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WORKERS' COMPENSATION POLICY REVIEW

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In This Issue:

FEATURED TOPICS

Summary of the Contents . .1

Workers' Compensation Costs in 2000: Regional, Industrial, and Other Variations3

California's New Design for Evaluating Workers' Compensation and Safety Legislation13

Synopsis of the Oregon Major Contributing Cause Study21

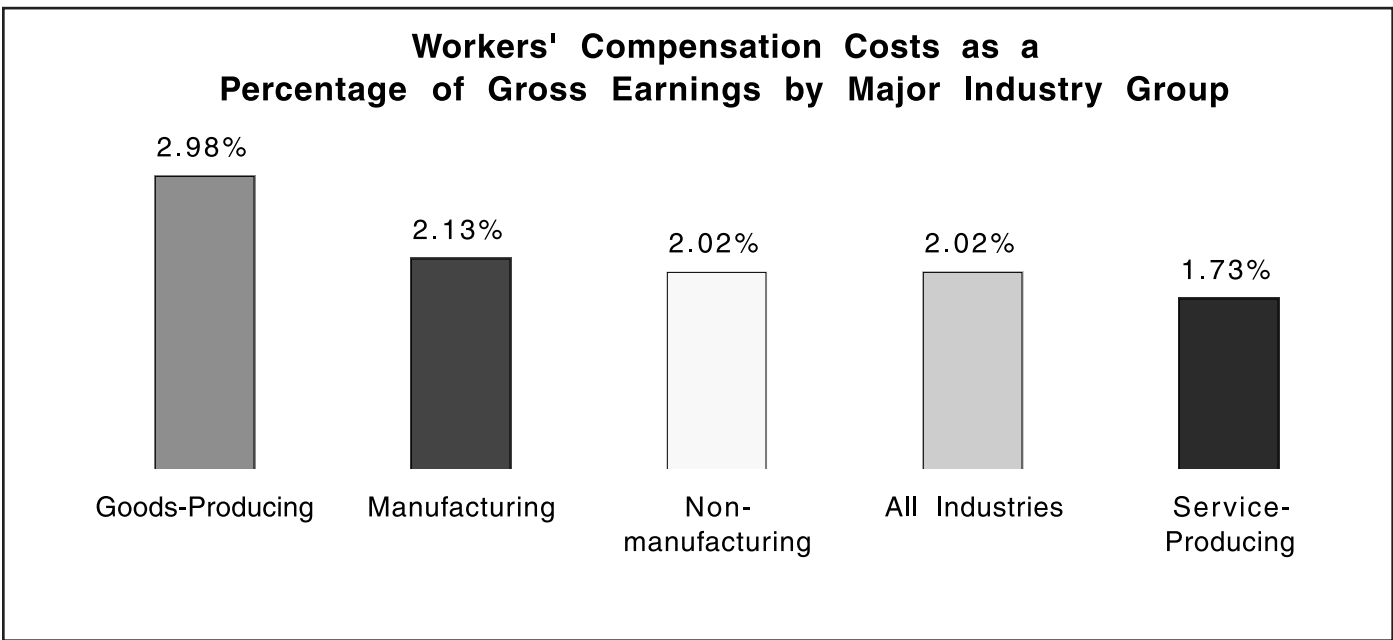
The Impact of Higher Compensability Standards on the Exclusive Remedy Shield23

Summary of the Contents

The employers' costs of workers' compensation as a percentage of payroll declined rapidly in recent years. As discussed in the lead article in the January-February issue of the Workers' Compensation Policy Review (WCPR), workers' compensation expenditures by all non-Federal Government employers peaked at 2.67 percent of gross earnings in 1994 and then rapidly declined to 1.90 percent of payroll in 2000.

The source of the data for the national average is the Bureau of Labor Statistics (BLS). The same source of data can be used to measure differences in employers' workers' compensation costs by region, industry, occupation, establishment size, and bargaining status of the workers. Burton and Blum discuss these differences in costs in this issue in "Workers' Compensation Costs in 2000: Regional, Industrial, and Other Variations." An example of these differences is illustrated in the figure below, which shows that employers' costs ranged from 2.96 percent of payroll in goods-producing industries to 1.73 percent in service-producing industries. We also use the BLS data to provide a rough estimate that the employers' costs of workers' compensation are 5.17 percent of payroll in mining and construction industries.

Most states base their reforms of workers' compensation programs on anecdotes, ersatz data, unvalidated theories, and power politics. (Or am I being too cynical? Or kind?) Eureka! Has California discovered a new path to nirvana? Charles Lawrence Swezey makes the case for the state's new approach to workers' compensation reform in a provocative and persuasive article, "California's New Design for Evaluating Workers' Compensation and Safety Legislation."



Research and Public Policy for the Workers' Disability System

Many states revised their workers' compensation statutes in the late 1980s and 1990s in response to the rapid increase in workers' compensation costs and the decline in insurance industry profitability in the period from 1985 to 1991. Oregon was one of the most prominent states in this revision process. The March-April issue of the WCPR contained two articles based on a compre-

hensive review of the Oregon workers' compensation program. Sara Harmon continues the examination of Oregon in this issue with an examination of court decisions in Oregon and states with similar reforms in "The Impact of Higher Compensability Standards on the Exclusive Remedy Shield." A topic of particular interest is whether the legislative reforms have jeopardized the exclusive

remedy shield for employers, which insulates them from tort suits for work-related injuries. As indicated in my introduction to the Oregon section and in Sara's article, a May 2001 decision by the Oregon Supreme Court has revalidated the old adage: There's no such thing as a free lunch. (To be fair to Sara, that's my characterization, not hers.)

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 with the address: www.workerscompresources.com. Access to the website is currently free.

The website contains several valuable features:

- Full-text versions of several recent studies of workers' compensation programs.
- 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.
- Summaries of the contents of the *Workers' Compensation Policy Review*.
- Information pertaining to the *Workers' Compensation Policy Review*, including a form to request a free sample copy and a Guide for Authors for those interested in submitting articles for possible publication in the *Workers' Compensation Policy Review*.
- 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.

During 2001, portions of the website will become available only to subscribers to the *Workers' Compensation Policy Review*. For more information about the website, and to make suggestions about current or potential content, please contact the website editor, Elizabeth Yates, at webeditor@workerscompresources.com

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Workers' Compensation Costs in 2000: Regional, Industrial, and Other Variations

by John F. Burton, Jr. and Florence Blum

The employers' costs of workers' compensation vary among regions and industries, according to 2000 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 many of these variations are not surprising, some of the patterns evident in the data are unexpected.

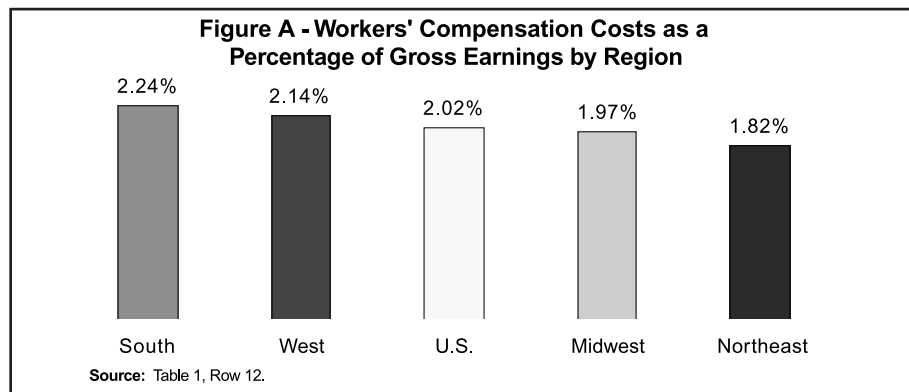
The BLS data used in this article provide information on the employers' costs per hour worked for wages and salaries and for benefits (including workers' compensation and other legally required benefits) for a sample of 6,200 establishments in the private sector.²

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 Not surprisingly, employers' workers' compensation costs are above the national average in two regions and are below the national average in the other regions.⁴ What is surprising is the ranking of the regions, and in particular the findings that: 1) the South is the region with the highest workers' compensation costs (as a percentage of gross earnings) and 2) 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 \$19.85 for employers in private industry throughout the United States in 2000 (row 1).⁵ The \$19.85 of total remuneration includes gross earnings that averaged \$16.37 per hour (row 2) and benefits other than pay that averaged \$3.48 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 \$0.33 per hour worked (row 9A), is one of the *legally required benefits* that are included in the BLS's total figure of \$1.67 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 2000, workers' compensation expenditures (\$0.33) were 1.66 percent of total remuneration (\$19.85) and 2.02 percent of gross earnings (or payroll) (\$16.37).

