplemental Pay	0.64	0.81	0.52	0.74	0.58
(6)	Benefits Other Than Pay	4.22	4.78	3.67	4.32	4.45
(7)	Insurance	1.58	1.79	1.39	1.68	1.55
(8)	Retirement Benefits	0.68	0.84	0.55	0.72	0.71
(9)	Legally Required Benefits	1.93	2.11	1.70	1.88	2.18
(9A)	Workers' Compensation	(0.42)	(0.40)	(0.35)	(0.38)	(0.58)
(10)	Other Benefits	0.03	0.04	0.02	0.04	0.02
(11)	Workers' Compensation As Percentage of Remuneration	1.83%	1.56%	1.71%	1.67%	2.46%
(12)	Workers' Compensation As Percentage of Gross Earnings	2.25%	1.91%	2.09%	2.06%	3.03%

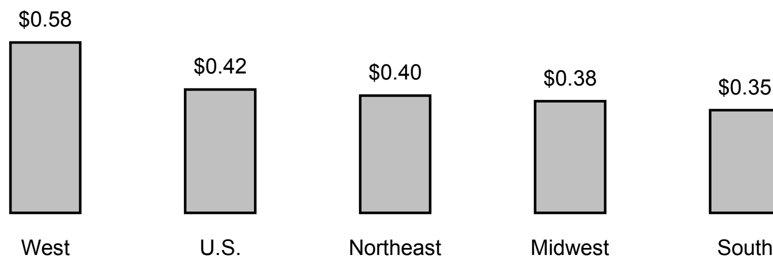
Notes: See page 22.

Source: *Employer Costs for Employee Compensation - March 2003*, News Release USDL: 03-297 (June 11, 2003), Tables 5 and 7.
Employer Costs for Employee Compensation - June 2003, News Release USDL: 03-446 (August 26, 2003), Tables 5 and 7.
Employer Costs for Employee Compensation - September 2003, News Release USDL: 03-760 (November 25, 2003), Tables 5 and 7.
Employer Costs for Employee Compensation - December 2003, News Release USDL: 04-288 (February 26, 2004), Tables 5 and 7.

Workers' compensation is measured as costs per hour worked, as shown in row (9A) of Table 1. In contrast to the results presented in Figure A - which indicated that the Northeast had the lowest workers' compensation costs (as a percentage of gross earnings), the results presented in row (9A) of Table 1 and in Figure B indicate that the Northeast's workers' compensation costs ($0.40 per hour) were greater than the Midwest's ($0.38 per hour) and the South's ($0.35 per hour) workers' compensation costs per hour worked.

Appendix A examines how the regions can switch their relative costs compared to the United States, depending on which measure of workers' compensation costs is used. That interregional differences in workers' compensation can vary depending on which measure of workers' compensation costs is used leads to an obvious question: Which is the "proper" measure that should be used to compare regions in terms of their workers' compensation costs: workers' compensation costs as a percentage of gross earnings (as shown in Figure A) or workers' compensation costs per hour worked (as shown in Figure B)?

Figure B - Workers' Compensation Costs as Employer Expenditures per Hour Worked by Region



Source: Table 1, Row 9A.

In our view, no measure of workers' compensation costs is invariably preferable for all comparisons. Rather, the choice of measurement depends on the purpose of the comparison. For example, an employer seeking a state or region with the least expensive operating environment may decide that workers' compensation costs per hour is the best measure of costs. In contrast, a policymaker concerned about adequacy of benefits may decide that workers' compensation costs as a percentage of payroll is the best measure.[7] In the

Table 2
Workers' Compensation Costs by Major Industry Groups in 2003
for Employers in Private Industry
(In Dollars Per Hours Worked)

		All Workers	Goods-Producing	Service-Producing	Manufac-turing	NonManu-facturing	Mining & Construction
(1)	Total Remuneration	22.69	26.63	21.60	26.37	22.02	27.18
(2)	Gross Earnings	18.47	20.90	17.80	20.81	18.05	21.06
(3)	Wages and Salaries	16.35	18.02	15.89	17.62	16.12	18.87
(4)	Paid Leave	1.47	1.73	1.40	1.99	1.38	1.18
(5)	Supplemental Pay	0.64	1.14	0.51	1.20	0.55	1.01
(6)	Benefits Other Than Pay	4.22	5.73	3.80	5.55	5.60	6.10
(7)	Insurance	1.58	2.20	1.40	2.33	1.44	1.93
(8)	Retirement Benefits	0.68	1.01	0.59	0.92	0.64	1.20
(9)	Legally Required Benefits	1.93	2.45	1.79	2.22	1.88	2.94
(9A)	Workers' Compensation	(0.42)	(0.74)	(0.33)	(0.52)	(0.40)	(1.21)
(10)	Other Benefits	0.03	0.07	0.02	0.09	0.02	0.03
(11)	Workers' Compensation As Percentage of Remuneration	1.83%	2.76%	1.53%	1.98%	1.79%	4.45%
(12)	Workers' Compensation As Percentage of Gross Earnings	2.25%	3.52%	1.85%	2.51%	2.19%	5.75%

Notes: See page 22.