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 \$0.34 per hour were divided by gross earnings of \$18.72 per hour to produce the figure of 1.82 percent — which is workers' compensation costs as a percentage of gross earnings in the Northeast in 2000.

An alternative way to measure regional differences in workers' compensation costs is shown in Figure B. 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 South had workers' compensation costs (as a percentage of gross earnings) that were **above** the national average — the results presented in row (9A) of Table 1 and in Figure B indicate that the South's workers' compensation costs (\$0.33 per hour) were **equal to** the national average (\$0.33 per hour).

Furthermore, while the Northeast's workers' compensation costs (as a percentage of gross earnings) were **below** the national average (see Figure A), in terms of workers' compensation costs per hour worked (shown in row 9A of Table 1 and in Figure B), the Northeast at \$0.34 was **above** the national average of \$0.33 per hour.

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? Should workers' compensation costs as a per-

Table 1
Workers' Compensation Costs by Region in 2000
for Employers in Private Industry
(In Dollars Per Hours Worked)

	U.S.	Northeast	South	Midwest	West
(1) Total Remuneration	19.85	22.67	17.81	19.22	20.88
(2) Gross Earnings	16.37	18.72	14.70	15.74	17.32
(3) Wages and Salaries	14.49	16.37	13.09	13.91	15.45
(4) Paid Leave	1.28	1.64	1.08	1.19	1.33
(5) Supplemental Pay	0.60	0.71	0.53	0.64	0.54
(6) Benefits Other Than Pay	3.48	3.95	3.12	3.48	3.56
(7) Insurance	1.19	1.40	1.06	1.23	1.14
(8) Retirement Benefits	0.59	0.67	0.51	0.61	0.61
(9) Legally Required Benefits	1.67	1.85	1.53	1.60	1.79
(9A) Workers' Compensation	(0.33)	(0.34)	(0.33)	(0.31)	(0.37)
(10) Other Benefits	0.03	0.03	0.02	0.04	0.02
(11) Workers' Compensation As Percentage of Remuneration	1.66%	1.50%	1.85%	1.61%	1.77%
(12) Workers' Compensation As Percentage of Gross Earnings	2.02%	1.82%	2.24%	1.97%	2.14%

- Notes:**
1. The text and all tables in this article use the term "remuneration" in place of the term "compensation" that 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.
- * Cost per hour worked is \$0.01 or less

Source: *Employer Costs for Employee Compensation - March 2000*, News Release USDL: 00-186 (June 29, 2000), Tables 5 and 7.

centage of gross earnings (as shown in Figure A) or workers' compensation costs per hour worked (as shown in Figure B) be the measure used?

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

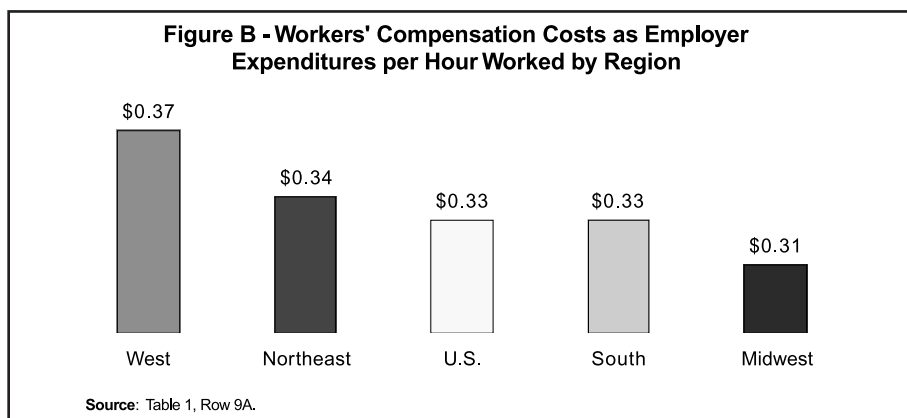
In the remainder of this article, we confine our discussion to workers' compensation costs as a percentage of gross earnings (or payroll). This format reflects the most common approach in workers' compensation studies. The reader who

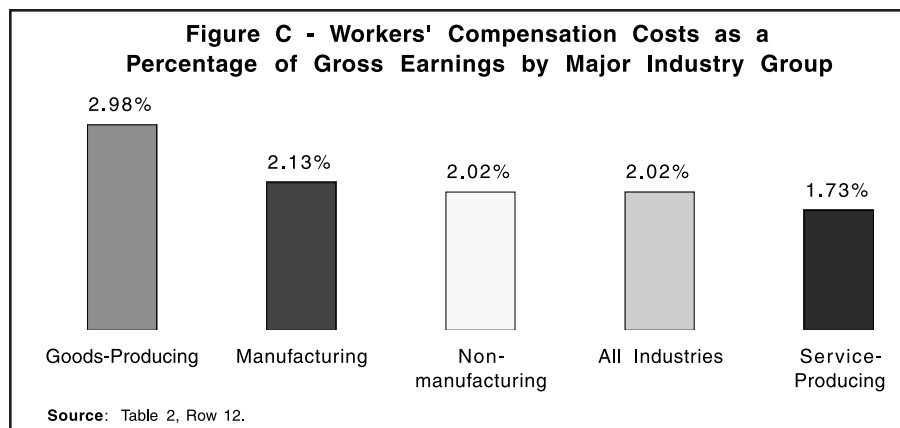
wishes to make comparisons in terms of workers' compensation costs per hour will be able to do so, however, because hourly cost data are also presented in all of the tables in this article.

Cost Differences by Industry

The BLS data for 2000 also reveal that employers' costs of workers' compen-

sation 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 2.02 percent of gross earnings in 2000. (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.)





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 2000, national

workers' compensation costs were, on average, 2.98 percent of gross earnings (payroll) in the goods-producing sector and 1.73 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 2000, national workers' compensation costs were, on average, 2.13 percent of gross earnings (payroll) in manufacturing and 2.02 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 2.13 percent of payroll, while workers' compensation costs for manufacturing in combination with mining and construction (that is, in the "goods-producing" sector) averaged 2.98 percent of gross earnings. Using a procedure explained in Appendix B, we estimate that the costs of workers' compensation benefits are \$0.97 per hour in mining and construction, which represents 4.06 percent of remuneration.

Table 2
Workers' Compensation Costs by Major Industry Groups in 2000
for Employers in Private Industry
(In Dollars Per Hours Worked)

	All Workers	Goods-Producing	Service-Producing	Manufacturing	NonManufacturing	Mining & Construction
(1) Total Remuneration	19.85	23.55	18.72	23.41	19.12	23.91
(2) Gross Earnings	16.37	18.78	15.62	18.79	15.87	18.75
(3) Wages and Salaries	14.49	16.25	13.95	16.01	14.18	16.86
(4) Paid Leave	1.28	1.51	1.20	1.74	1.18	0.92
(5) Supplemental Pay	0.60	1.02	0.47	1.04	0.51	0.97
(6) Benefits Other Than Pay	3.48	4.76	3.07	4.61	3.24	5.12
(7) Insurance	1.19	1.77	1.02	1.85	1.06	1.57
(8) Retirement Benefits	0.59	0.83	0.51	0.75	0.56	1.03
(9) Legally Required Benefits	1.67	2.09	1.54	1.92	1.62	2.52
(9A) Workers' Compensation	(0.33)	(0.56)	(0.27)	(0.40)	(0.32)	(0.97)
(10) Other Benefits	0.03	0.07	*	0.09	*	0.02
(11) Workers' Compensation Percentage of Remuneration	1.66%	2.38%	1.44%	1.71%	1.67%	4.06%
(12) Workers' Compensation As Percentage of Gross Earnings	2.02%	2.98%	1.73%	2.13%	2.02%	5.17%

- Notes:**
- The text and all tables in this article use the term "remuneration" in place of the term "compensation" that is used by the BLS.
 - Total remuneration (row 1) = gross earnings (row 2) + benefits other than pay (row 6).
 - Gross earnings (row 2) = wages and salaries (row 3) + paid leave (row 4) + supplemental pay (row 5).
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 - Workers' compensation as percent of gross earnings (row 12) = workers' compensation (row 9A) + gross earnings (row 2).
 - Results in rows (2), (6), (11), and (12) were calculated by Florence Blum and John F. Burton, Jr.
 - Individual items may not sum to total remuneration because of rounding in BLS data.
 - Goods-Producing includes mining, construction, and manufacturing.
 - Service-Producing includes transportation, communication, and public utilities: wholesale and retail trade; finance, insurance, and real estate; and service industries.
- * Cost per hour worked is \$0.01 or less

Source: *Employer Costs for Employee Compensation - March 2000*, News Release USDL: 00-186 (June 29, 2000), Table 5 for all industry groups except Mining & Construction, for which the derivation is explained in Appendix B of this article.

neration and 5.17 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 (92.6 percent) of the combined total of employment in the construction and mining sectors. 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 2.02 percent of payroll in 2000. (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 4.07 percent of payroll, and service workers, for whom employers' workers' compensation costs averaged 2.84 percent of payroll. In sharp contrast, employers' workers' compensation costs for white-collar workers were, on average, only 1.03 percent of payroll in 2000. (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

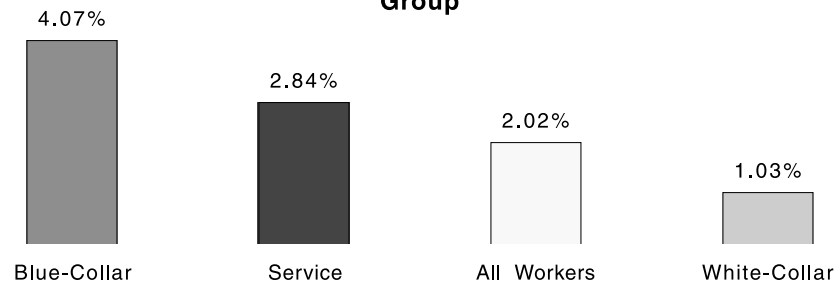
An establishment is defined as an economic unit that: 1) produces goods or services at a single location (such as a factory or store) and 2) is engaged in one type of economic activity.⁸ Many firms (or companies) thus consist of more than one establishment.

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



Source: Appendix Table B.1

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



Source: Table 3, Row 12.

**Table 3
Workers' Compensation Costs by Major Occupational Groups in 2000
for Employers in Private Industry
(In Dollars Per Hours Worked)**

		All Workers	White-Collar	Blue-Collar	Service
(1)	Total Remuneration	19.85	24.19	18.73	9.72
(2)	Gross Earnings	16.37	20.34	14.76	8.10
(3)	Wages and Salaries	14.49	17.91	12.99	7.57
(4)	Paid Leave	1.28	1.76	1.01	0.39
(5)	Supplemental Pay	0.60	0.6776		0.14
(6)	Benefits Other Than Pay	3.48	3.85	3.97	1.63
(7)	Insurance	1.19	1.34	1.39	0.45
(8)	Retirement Benefits	0.59	0.70	0.69	0.13
(9)	Legally Required Benefits	1.67	1.78	1.85	1.05
(9A)	Workers' Compensation	(0.33)	(0.21)	(0.60)	(0.23)
(10)	Other Benefits	0.03	0.03	0.04	*
(11)	Workers' Compensation As Percentage of Remuneration	1.66%	0.87%	3.20%	2.37%
(12)	Workers' Compensation As Percentage of Gross Earnings	2.02%	1.03%	4.07%	2.84%

- Notes:**
1. The text and all tables in this article use the term "remuneration" in place of the term "compensation" that is used by the BLS.
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 3. Gross earnings (row 2) = wages and salaries (row 3) + paid leave (row 4) + supplemental pay (row 5).
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 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.
 - * Cost per hour worked is \$0.01 or less

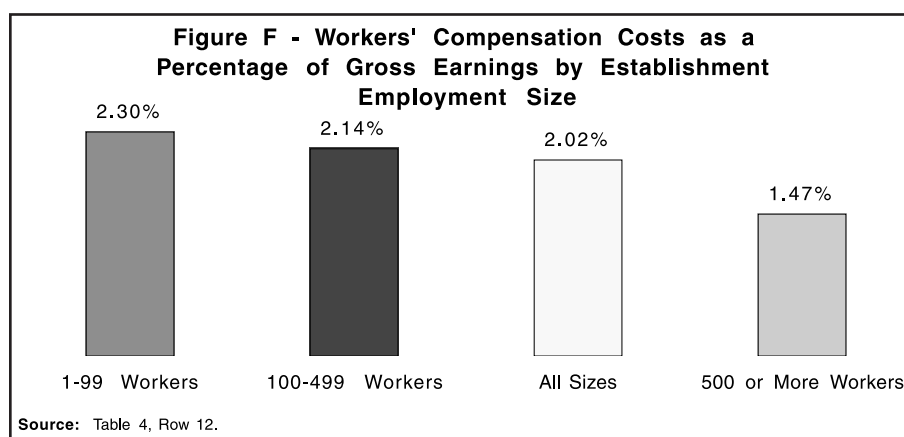
Source: *Employer Costs for Employee Compensation - March 2000*, News Release USDL: 00-186 (June 29, 2000), Table 6.

Table 4
Workers' Compensation Costs by Establishment Employment Size in 2000
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	19.85	17.16	19.30	26.93
(2) Gross Earnings	16.37	14.34	15.87	21.81
(3) Wages and Salaries	14.49	12.95	14.05	18.70
(4) Paid Leave	1.28	0.92	1.23	2.18
(5) Supplemental Pay	0.60	0.47	0.59	0.93
(6) Benefits Other Than Pay	3.48	2.82	3.43	5.12
(7) Insurance	1.19	0.89	1.20	1.93
(8) Retirement Benefits	0.59	0.40	0.56	1.08
(9) Legally Required Benefits	1.67	1.53	1.65	2.02
(9A) Workers' Compensation	(0.33)	(0.33)	(0.34)	(0.32)
(10) Other Benefits	0.03	*	0.02	0.09
(11) Workers' Compensation As Percentage of Remuneration	1.66%	1.92%	1.76%	1.19%
(12) Workers' Compensation As Percentage of Gross Earnings	2.02%	2.30%	2.14%	1.47%

- Notes:**
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 - Workers' compensation (row 9A) is one of the legally required benefits (row 9).
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 - Workers' compensation as percent of gross earnings (row 12) = workers' compensation (row 9A) + gross earnings (row 2).
 - Results in rows (2), (6), (11), and (12) were calculated by Florence Blum and John F. Burton, Jr.
 - Individual items may not sum to total remuneration because of rounding in BLS data.
 - Cost per hour worked is \$0.01 or less

Source: *Employer Costs for Employee Compensation - March 2000*, News Release USDL: 00-186 (June 29, 2000), Table 8.



The BLS data on the employers' costs of workers' compensation allow comparisons among establishments of various sizes (as measured by number of employ-

ees). 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 2.02 percent of payroll. Those establishments with fewer than 100 employees had workers' compensation costs that, on average, were 2.30 percent of gross earnings in 2000, while those establishments with 100 to 499 workers had workers' compensation costs that averaged 2.14 percent of payroll – both figures are above the national (all-establishments) average. In contrast, establishments with 500 or more workers had costs that averaged 1.47 percent of payroll, which is below the national average.

Cost Differences by Bargaining Status

The employers' costs of workers' compensation as a percentage of gross

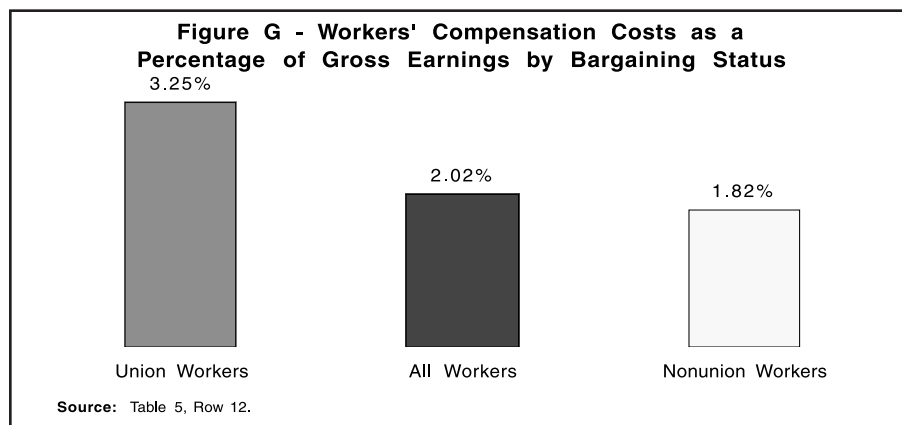
Table 5
Workers' Compensation Costs by Bargaining Status in 2000
for Employers in Private Industry
(In Dollars Per Hours Worked)

		All Workers	Union	Nonunion
(1)	Total Remuneration	19.85	25.88	19.07
(2)	Gross Earnings	16.37	19.67	15.94
(3)	Wages and Salaries	14.49	16.87	14.18
(4)	Paid Leave	1.28	1.75	1.22
(5)	Supplemental Pay	0.60	1.05	0.54
(6)	Benefits Other Than Pay	3.48	6.21	3.12
(7)	Insurance	1.19	2.37	1.04
(8)	Retirement Benefits	0.59	1.49	0.47
(9)	Legally Required Benefits	1.67	2.25	1.59
(9A)	Workers' Compensation	(0.33)	(0.64)	(0.29)
(10)	Other Benefits	0.03	0.10	0.02
(11)	Workers' Compensation As Percentage of Remuneration	1.66%	2.47%	1.52%
(12)	Workers' Compensation As Percentage of Gross Earnings	2.02%	3.25%	1.82%

Notes:

1. The text and all tables in this article use the term "remuneration" in place of the term "compensation" that is used by the BLS.
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 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.
- * Cost per hour worked is \$0.01 or less

Source: *Employer Costs for Employee Compensation - March 2000*, News Release USDL: 00-186 (June 29, 2000), Tables 5 and 7.