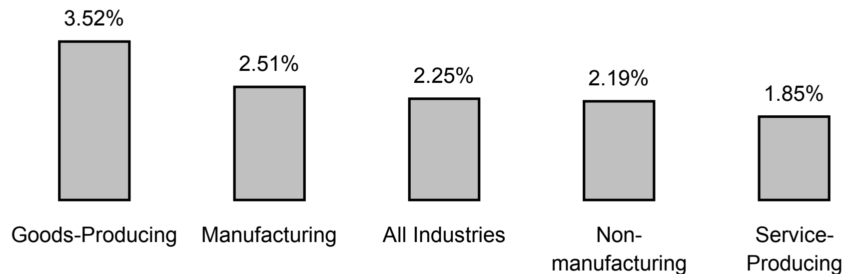
Source: *Employer Costs for Employee Compensation - March 2003*, News Release USDL: 03-297 (June 11, 2003), Tables 5 and 7.
Employer Costs for Employee Compensation - June 2003, News Release USDL: 03-446 (August 26, 2003), Tables 5 and 7.
Employer Costs for Employee Compensation - September 2003, News Release USDL: 03-760 (November 25, 2003), Tables 5 and 7.
Employer Costs for Employee Compensation - December 2003, News Release USDL: 04-288 (February 26, 2004), Tables 5 and 7.

remainder of this article, we confine our discussion to workers' compensation costs as a percentage of gross earnings (or payroll). This format reflects the most common approach in workers' compensation studies. The reader who wishes to make comparisons in terms of workers' compensation costs per hour will be able to do so, however, because hourly cost data are also presented in all of the tables in this article.

Cost Differences by Industry

The BLS data for 2003 also reveal that employers' costs of workers' compensation as a percentage of gross earnings vary among major industry groups in the private sector (*see* Figure C and row 12 of Table 2). The national average for employers' workers' compensation costs was 2.25 percent of gross earnings in 2003. (This all-industry average, in row 12 and the "all workers" column of Table 2, is the same as the U.S. average in Table 1.)

Figure C - Workers' Compensation Costs as a Percentage of Gross Earnings by Major Industry Group



Source: Table 2, Row 12.

Figure D - Workers' Compensation Costs as a Percentage of Gross Earnings in All Goods-Producing Industries, in Manufacturing, and in Mining & Construction

Source: Appendix Table B.1

Table 3
Workers' Compensation Costs by Major Occupational Groups in 2003 for Employers in Private Industry
(In Dollars Per Hours Worked)

		All Workers	White-Collar	Blue-Collar	Service
(1)	Total Remuneration	22.69	27.61	21.19	11.45
(2)	Gross Earnings	18.47	22.91	16.49	9.38
(3)	Wages and Salaries	16.35	20.17	14.54	8.73
(4)	Paid Leave	1.47	2.01	1.18	0.47
(5)	Supplemental Pay	0.64	0.74	0.78	0.18
(6)	Benefits Other Than Pay	4.22	4.70	4.70	2.07
(7)	Insurance	1.58	1.78	1.76	0.70
(8)	Retirement Benefits	0.68	0.83	0.74	0.18
(9)	Legally Required Benefits	1.93	2.05	2.17	1.20
(9A)	Workers' Compensation	(0.42)	(0.26)	(0.38)	(0.28)
(10)	Other Benefits	0.03	0.04	0.03	0.00
(11)	Workers' Compensation As Percentage of Remuneration	1.83%	0.95%	1.78%	2.42%
(12)	Workers' Compensation As Percentage of Gross Earnings	2.25%	1.15%	2.29%	2.96%

Notes: See page 22.