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 2000 was 3.25 percent of payroll and the comparable figure for nonunionized workers was 1.82 percent. The national average (unionized

and nonunionized workers) was 2.02 percent. (See Table 5, row 12.)

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.

Conclusions

The employers' costs of workers' compensation measured as a percentage of payroll (or measured as costs per hour)

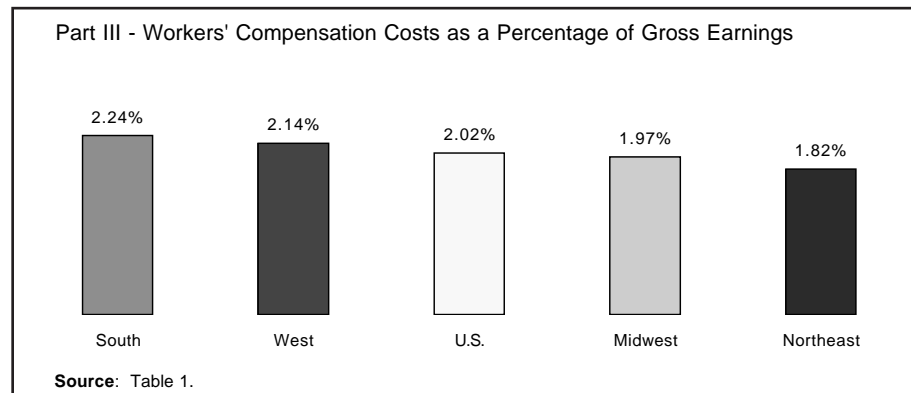
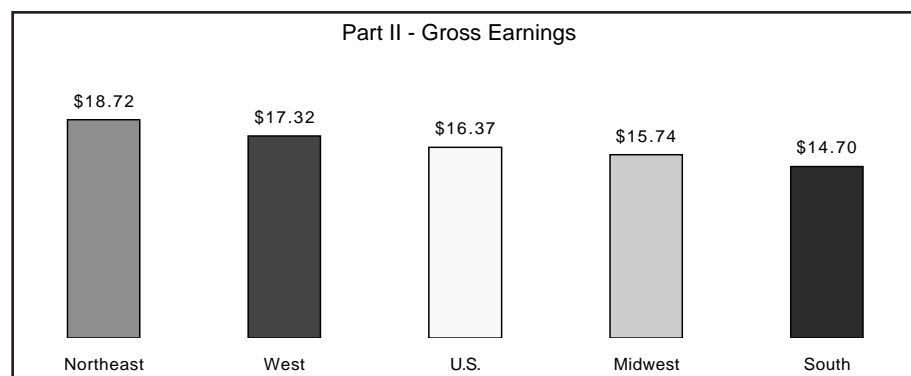
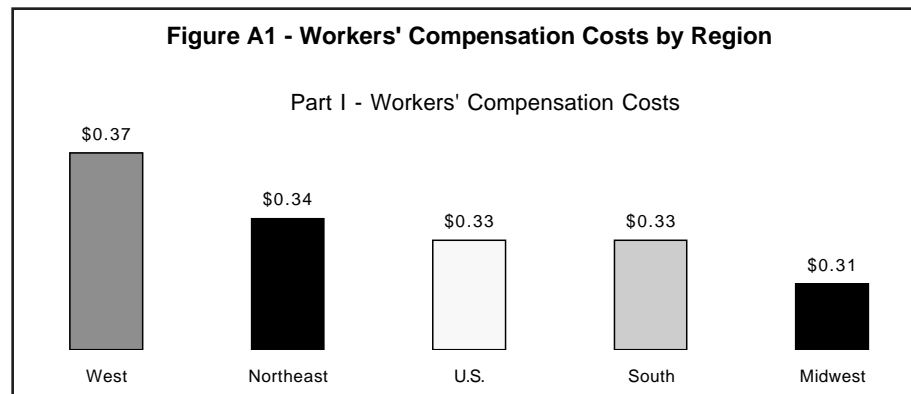
vary systematically by region, by major industry group, by major occupational group, by major occupational group, by establishment size, and by bargaining status. The information derived from the BLS data should be useful to firms trying to place their own workers' compensation costs in perspective and 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.

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 first the South. Workers' compensation costs per hour in the South (\$0.33 per hour) are equal to the national average for workers' compensation costs (\$0.33 per hour), but the hourly gross earnings in the South (\$14.70 per hour – row 2 of Table 1) are ten percent below the national average for gross earnings (\$16.37 – row 2 of Table 1). As a result, the South's workers' compensation costs as a percentage of



gross earnings (2.24 percent – or \$0.33 divided by \$14.70) are above the national average of workers' compensation costs as a percentage of gross earnings (2.02 percent – or \$0.33 divided by \$16.37).

Consider next the Northeast. The Northeast's workers' compensation costs per hour (\$0.34 per hour) are above the national average for workers' compensation costs (\$0.33 per hour) by about three percent, but the Northeast's hourly gross earnings (\$18.72 per hour) are fourteen

percent above the national average for hourly gross earnings (\$16.37 per hour). As a result, the division of \$0.34 by \$18.72 produces a figure for workers' compensation costs as a percent of gross earnings in the Northeast (1.82 percent) that is below the similarly computed national average for workers' compensation costs as a percent of gross earnings (2.02 percent).

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

		Goods- Producing (A)	Manufac- turing (B)	Mining & Construction (C)
(1)	Total Remuneration	23.55	23.41	23.91
(2)	Gross Earnings	18.78	18.79	18.75
(3)	Wages and Salaries	16.25	16.01	16.86
(4)	Paid Leave	1.51	1.74	0.92
(5)	Supplemental Pay	1.02	1.04	0.97
(6)	Benefits Other Than Pay	4.76	4.61	5.14
(7)	Insurance	1.77	1.85	1.57
(8)	Retirement Benefits	0.83	0.75	1.03
(9)	Legally Required Benefits	2.09	1.92	2.52
(9A)	Workers' Compensation	(0.56)	(0.40)	(0.97)
(10)	Other Benefits	0.07	0.09	0.02
(11)	Workers' Compensation Percentage of Remuneration	2.38%	1.71%	4.06%
(12)	Workers' Compensation As Percentage of Gross Earnings	2.98%	2.13%	5.17%
(13)	Employment (Millions)	25.738	18.476	7.232
(14)	Share of Employment in Goods Producing	100.0%	71.8%	28.2%

- Notes:**
1. The text and all tables in this article use the term "remuneration" in place of the term "compensation" that 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. Goods-Producing includes mining, construction, and manufacturing.
 11. Service-Producing includes transportation, communication, and public utilities:
wholesale and retail trade; finance, insurance, and real estate; and service industries.
- * Cost per hour worked is \$0.01 or less

Source: Columns (A) and (B), Rows 1-10: *Employer Costs for Employee Compensation March 2000*, News Release USDL: 00-186 (June 29, 2000), Table 5.
Columns (A), (B), and (C), Rows 13-14: April 2000 Employment from Monthly Labor Review, October 2000, Vol. 123, No. 10, Table 12, pp. 66-67.
Column (C), Rows 1-10, derivation explained in text.

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. The BLS indicates that March 2000 employment counts from the Bureau's Current Employment

Statistics program are used as weights to calculate cost levels. 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 2000 71.8 percent of the employment in the Goods-Producing Industries were accounted for by Manufacturing Industries and 28.2 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:

$$23.55 = (.718)(23.41) + (.282)(X)$$

where X is the total remuneration in Mining and Construction.