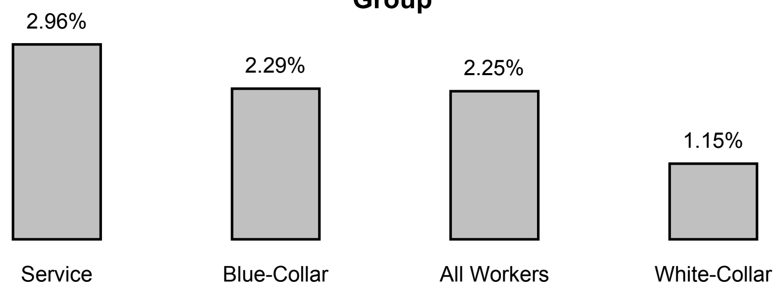
Source: *Employer Costs for Employee Compensation - March 2003*, News Release USDL: 03-297 (June 11, 2003), Table 6.
Employer Costs for Employee Compensation - June 2003, News Release USDL: 03-446 (August 26, 2003), Table 6.
Employer Costs for Employee Compensation - September 2003, News Release USDL: 03-760 (November 25, 2003), Table 6.
Employer Costs for Employee Compensation - December 2003, News Release USDL: 04-288 (February 26, 2004), Table 6.

Workers' compensation data on industries throughout the United States can be disaggregated three ways. First, a distinction can be made between "goods-producing" industries (mining, construction, and manufacturing) and "service-producing" industries (including transportation, communication, and public utilities; wholesale and retail trade; finance, insurance, and real estate; and services). In 2003, national workers' compensation costs were, on average, 3.52 percent of gross earnings (payroll) in the goods-producing sector and 1.85 percent of gross earnings (payroll) in the service-producing sector (*see* row 12 of Table 2 and Figure C).

Workers' compensation data on industries can be disaggregated a second way. A distinction can be made between manufacturing and non-manufacturing industries. In 2003, national workers' compensation costs were, on average, 2.51 percent of gross earnings (payroll) in manufacturing and 2.19 percent of gross earnings (payroll) in the non-manufacturing sector (*see* row 12 of Table 2 and Figure C).

A third way to disaggregate the data on employers' costs by industry is possible. One implication of the data in Figure C is that workers' compensation costs in mining and construction are considerably higher than are workers' compensation costs in manufacturing, since workers' compensation costs for manufacturing industries alone averaged 2.51 percent of payroll, while workers' compensation costs for manufacturing in combination with mining and construction (that is, in the "goods-producing" sector) averaged 3.52 percent of gross earnings. Using a proce-

Figure E - Workers' Compensation Costs as a Percentage of Gross Earnings by Major Occupational Group



Source: Table 3, Row 12.

Table 4
Workers' Compensation Costs by Establishment Employment Size in 2003 for Employers in Private Industry
(In Dollars Per Hours Worked)

		All Workers	1-99 Workers	100-499 Workers	500 or More Workers
(1)	Total Remuneration	22.69	19.12	23.09	31.45
(2)	Gross Earnings	18.47	15.78	18.66	25.21
(3)	Wages and Salaries	16.35	14.26	16.45	21.66
(4)	Paid Leave	1.47	1.04	1.53	2.53
(5)	Supplemental Pay	0.64	0.48	0.68	1.02
(6)	Benefits Other Than Pay	4.22	3.33	4.43	6.24
(7)	Insurance	1.58	1.15	1.76	2.45
(8)	Retirement Benefits	0.68	0.42	0.70	1.35
(9)	Legally Required Benefits	1.93	1.76	1.95	2.35
(9A)	Workers' Compensation	(0.42)	(0.44)	(0.41)	(0.37)
(10)	Other Benefits	0.03	0.00	0.03	0.09
(11)	Workers' Compensation As Percentage of Remuneration	1.83%	2.28%	1.76%	1.18%
(12)	Workers' Compensation As Percentage of Gross Earnings	2.25%	2.76%	2.18%	1.48%

Notes: See page 22.