Solving this equation provides the estimate that total remuneration in Mining and Construction averages \$23.91 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 4.06 percent of total remuneration in Row (11) was calculated by dividing the figure of \$ 0.97 in Row (9A) by the figure of \$23.91 in Row (1). The estimate of Workers' compensation costs as 5.17 percent of gross earnings in Row (11) was calculated by dividing the figure of \$ 0.97 in Row (9A) by the figure of \$18.75 in Row (2).

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 represents 92.6 percent of the total of the combined construction and mining industries, 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.

ENDNOTES

1. The BLS data used in this article were published in U.S. Department of Labor 2000. The national data for private industry employees, state and local employees, and all non-federal employees were analyzed in Burton 2001.

2. The data set is described in more detail in Burton 1995a.

3. The BLS data on the employers' costs of workers' compensation do not provide information on individual states or on any other disaggregated level geographi-

cally, 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. It is not always the case that two regions will be above the national average and the remaining two regions will be below the national average. If, for example, workers' compensation costs in one region (the Northeast) are very low compared to the national average, while the costs in the other three regions are generally only moderately higher than the national average, then three regions will have costs above the national average and only one region will have costs below the national average. This actually happened in 1995, as shown in Figure A and Table 1 of Burton 1995b.

5. The BLS uses the term "total compensation" for wages and salaries plus total benefits. I 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 \$14,700 (\$14.70 X 1,000 hours); the total amount of workers' compensation benefits is \$490 (\$14.70 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 3.33 percent (\$470 divided by \$14,700).

Using the data on hourly gross earnings shown in Table 1, the total wage bill in the Northeast for 1,000 hours worked is \$18,720 (\$18.72 X 1,000 hours); the total amount of workers' compensation benefits is \$624 (\$18.72 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 (\$624 divided by \$18,720).

8. U.S. Department of Labor 2001, 39.

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California's New Design for Evaluating Workers' Compensation and Safety Legislation

by Charles Lawrence Swezey

There are indications that California may be turning from basing changes in workers' compensation law on anecdotal evidence to reliance on empirical results from well-designed studies by impartial researchers and skilled professionals. Numerous studies of this nature have been completed during the past five years, and their recommendations have been implemented by administrators and considered by the California Legislature. The extent to which a permanent change in the policy-making process has been accomplished should become clear by the end of the current legislative session.

In the past in California, and apparently in other states,¹ the usual legislative process has been to conduct committee hearings at which representatives of the various interest groups gave their opinions on pending or proposed legislation. The opinions were more often than not based on "horror stories." As bills progressed through the various legislative committees amendments were made either by consensus or persuasion. Normally the bills as passed out of the two houses of the Legislature would differ, and it was necessary for a conference committee of members of each house to resolve the differences without any further public participation. On occasion the bill emerging from conference committee bore little resemblance to the initial proposal.

In 1989 California adopted sweeping changes to its workers' compensation system in essentially this manner.² Almost from the outset there were problems with its implementation, and several modifications and clarifying amendments were made the following year.³ These amendments fell short of solving all the concerns and complaints of most of the interest groups, and in 1993 the Legislature passed and the Governor signed 14 separate workers' compensation bills affecting 150 sections of the California Labor Code relating to workers' compensation. Twelve of the statutes were adopted as urgency measures that went into effect i

mmediately.⁴ Among the new provisions was the creation of the Commission on Health and Safety and Workers' Compensation (CHSWC) that was charged, among other things, with conducting "a continuous examination of the workers' compensation system."⁵

CHSWC consists of eight members appointed by the governor and the legislature for four-year terms; four members represent organized labor and four represent employers.⁶ The commission is authorized to conduct or contract for studies necessary to carry out its responsibilities. All workers' compensation insurance rating organizations licensed by the Insurance Commissioner and all state agencies are required to provide data to CHSWC necessary for its studies and other functions.⁷ CHSWC is funded by the proceeds of penalties assessed by the Administrative Director (AD) of the Division of Workers' Compensation (DWC) in the course of audits of claims administrators.⁸

To make the continuous review of the system useful, the statute requires the commission to annually report on the state of workers' compensation in California and to recommend administrative or legislative modifications to improve the system's operation. During the past six years CHSWC completed over a score of studies directed at curing perceived inadequacies in the system as currently administered and evaluating the effectiveness of the provisions of the 1989 and

1993 reform acts. Discussed here in detail are studies of the manner in which permanent partial disability is compensated, methods of reducing the number of uninsured employers, the efficiency of the DWC audit function, and the effectiveness of reform act provisions relating to medical-legal costs, reports of treating physicians, a presumption that the findings of a treating physician are correct, and final offer arbitration. The nature and objectives of other research projects that have been completed or are currently in progress are briefly mentioned.

Permanent Partial Disability Study

Since the adoption of the Workmen's Compensation and Insurance and Safety Act of 1917, California has had a schedule for rating permanent disabilities that is prima facie evidence, without formal receipt in evidence, of the percentage of permanent disability (PD) to be attributed to each injury covered by the schedule.⁹ The AD was required by the reform acts to review and revise the schedule by 1995 but was not authorized to make any changes in standard disability ratings without the approval of CHSWC. At the commission's first meeting on July 28, 1994, the AD reported on his progress in revising the schedule. A CHSWC member representing employers suggested that the entire schedule be scrapped and a new one adopted "that anyone can understand and apply." The AD replied that he could not meet his deadline if he undertook more than updat-

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ing the table of occupations and adding some disabilities for which standard ratings had been developed in practice. He suggested, however, that CHSWC hold hearings on changing to a different system of calculating PD indemnity.¹⁰

After fact-finding hearings on the PD issue, it appeared that the only thing on which all interested parties agreed was that the system should be one in which the amount of PD benefits is readily determinable and the benefit delivery is consistent and efficient.¹¹ After receiving competitive bids, CHSWC contracted with RAND's Institute for Civil Justice (RAND) to evaluate the California permanent partial disability (PPD) system. RAND interviewed key participants and "stakeholders," reviewed pertinent literature and developments in other states, analyzed databases relating to the processing of PPD claims, and, most importantly, did a wage loss study to determine the financial effects of PPD on injured workers and to test the validity of the existing rating system.

The wage loss study was done by matching wage data obtained from the California Employment Development Department (EDD) with information on dates of injury, PPD ratings, and benefits paid from the California Workers' Compensation Insurance Rating Bureau (WCIRB). Comparing the earnings of fellow uninjured workers that had the same pre-injury employment and pay with those of 30,000 PPD claimants, RAND found that PPD claimants were suffering a substantial wage loss even if they had returned to work. The portion of the wage loss uncompensated by benefits increased over the five years following the injury, and contrary to the lore on which the statutory tables for PPD indemnity in California are based, the highest percentage of uncompensated wage loss was sustained by workers with PPD of 10 percent or less.¹²

CHSWC promptly selected an advisory committee to make recommendations on how to remedy the inadequacies found by RAND. Representatives of labor and injured workers contended that the study demonstrated the need for a substantial benefit increase. Industry

representatives criticized the RAND conclusions because the study covered only insured employers and was based on data for a period of economic downturn in California. The committee recommended that CHSWC study the issue further.¹³ RAND then did a similar study of self-insured employers and extended its previous study to determine the impact of economic conditions on the uncompensated wage loss.

Labor organizations and attorneys for injured workers are urging that the first phases of the RAND study have demonstrated a need for a substantial benefit increase.

RAND examined the consequences of disabling injuries for workers at sixty-eight private self-insured employers from 1991 through 1995. As did the study of insured employers, this study showed inadequate wage loss replacement at all levels. Self-insured employers, however, were better at returning injured workers to work. PPD claimants at self-insured firms were more likely to continue to work, less likely to drop out of the labor market, and more likely to be working for the at-injury employer, but their uncompensated wage loss tended to be greater because a larger percentage of them earned in excess of the maximum weekly compensation rate. The average self-insured replacement rate was 48 percent as opposed to 53 percent for insured employers, but employees of self-insured employers with the lowest PPD ratings had 14 percent of their lost earnings replaced contrasted with 11 percent at the insured businesses. As was true of insured employers, replacement rates were very low for workers with the lowest PD ratings (i.e., those with the least disability).¹⁴

Extending its wage loss analysis to workers injured later than 1991, RAND found some reduction in lost earnings, particularly for workers with lesser disabilities. There was, however, no evidence of continued improvement after 1993. Despite the improvement, overall replacement rates remained below two-

thirds, the replacement rates for the low rated claims were still low, and high uncompensated losses continued for the high rated claims.