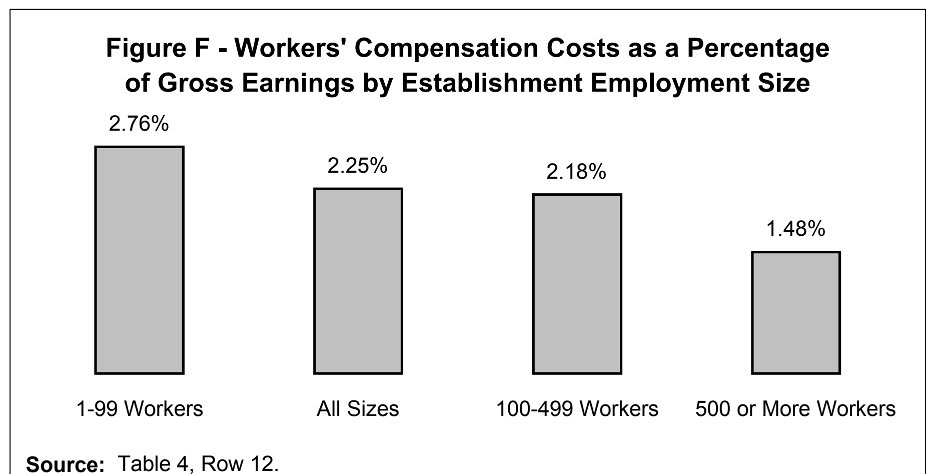
Source: *Employer Costs for Employee Compensation - March 2003*, News Release USDL: 03-297 (June 11, 2003), Table 8.
Employer Costs for Employee Compensation - June 2003, News Release USDL: 03-446 (August 26, 2003), Table 8.
Employer Costs for Employee Compensation - September 2003, News Release USDL: 03-760 (November 25, 2003), Table 8.
Employer Costs for Employee Compensation - December 2003, News Release USDL: 04-288 (February 26, 2004), Table 8.

dure explained in Appendix B, we estimate that the costs of workers' compensation benefits are $1.21 per hour in mining and construction, which represents 4.45 percent of remuneration and 5.75 percent of gross earnings (payroll) in these sectors.

The costs of workers' compensation as a percentage of gross earnings in manufacturing, in mining and construction, and in the good-producing industries are shown in Figure D. It is not possible to separate the costs of workers' compensation in the mining industry from the construction industry in the data published by the BLS. However, the construction sector accounts for virtually all of the employment (93.1 percent) of the combined total of employment in the construction and mining sectors.[8] Thus, the high costs for the construction and mining sectors shown in Figure D and Table 2 are almost certainly due to the high costs of workers' compensation in the construction sector.

Cost Differences by Occupation

The employers' costs of workers' compensation as a percentage of payroll also vary among major occupational groups in the private sector, as shown in Figure E and in Table 3. The national average cost of employers' workers' compensation was 2.25 percent of payroll in 2003. (*See* Table 3, row 12, "All Workers" column. The U.S. average is the same in all tables in this article.) Two occupational groups had, on average, workers' compensation costs that exceeded the national average: blue-collar workers, for whom employers' workers' compensation costs averaged 2.29 percent of payroll, and service workers, for whom employers' workers' compensation costs averaged 2.96 percent of



Source: Table 4, Row 12.

Table 5
Workers' Compensation Costs by Bargaining Status in 2003
for Employers in Private Industry
(In Dollars Per Hours Worked)

		All Workers	Union	Nonunion
(1)	Total Remuneration	22.69	31.33	21.65
(2)	Gross Earnings	18.47	23.64	17.86
(3)	Wages and Salaries	16.35	20.30	15.88
(4)	Paid Leave	1.47	2.24	1.38
(5)	Supplemental Pay	0.64	1.10	0.59
(6)	Benefits Other Than Pay	4.22	7.69	3.80
(7)	Insurance	1.58	3.13	1.39
(8)	Retirement Benefits	0.68	1.77	0.56
(9)	Legally Required Benefits	1.93	2.72	1.84
(9A)	Workers' Compensation	(0.42)	(0.79)	(0.37)
(10)	Other Benefits	0.03	0.08	0.03
(11)	Workers' Compensation As Percentage of Remuneration	1.83%	2.51%	1.72%
(12)	Workers' Compensation As Percentage of Gross Earnings	2.25%	3.33%	2.09%

Notes: See page 22.

Source: *Employer Costs for Employee Compensation - March 2003*, News Release USDL: 03-297 (June 11, 2003), Tables 5 and 7.
Employer Costs for Employee Compensation - June 2003, News Release USDL: 03-446 (August 26, 2003), Tables 5 and 7.
Employer Costs for Employee Compensation - September 2003, News Release USDL: 03-760 (November 25, 2003), Tables 5 and 7.
Employer Costs for Employee Compensation - December 2003, News Release USDL: 04-288 (February 26, 2004), Tables 5 and 7.

payroll. In sharp contrast, employers' workers' compensation costs for white-collar workers were, on average, only 1.15 percent of payroll in 2003. (*See* Table 3, row 12). These cost differences presumably reflect the differences in the number and severity of workplace injuries and diseases experienced by workers in these occupations.

Cost Differences by Establishment Size

An establishment is defined as an economic unit that: 1) produces goods or services at a single location (such as a factory or store) and 2) is engaged in one type of economic activity.[9] Many firms (or companies) thus consist of more than one establishment.