The current and final phase of the RAND PPD study is directed at ways of improving the disability rating process in California. Adding information about the disabilities suffered by the PPD claimants to the database established in the earlier phases of the study, RAND will try to determine how the PD rating schedule can more accurately reflect the anticipated wage loss for the most frequently rated disabilities. In doing so, it will investigate the usefulness of increased reliance on objective findings.¹⁵

The completion of this phase of the PPD schedule is targeted for the fall of 2001. If the results indicate that the current schedule can be revised to meet the CHSWC criteria, revision by the AD will be recommended. Meanwhile, labor organizations and attorneys for injured workers are urging that the first phases of the RAND study have demonstrated a need for a substantial benefit increase.

Uninsured Employer Study

To evaluate the effect of the fraud prevention provisions of the reform acts, CHSWC held a public fact finding hearing early in 1997. In the course of the hearing several witnesses protested the lack of attention to the number of willfully uninsured employers in the state. Following the hearing, the CHSWC staff and a research team developed an issue paper containing recommendations to identify illegally uninsured employers and bring them into compliance. In response, the Commission assembled a CHSWC Uninsured Employer Roundtable to consider and propose legislative changes.

The roundtable, on which all segments of the workers' compensation community were represented, found that employers that fail to secure the payment of workers' compensation impose a burden not only on their injured employees but also on employers complying with the law and the taxpayers of the state. Insured employers, particularly small contractors, were placed at a competitive disadvantage when bidding against

uninsured employers. The California Uninsured Employers' Fund (UEF), which pays awards against uninsured employers, is over 80 percent funded by the state's general fund and during the five preceding years paid out an average of over \$22 million each year with annual recoveries of only slightly over \$2 million. There was a net loss to the taxpayers of over \$100 million during the five years.

The roundtable made four legislative proposals directed at increasing the civil and criminal penalties and strengthening enforcement of the insurance requirement. The industry representatives were of the opinion, however, that education and notification would be more effective. A review of procedures in other states by the University of California DATA/Survey Research Center (UC-DATA) suggested that substantial compliance could be attained by notification of new employers. To test this concept, CHSWC undertook pilot projects with the cooperation of UC-DATA, EDD, WCIRB, and the Division of Labor Standards Enforcement (DLSE).¹⁶

One pilot targeted industries responsible for a disproportionate number of claims against the UEF. Searching its database for these specific industries (auto and truck repair, and restaurants and bars), EDD extracted random samples of 250 employers in each targeted industry. It also provided a random sample of 250 firms drawn from all other employers. WCIRB matched these employers to policy information and sent notices requesting an explanation to each employer for which coverage could not be verified. DLSE followed-up with a mail request for policy information from the 221 employers that failed to respond or failed to adequately demonstrate insurance coverage to WCIRB. DLSE then made on-site inspections of employers that did not substantiate coverage in response to its request.

Notification achieved compliance by about 60 percent of employers that were out of compliance. The inspections conducted after screening employers through WCIRB records and notification by the Bureau and DLSE produced compliance among the 40 percent remaining out of

compliance after notification. A similar pilot targeting a sample of 500 new employers reported by EDD produced similar results. The cost of the DLSE field work related to inspections for the pilot project was approximately \$12,500, but penalties of \$180,000 were assessed. Assuming collections at the same rate (20 percent) as other DLSE collection efforts, there was a net gain to the state of nearly three times the cost. Costs for notification by WCIRB and DLSE and management staff time were not included, but they were not expected to be greater than the costs for DLSE inspection.¹⁷

**The Audit Unit was
staffed at a fairly consistent
level of only about twenty-five
positions from 1993 to 1997.
It assessed penalties varying
between \$1,069,285 in 1998
and \$1,532,540 in 1999,
but less than forty sites were
audited each year.**

CHSWC recommended implementation of matching records on a permanent basis and resubmission of the proposed legislation. Most of the proposed legislation had previously been included in a bill introduced by the chairman of the California State Senate Labor Relations Committee in 1998, but as it progressed through committees all provisions except the civil penalty provisions were amended out. The governor vetoed the bill as finally passed. DWC and DLSE are currently implementing the matching project on a permanent basis to the extent that their resources permit, and some of the legislative recommendations are included in bills introduced during the current legislative session.

Study of DWC Audit Function

The 1989 act gave the DWC an audit function designed to monitor the performance of workers' compensation insurers, self-insured employers, and third-party administrators to assure that injured workers are receiving the proper

benefits in a timely manner. Secondary purposes are to provide incentives for the prompt and accurate delivery of benefits and to identify and bring into compliance those insurers, third-party administrators, and self-insured employers that are not providing benefits in a timely and accurate manner. The statute requires the at least half of the audit subjects be selected at random; the remainder can be targeted on the basis of information tending to show that an insurer, self-insured employer, or third-party administrator may be failing to meet its obligations.¹⁸

To implement the statutory provision, the AD adopted a schedule of violations and penalties¹⁹ and created an audit unit. The Audit Unit was staffed at a fairly consistent level of only about twenty-five positions from 1993 to 1997. It assessed penalties varying between \$1,069,285 in 1998 and \$1,532,540 in 1999, but less than forty sites were audited each year. In April 1998, the California Senate Industrial Relations Committee and the Assembly Insurance Committee jointly requested CHSWC to undertake an evaluation of the effectiveness of the DWC audit function.

To comply with the request, CHSWC formed a project team, comprised of CHSWC staff and independent researchers. An Audit Review Advisory Committee that included representatives of all segments of the workers' compensation community was selected to assist the project team. The researchers interviewed persons involved in all aspects of the audit process, surveyed audit programs in six other states, conducted an on-site review of the claims handling practices of a major insurer, analyzed Audit Unit documents and data, reviewed Department of Insurance audit procedures, and reported its findings to the advisory committee.²⁰

After obtaining additional details and clarification from the project team, the advisory committee concluded that the current audit procedures were not as effective as they might be. With the staff available the Audit Unit could not audit all insurers, self-insured employers, and third-party administrators within a reasonable number of years. The audits were

not necessarily focused on the worst performers and to a large extent concentrated penalties on minor violations. The penalty structure was unfair to smaller entities because a larger percentage of their files were being audited with the result that they were being assessed a disproportionate number of penalties.

Based on the project team's analysis and the contributions of the advisory committee, CHSWC recommended changes in the system to accomplish the following goals: improve audit administration and ensure sufficient staffing; increase incentives for timely and accurate delivery of benefits; improve targeting of poor performers; revise the audit process to focus on key violations; audit all locations at least once every five years; monitor key performance indicators electronically where possible; and increase audits targeted at poor performers. New audit procedures were outlined in detail, and enabling legislation was drafted.²¹

Some of the legislative proposals were included in omnibus workers' compensation bills that passed the Legislature in 1999 and 2000, but the bills were vetoed by the governor for other reasons. Meanwhile the AD is drafting rules to implement the CHSWC recommendations to the fullest extent possible under the existing statute.

Evaluation of Medical-Legal Costs

The 1989 reforms provided for appointment of qualified medical evaluators (QME) and an alternative dispute resolution mechanism that was prerequisite to access to the adjudicatory services of the Workers' Compensation Appeals Board (WCAB). Represented workers were required to attempt to reach agreement on an agreed medical evaluator (AME) before resort to a QME of their own choice. Each party was limited to a single medical-legal report. Medical opinions obtained before the QME evaluation were inadmissible in evidence unless they came from a treating physician. Additional changes to the process of selecting medical evaluators were made in 1993, and parties were allowed to rely on the opinion of the primary treating physician rather than a QME or an AME. Another 1993 change precluded medical-

legal evaluations before the employer denied liability if injury was in issue. The reforms also placed severe restrictions on the compensability of psychiatric injuries and required the AD to promulgate a medical-legal fee schedule.

The adoption of a medical-legal fee schedule, the restrictions on psychiatric claims, the AME-QME provisions, and the reestablished role of treating physicians in writing medical-legal reports had markedly decreased medical-legal costs but had not noticeably accelerated case resolution.

A primary objective of these proposals was to reduce the costs of litigation before the WCAB. As part of its mandate to "conduct a continuous examination of the worker's compensation system," CHSWC undertook a study to ascertain the impact of the reform legislation on medical-legal evaluations. UC DATA was selected to do the statistical analysis. Using WCIRB data summarizing claim activity, including degree of impairment, type and cost of specialty exams, and other relevant information, UC DATA drew a random sample of 3,500 permanent disability claims from the 1989 through 1993 accident years and a smaller sample for the 1994 and 1995 accident years.