The BLS data on the employers' costs of workers' compensation allow comparisons among establishments of various sizes (as measured by number of employees). As shown in Figure F and in Table 4, there is a clear tendency for workers' compensation costs to decline with increasing establishment size. The national average for employers' workers' compensation costs across all establishments was 2.25 percent of payroll. Those establishments with fewer than 100 employees had workers' compensation costs that, on average, were 2.76 percent of gross earnings in 2003. In contrast, those establishments with 100 to 499 workers had workers'

...there is a clear tendency for workers' compensation costs to decline with increasing establishment size.

Figure G - Workers' Compensation Costs as a Percentage of Gross Earnings by Bargaining Status

Source: Table 5, Row 12.

compensation costs that averaged 2.18 percent of payroll and establishments with 500 or more workers had costs that averaged 1.48 percent of payroll - both figures are below the national (all-establishments) average.

Cost Differences by Bargaining Status

The employers' costs of workers' compensation as a percentage of gross earnings also vary between unionized and nonunionized workers, as shown in Figure G and in Table 5. The employers' costs of workers' compensation for unionized workers in 2003 was 3.33 percent of payroll, and the comparable figure for nonunionized workers was 2.09 percent. The national average (unionized and nonunionized workers) was 2.25 percent. (*See* Table 5, row 12.)

Thus, the higher costs are not due to unions, but are instead a reflection of the elevated risks of workplace injuries and diseases found in the industries that unions have organized.

One possible explanation for these cost differences between nonunionized and unionized workers is that unions have been more successful in organizing workers in industries such as mining, construction, and manufacturing than they have been in organizing other industries that have relatively fewer workplace injuries and diseases than do the mining, construction, and manufacturing industries. Thus, the higher costs are not due to unions, but are instead a reflection of the elevated risks of workplace injuries and diseases found in the industries that unions have organized. Another possible explanation is that unions provide information and assistance to members who are injured on the job, thus increasing the likelihood that unionized members will receive workers' compensation benefits, which in turn increases the employers' costs of workers' compensation for those workers.

The information derived from the BLS data should be useful to firms trying to place their own workers' compensation costs in perspective and to policymakers attempting to assess the costs of the workers' compensation programs in a particular jurisdiction relative to costs elsewhere.

Conclusions

The employers' costs of workers' compensation measured as a percentage of payroll (or measured as costs per hour) vary systematically by region, by major industry group, by major occupational group, by establishment size, and by bargaining status. The information derived from the BLS data should be useful to firms trying to place their own workers' compensation costs in perspective and to policymakers attempting to assess the costs of the workers' compensation programs in a particular jurisdiction relative to costs elsewhere. Ideally, the BLS data will be expanded in future years to present greater detail by industry, occupation, and (in particular) by individual states.

REFERENCES

Blum, Florence and John F. Burton, Jr. 2002. “Workers’ Compensation Costs in 2002: Regional, Industrial and Other Variations.” *Workers’ Compensation Policy Review* 2, no. 5 (September/October): 3-12.

Burton, John F., Jr. 2004. “Workers’ Compensation Costs for Employers 1986-2003.” *Workers’ Compensation Policy Review* 4, no. 1 (January/February): 7-22.

U.S. Department of Labor, Bureau of Labor Statistics. 2003a. *Employer Costs for Employee Compensation - March 2003*, News Release USDL: 03-297 (June 11, 2003).

U.S. Department of Labor, Bureau of Labor Statistics. 2003b. *Employer Costs for Employee Compensation - June 2003*, News Release USDL: 03-446 (August 26, 2003).

U.S. Department of Labor, Bureau of Labor Statistics. 2003c. *Employer Costs for Employee Compensation - September 2003*, News Release USDL: 03-760 (November 25, 2003).

U.S. Department of Labor, Bureau of Labor Statistics. 2004a *Employer Costs for Employee Compensation - December 2003*, News Release USDL: 04-288 (February 26, 2004).