Analysis of this data, which covered only insured employers, revealed that the total cost of medical-legal exams performed on PPD claims by forty months after the beginning of the accident year had declined from a high of \$394.5 million for the 1991 accident year to an estimated \$58.8 million for 1995. The total cost of psychiatric exams dropped from a 1991 high of \$93.8 million to an estimated low of \$5.8 million in 1995. The average cost per exam had declined from a high of \$987 for 1990 to an estimated \$518 for 1995 claims, and the number of exams per claim declined 53 percent from 1989 to 1995. Interestingly, the fre-

quency of exams changed very little in cases where the injured worker was not represented by an attorney. The percentage of PPD claims in which the worker and the insurer both obtained medical-legal evaluations in the same specialty declined by slightly over 33 percent from 1989 to the 1993 and 1994 accident years. The percentage of claims where both requested evaluations, regardless of the specialty, decreased over the same period by 48 percent. There was no significant improvement in the time taken to close cases.²²

UC DATA pointed out that when data became available to provide a full panel of 3,500 claims for later years, further analysis would be important in evaluating the persistence of the trend. It seemed clear, however, that the adoption of a medical-legal fee schedule, the restrictions on psychiatric claims, the AME-QME provisions, and the reestablished role of treating physicians in writing medical-legal reports had markedly decreased medical-legal costs but had not noticeably accelerated case resolution. The report of the study was accepted by CHSWC at its July 25, 1997, meeting, and released to the public.

Evaluation of Reports of Treating Physicians

As previously mentioned, the 1993 amendments increased the role of the primary treating physician (PTP) by requiring the PTP to report on all medical issues necessary to determine eligibility for compensation. When the worker or the claims administrator objects to a determination by the PTP and obtains a QME evaluation on the issue but the other party continues to rely on the PTP's opinion, the PTP's findings are presumed to be correct. These legislative changes restored the importance of the PTP that had been diminished by the 1989 reforms and added the additional authority of a rebuttable presumption of correctness.

CHSWC received complaints that these provisions were causing increased litigation and "doctor shopping," resulting in inconsistent PD ratings, and restricting a fair evaluation of the evidence by workers' compensation administrative law judges (WCJ). Disability evalua-

tion specialists asserted that the poor quality of medical reports submitted for rating was the primary cause of erratic PD ratings. The Commission requested UCDA to determine the nature and magnitude of the problem, ascertain who was producing incomplete reports and why, and calculate the costs and benefits obtained from these provisions.

To find an answer to the first two questions, UCDA took a random sample of medical reports that had been submitted to the DWC Disability Evaluation Unit (DEU). The reports were coded according to physician status (PTP, QME provided to an unrepresented worker by the Industrial Medical Council (IMC), AME, worker's QME, or claims administrator's QME). Whether the PTP was also a QME was determined from the IMC database of QME appointments. The DEU evaluated each report using IMC criteria and additional standards selected in consultation with several raters, the manager of the DEU, and the IMC. Thirty-nine percent of the reports were prepared by PTPs, 25 percent by QMEs, 24 percent by AMEs, and 13 percent by QMEs from panels provided to unrepresented workers by the IMC. Nearly 60 percent of PTPs were also eligible to act as QMEs.

UCDA compared the performance of the various medical evaluators according to each of several criteria. The ultimate finding was that PTPs who were not also QMEs did most poorly. No PD rating at all could be formulated from 4 percent of their disability evaluations. Twenty-four percent of their disability descriptions were ratable, and the remainder could be rated with qualifications. Nearly 60 percent of the reports written by PTPs that were also QME's were ratable without qualification. Sixty percent of both employer QME and panel QME reports were ratable without qualification although a handful of the panel QME reports were unratable. AMEs performed the best with over 80 percent of their reports ratable without qualification.²³

The preliminary results of this study were conveyed to the governor and the legislature in September 1999.²⁴ The 2000 Legislature amended Labor Code §139.2

to require that, prior to appointment, a QME demonstrate competence in evaluating medical-legal issues and complete a course on disability evaluation report writing.²⁵ The IMC complied with the statute by providing a course in report writing and modifying the QME examination to test competency in dealing with medical-legal issues. Meanwhile, the IMC stepped up its program of reviewing QME reports and presented two courses on report writing for treating physicians.

Evaluation of Effect of Treating Physician Presumption

In view of the UCDA findings on the quality of PTP disability evaluations, CHSWC recommended that consideration be given to replacing the presumption with some lower legal standard such as affording PTP determinations "great weight."²⁶ At the request of the state senator that was carrying the major workers' compensation bill during the 2000 legislative session, the Commission undertook bringing its data regarding the impact of the presumption up to date.

CHSWC continued to recommend that the presumption be repealed or replaced with a lower standard.

The CHSWC project team updated and reanalyzed the data used in earlier studies of the impact of the reform legislation to evaluate the effect of the PTP presumption on medical costs, disability compensation, and litigation. Cases closed within two years after the date of injury for a year before and three years after the effective date of the presumption were classified in four groups according to whether the injured worker was represented by an attorney and who chose the treating physician.

Medical costs remained essentially the same for all four groups throughout the entire period studied, but both before and after adoption of the presumption, the cost of medical treatment was consistently greater when the worker was repre-

sented. There was also little change in the duration of temporary disability (TD).

The average permanent disability indemnity (PDI) paid to unrepresented workers remained essentially the same during the entire period regardless of who chose the PTP. In the case of represented workers, however, the amount of PDI paid increased substantially from 1993 to 1996. The increase was greater when the PTP was chosen by the represented employee. This finding tended to confirm anecdotal evidence received by the project team to the effect that many represented applicants were obtaining medical control as early as possible²⁷ in the hope of securing a more favorable outcome by having a sympathetic physician with the benefit of the presumption.

The impact of the presumption on litigation was measured by comparing the number of requests for expedited hearings before the presumption with the requests after its effective date. There was no change in the number of requests by unrepresented workers regardless of who had medical control. They were minimal both before and after. In PD cases where the worker was represented and had medical control, expedited hearings were requested in 5 percent of cases in the last quarter of the year before the presumption became effective. Three years later this percentage had increased to over 9 percent. In cases where the applicant was represented but had not assumed medical control, there was an increase from 2.5 percent to 4.5 percent.

This confirmed the information previously obtained in a series of meetings by the project team with WCJs during the earlier phase of the study. The WCJs said that the presumption had increased the amount of litigation in two ways; first, there was frequently an argument over who was the PTP, and second, sufficiency of the evidence offered to rebut presumption had become an issue in nearly every PD case. Finally, the WCJs felt that the presumption unduly limited their discretion in making a fair decision based on the range of medical evidence. The report of that phase²⁸ attached a list of over sixty-five reported²⁹ cases involving one or more of these issues between 1994 and 1999.

CHSWC continued to recommend that the presumption be repealed or replaced with a lower standard. A major workers' compensation bill passed by both houses of the legislature but vetoed by the governor for other reasons contained a provision limiting the operation of this presumption to a personal physician that was predesignated before the date of injury.

Final Offer ("Baseball") Arbitration

Final offer arbitration was introduced into the California WCAB's decision-making process by the adoption of Labor Code §4065 in 1993. Members of the California workers' compensation community generally refer to it as "baseball arbitration" because it is the type used to resolve baseball contract salary disputes. Several states use final offer arbitration to resolve collective bargaining disputes between government employers and their workers. Under §4065 a WCJ is restricted, in determining a PD rating, to selecting the "final offer" of one of the parties. This restriction is inconsistent with a long line of judicial decisions giving WCJs discretion to determine PD within the range of the medical evidence.³⁰ The specific mechanics of §4065 provide that in cases where either party has obtained a QME evaluation of the injured employee's PD under §4061 (prelitigation procedure for resolving disputes about PD and medical treatment) and a party contests the evaluation obtained by the other, the WCJ or Appeals Board is limited to adopting one of the two proposed PD ratings.

CHSWC was informed that WCJ's were having problems with application of §4065 and that many of them were trying to avoid it. It is often impossible to tell from the record whether §4065 is applicable, i.e., whether the dispute arose under §4061 or some other section. Some WCJs were reportedly using hyper-technical reasons for finding that a party had waived the right to "baseball arbitration."³¹ Attorneys were said to be equally adept at avoiding it by arguing that the objection to the PTP's determination was not under §4061 but under another section. The results of "baseball arbitration" were often unfair.³² It was further as-

serted that §4065 made it difficult to deal with issues of apportionment and rating of cases involving multiple injuries or a single injury involving several parts of the body. Finally, the process tended to drive a wedge between attorney and client because the attorney often felt obliged to propose a rating inconsistent with the client's expectations.

Because of term limits, only a handful of the legislators that were involved in passage of the 1989 and 1993 reforms are present in the current 2001-2002 session.