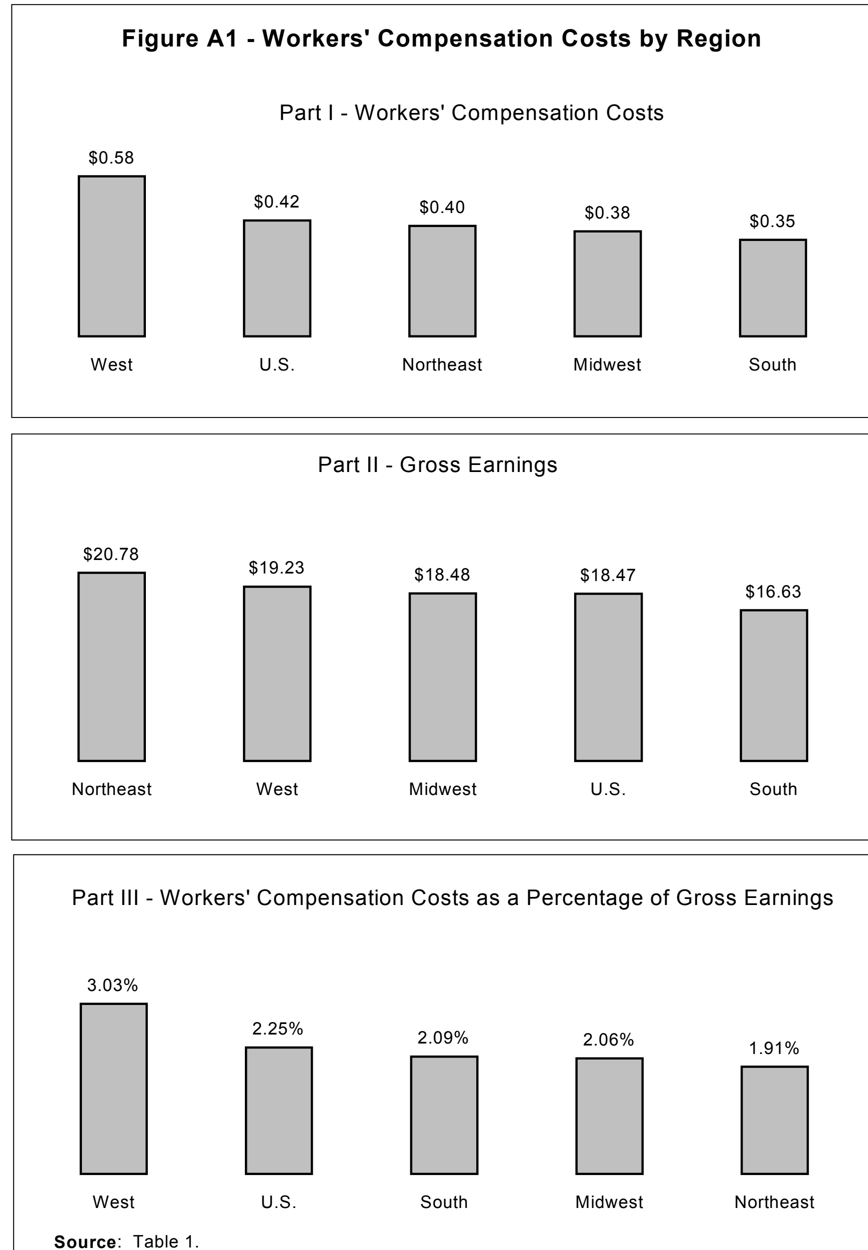
U.S. Department of Labor, Bureau of Labor Statistics. 2004b. *Monthly Labor Review* 125, no. 7 (February).

APPENDIX A

Alternative Ways to Measure Regional Differences in Workers' Compensation Costs

This appendix examines how regions can switch their relative costs compared to the United States depending on which measure of workers' compensation costs is used. The explanation is provided by a closer examination of the arithmetic procedure used in computing workers' compensation costs as a percentage of gross earnings. The workers' compensation costs per hour (row 9A of Table 1 and Appendix Figure A1: Part I, which is the same as Figure B in the article) have to be divided by gross earnings per hour (row 2 of Table 1 and Appendix Figure A1: Part II) in order to produce the figures on workers' compensation costs as a percentage of wages and salaries (row 12 of Table 1 and Appendix Figure A1: Part III, which is the same as Figure A in the article). The relationships between these numerators and denominators for the four regions account for the fluctuations in rankings between Figure A and Figure B in the article.

Consider the Midwest. Workers' compensation costs per hour in the Midwest ($0.38 per hour) are four percent below the national average for workers' compensation costs ($0.42 per hour), and the hourly gross earnings in the Midwest ($18.48 per hour - row 2 of Table 1) is one cent more than the national average for gross earnings ($18.47 - row 2 of Table 1). As a result, the Midwest's workers' compensation costs as a percentage of gross earnings (2.06 percent - or $0.38 divided by $18.48) is 19 percent less than the national average of workers' compensation costs as a percentage of gross earnings (2.25 percent - or $0.42 divided by $18.47).



Source: Table 1.

APPENDIX B

Derivation of Workers' Compensation Costs in the Mining and Construction Industries

The BLS does not publish estimates of remuneration or the components of remuneration (including workers' compensation costs) for the mining and construction industries. However, rough estimates of remuneration and workers' compensation costs can be produced using the BLS data and the procedure explained in this appendix.

Table B1 contains information on remuneration that BLS publishes for the Goods Producing Major Industry Group in Rows (1) to (10) of Column (A). Similar BLS information for the Manufacturing Major Industry Group is contained in Rows (1) to (10) of Column (B) of Table B1. (These are identical to data contained in Table 2 of the article.)

The Goods-Producing Major Industry Group consists of the Manufacturing Industry, the Construction Industry, and the Mining Industry.[10] The BLS indicates that March 2003 employment counts from the Bureau's Current Employment Statistics program were used as weights to calculate cost levels for all four quarterly reports in 2003. Row (13) of Table B1 provides the employment figures for the Goods-Producing Industries, the Manufacturing Industries, and the combination of the Mining & Construction Industries. Row (14) of Table B1 indicates that as of March 2003, 67.3 percent of the employment in the Goods-Producing Industries were accounted for by Manufacturing Industries and 32.7 percent were accounted for by the Mining & Construction Industries.

With this information, the approximate costs of Total remuneration and its various components in Mining & Construction can be estimated by solving equations such as this for Total Remuneration:

$$26.63 = (.673)(26.37) + (.327)(X)$$

where X is the total remuneration in Mining and Construction.

Solving this equation provides the estimate that total remuneration in Mining and Construction averages $27.18 per hour, which is the figure shown in Row (1) of Column (C) of Table B1. Similar equations were solved for each of the other entries in Rows (2) to (10) in Column (C) of Table B1. The estimate of workers' compensation costs as 4.45 percent of total remuneration in Row (11) was calculated by dividing the figure of $ 1.21 in Row (9A) by the figure of $27.18 in Row (1). The estimate of workers' compensation costs as 5.75 percent of gross earnings in Row (12) was calculated by diving the figure of $ 1.03 in Row (9A) by the figure of $21.06 in Row (2).

Table B1
Workers' Compensation Costs for Employers in the Mining & Construction Industries in 2003
(In Dollars Per Hours Worked)

		Goods-Producing (A)	Manufacturing (B)	Mining & Construction (C)
(1)	Total Remuneration	26.63	26.37	27.18
(2)	Gross Earnings	20.90	20.81	21.06
(3)	Wages and Salaries	18.02	17.62	18.87
(4)	Paid Leave	1.73	1.99	1.18
(5)	Supplemental Pay	1.14	1.20	1.01
(6)	Benefits Other Than Pay	5.73	5.55	6.10
(7)	Insurance	2.20	2.33	1.93
(8)	Retirement Benefits	1.01	0.92	1.20
(9)	Legally Required Benefits	2.45	2.22	2.94
(9A)	Workers' Compensation	(0.74)	(0.52)	(1.21)
(10)	Other Benefits	0.07	0.09	0.03
(11)	Workers' Compensation Percentage of Remuneration	2.76%	1.98%	4.45%
(12)	Workers' Compensation As Percentage of Gross Earnings	3.52%	2.51%	5.75%
(13)	Employment (Millions)	22.550	15.306	7.244
(14)	Share of Employment in Goods Producing	100.0%	67.9%	32.1%

Notes: See page 22.

Source: Columns (A) and (B), Rows 1-10: *from Table 2.*
Columns (A), (B), and (C), Rows 13-14: March 2003 Employment from U.S. Department of Labor (2004), Table 12, p. 129.
Column (C), Rows 1-10, derivation explained in text. Figures in Rows (2), and (6) do not equal sum of components because of rounding.

The results shown in Column (C) of Table B1 and Figure D should be understood as rough estimates of the costs of various items in the construction and mining industries since they are based on manipulation of the BLS data. We nonetheless feel they are accurate enough to be useful to illustrate the relatively high costs of workers' compensation in the mining and construction industries. Since the BLS data indicate that construction industry employment represented 93.1 percent of the total of the combined construction and mining industries in March 2003, the results strongly suggest that construction is the most expensive major industry group in the U.S. economy in terms of the costs of workers' compensation for employers.

Notes for Tables 1 - 5 and B1.

1. The text and all tables in this article use the term "remuneration" in place of the term "compensation" which is used by the BLS.
2. Total remuneration (row 1) = gross earnings (row 2) + benefits other than pay (row 6).
3. Gross earnings (row 2) = wages and salaries (row 3) + paid leave (row 4) + supplemental pay (row 5).
4. Benefits other than pay (row 6) = insurance (row 7) + retirement benefits (row 8) + legally required benefits (row 9) + other benefits (row 10).
5. Workers' compensation (row 9A) is one of the legally required benefits (row 9).
6. Workers' compensation as percent of remuneration (row 11) = workers' compensation (row 9A) / total remuneration (row 1).
7. Workers' compensation as percent of gross earnings (row 12) = workers' compensation (row 9A) / gross earnings (row 2).
8. Results in rows (2), (6), (11), and (12) were calculated by Florence Blum and John F. Burton, Jr.
9. Individual items may not sum to total remuneration because of rounding in BLS data.
10. * means cost per hour worked is $0.01 or less
11. The data in Tables 1-5 and B1 are annual averages of the quarterly data presented in the quarterly surveys conducted by the Bureau of Labor Statistics. We calculated the annual averages, which are not weighted to reflect changes in employment among quarters.

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ENDNOTES

1. The BLS data used in this article were published in U.S. Department of Labor 2003a, 2003b, 2003c, and 2004a. The national 2003 data for private industry employees, state and local employees, and all non-federal employees were analyzed in Burton 2004. The most recent article analyzing regional, industrial, and other variations is Blum and Burton 2002.

2. The numbers of private sector establishments in the quarterly samples were 6,850 in March 2003; 8,500 in June 2003; 8,400 in September 2003; and 8,300 in December 2003. The number of establishments in the state and local sector was 800 for each of the quarterly samples in 2003.

3. The BLS data on the employers' costs of workers' compensation do not provide information on individual states or on any other disaggregated level geographically, aside from the four regions for which data are shown in Figure A.

The four BLS-designated regions are the same as the U.S. Census regions and consist of the following categorization: 1) **Northeast** (Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont); 2) **South** (Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia); 3) **Midwest** (Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin); and 4) **West** (Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming).

4. Generally, two regions will be above the national average and the remaining two regions will be below the national average. However, in 2003 workers' compensation costs in one region (the West) were very high compared to the national average, while the costs in the other three regions were generally only moderately lower than the national average. As a result, three regions had costs below the national average and only one region had costs above the national average in 2003.

5. The BLS uses the term "total compensation" for wages and salaries *plus* total benefits. We have instead used the term "total remuneration," lest the references to "total compensation" and to "workers' compensation" (one of the BLS's subcategories under "total benefits") become too confusing.

6. Specifically, the *gross earnings* figure includes wages and salaries; paid leave (vacations, holidays, sick leave, and other leave); and supplemental pay (premium pay, shift pay, and nonproduction bonuses). The *benefits other than pay* figure includes insurance (life insurance, health insurance, sickness and accident insurance); retirement and savings (pensions, savings and thrift); legally required benefits (Social Security, federal unemployment, state unemployment, and workers' compensation); and other benefits (includes severance pay and supplemental unemployment benefits).

7. The latter decision reflects a judgment that, since workers' compensation benefits are generally tied to workers' preinjury wages, and thus benefits and costs ought to increase proportionately with wages, costs as a percentage of wages and salaries should be the same across states and regions.

For example, suppose that in all regions, for every 1,000 hours worked, there are work injuries that result in the loss of 50 hours of work. Also suppose that two-thirds of lost wages are replaced by workers' compensation benefits in all regions. (A two-thirds replacement rate is a commonly used measure of adequacy.)

Using the data on hourly gross earnings shown in Table 1, the total payroll in the **South** for 1,000 hours worked is $16,630 ($16.63 X 1,000 hours); the total amount of workers' compensation benefits is $555 ($16.63 X 50 hours X 2/3 replacement rate); benefits (assumed to be the same as costs for this example) as a percentage of gross earnings in the **South** are 3.34 percent ($555 divided by $16,630).

Using the data on hourly gross earnings shown in Table 1, the total wage bill in the **Northeast** for 1,000 hours worked is $20,780 ($20.78 X 1,000 hours); the total amount of workers' compensation benefits is $693.01 ($20.78 X 50 hours X 2/3 replacement rate); benefits (assumed to be the same as costs for this example) as a percentage of wages and salaries in the **Northeast** are 3.33 percent ($693.01 divided by $20,7806.

8. There were 500 thousand employees in mining and 6,720 thousand employees in construction in 2003, according to the U.S. Department of Labor 2004b, Table 12, p.129.

9. U.S. Department of Labor, 2004b, "Notes on Current Labor Statistics," p. 111.

10. The Goods-Producing Major Industry Group also includes logging, which we exclude from our calculations since apparently the logging industry is not included in the BLS Survey used to construct the Employer Costs for Employee Compensation data.

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