In April 1999 CHSWC requested a report on the WCAB's experience with baseball arbitration and its effectiveness. A project team did an extensive review of the literature on final offer arbitration and concluded that there were serious problems in applying the models in the literature to the California workers' compensation system. To test whether use of the §4065 procedure was successful in increasing the uncertainty about decisions and thus increasing the probability of voluntary settlement, UCDA analyzed all WCJ PD determinations during a two-week period. The analysis showed that only 12 percent of the cases were resolved by baseball arbitration. It was used in only 20 percent of the cases in which it could have been used. The proposed ratings varied markedly, e.g., the spread in one case was from 15 percent to 74 percent; the smallest spread in the cases studied was from 17 percent to 23 percent. The greater the spread, the more likely the WCJ was to select the applicant's proposal. Although the sample was admittedly small, the distribution of ratings when baseball arbitration was not used demonstrated the expected relationship: frequent smaller ratings and a steady decline in the number of ratings as the size of the ratings increased. In the cases where final offer arbitration was used, smaller ratings and larger ratings were more frequent, and intermediate ratings were less frequent.

The project team's preliminary conclusion was that the literature review, the preliminary data analysis, and legal and anecdotal evidence all seemed to agree that there are serious problems with adapting final offer arbitration to workers' compensation. The data analysis, however, was performed on a small sample of "final offers" and awards under baseball arbitration, but if a larger sample confirmed the problems suggested by the preliminary analysis, there would appear to be enough nonanecdotal evidence to conclude that baseball arbitration is neither working satisfactorily nor producing fair ratings. Because it precludes determinations based on the range of the evidence, it would appear that nothing short of repeal would remedy the situation.³³

These findings were presented to the Commission at its December 1999 meeting, and it voted to recommend repeal of the "baseball arbitration" provisions.

Other Studies by CHSWC

In addition to those summarized here, CHSWC completed studies on workers' compensation costs and benefits in relation to the California economy,³⁴ vocational rehabilitation,³⁵ pharmaceutical costs,³⁶ penalties for unreasonable delay in paying benefits,³⁷ anti-fraud activities,³⁸ and information for injured workers.³⁹ Legislative changes recommended by CHSWC in the pharmaceutical cost and information for injured workers studies were included in a major workers' compensation bill passed by the Legislature in 2000 but vetoed by the governor for reasons unrelated to those proposals.

RAND is currently doing an in-depth study of the workers' compensation adjudicatory process. The WCAB's adjudicatory process has been the subject of criticism both internally and by litigants. The Legislature twice proposed creation of a position of court administrator or "chief judge" to supervise the trial level adjudicatory process. The administrator would have been appointed by the governor with the advice and consent of the State Senate. If the bills had become law, they would have required the court administrator to conduct a study to evaluate and recommend changes to the sys-

tem. At the recommendation of DWC, CHSWC voted to authorize such a study to be completed before the end of the current legislative session.

In consultation with the AD and the Director of Industrial Relations, CHSWC requested proposals for a study with the following objectives: to determine what is occurring at each step of proceedings before the WCAB; to look at case management, court administration, and rules in other comparable judicial systems; to find the causes of problems such as delay and ineffective use of resources; to assess the extent to which the system is complying with its constitutional mandate to accomplish substantial justice expeditiously and inexpensively; and to recommend administrative and statutory changes to make the process more efficient. Specifically, the study is to cover such things as paper flow, calendaring, conference procedures, trial practices, judicial function, staffing levels, necessary equipment and technology, and administrative structure. RAND's proposal was selected as the most responsive to the request.

RAND is currently developing an integrated database from existing systems that have not previously been able to share data. Further data will be collected and added by tracking key events in 1,800 cases and interrogating the parties involved in each case by questionnaire. A functional evaluation is being made of six representative WCAB district offices. The study is scheduled to be completed and subjected to review by the workers' compensation community before the end of the current legislative session.

CHSWC and the Legislature

CHSWC submits an annual report to the legislature and the governor summarizing the results of its projects and making recommendations for changes in the law. Not infrequently a committee chairman will request information from the commission staff or request the commission to do a study on some issue. CHSWC staff and independent re-

searchers have made numerous presentations to legislative committees.

There have been no major changes in the workers' compensation law since 1993, but the chairman of the Senate Labor Committee introduced major workers' compensation packages in 1999⁴⁰ and 2000.⁴¹ The 2000 bill affected fifty-six sections of the Labor Code and several sections of the Insurance Code. CHSWC recommendations were followed in whole or in part with regard to twenty-four sections. Both bills were passed, but were vetoed by the governor.

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The 2000 veto message said that although that bill included some improvements over the provisions of its predecessor that he had vetoed the year before, the proposed reforms to the workers' compensation system were not sufficient to support the large benefit increase that the bill included without having an adverse impact on the California economy. He recognized, however, that the benefits paid to injured workers in California have not been increased in many years and needed to be increased. He added that he would be willing to sign a bill that incorporated reasonable benefit increases and additional system reforms to ensure that the workers' compensation system operates in a fair and cost efficient manner.

Because of term limits, only a handful of the legislators that were involved in passage of the 1989 and 1993 reforms are present in the current 2001-2002 session. The chairman of the Assembly Insurance Committee has taken the lead in a third attempt to enact a benefit increase and system improvements. CHSWC staff and researchers gave an extensive review of CHSWC studies, findings, and recommendations at the first two committee meetings convened to familiarize the new members with workers' compensation. The committee chairman asked CHSWC to provide evaluations of several items being considered for inclusion in Senate Bill 71, which was introduced by the President pro tem of the Senate and coauthored by the chairmen of the Senate Labor Committee and the Assembly Insurance Committee. CHSWC staff, with assistance from UC DATA, RAND, the California Workers' Compensation Institute, the State Department of Rehabilitation, EDD, WCIRB, AND DWC, prepared a 195 page response to the inquiry that included cost estimates for all of the proposals, data and models from other states, historical information, and clarification on legal issues.

Conclusion

During the past six years CHSWC has completed studies on nearly every phase of the California workers' compensation system. The results of these studies, including legislative proposals, have been made available to the State Legislature, and CHSWC has provided additional data to legislative committees and staff members. The final form in which workers' compensation legislation emerges from the current legislative session will provide a clear indication of the extent to which California has turned from basing changes in workers' compensation law on consensus and anecdotal evidence to reliance on empirical results from well-designed studies by impartial researchers and skilled professionals.

ENDNOTES

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3. Chapter 1550, Statutes of California, 1990
4. 23 *Calif. Work. Comp. Rptr.* 306
5. Chapter 227, Statutes of California, 1993; Calif. Labor Code §§75-78
6. Calif. Labor Code §75
7. *Ibid* §76
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9. *Ibid* §4660
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16. CHSWC Issue Paper, *Project to Identify, Track and Bring into Compliance Employers Illegally Uninsured for Workers' Compensation*, April 1997
17. CHSWC *Recommendations to Identify Illegally Uninsured Employers And Bring Them Into Compliance*, December 1998
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19. 8 Cal. Code Regs. §10111-10112
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21. Executive Summary, CHSWC Study of the DWC Audit Function, December 1998
22. CHSWC *Evaluating the Reforms of the Medical-Legal Process Using the WCIRB Permanent Disability Survey*, 1997
23. CHSWC *Report on Quality of Treating Physician Reports and Cost-Benefit of Presumption in Favor of the Treating Physician*, 1999
24. CHSWC 1998-1999 Annual Report, p. 49
25. Chapter 54, Statutes of California, 2000
26. CHSWC *Report on Quality of Treating Physician Reports and Cost-Benefit of Presumption in Favor of the Treating Physician*, 1999
27. Calif. Labor Code §4600 provides that after 30 days from the date of injury an employee may be treated by a physician of his or her own choice.
28. CHSWC *Report on Quality of Treating Physician Reports and Cost-Benefit of Presumption in Favor of the Treating Physician*, 1999
29. Officially reported judicial decisions in California Reports and cases unofficially reported by Calif. Comp. Cases and *Calif. Work. Comp. Rptr.*
30. See *Liberty Mut. Ins. Co. v. IAC* (Serafin)(1948), 33 C2d 89, 199 P2d 302, 13 CCC 267, permitting the trier of fact to resolve conflicts in the medical evidence by finding any degree of disability between the extremes established by the medical opinion.
31. See *Paula Ins. Co. v. WCAB* (Diaz) (1997), 62 CCC 375, (objection to applicant's failure to submit proposed rating as required at settlement conference waived by failing to make it at that time).
32. See for example *Sheppard v. WCAB* (1997), 62 CCC 993, (WCJ determined the actual PDR to be 133/4 percent but was compelled to find it to be the 71/2 percent proposed by the employer because that was closer than the 25 percent proposed by the applicant).
33. CHSWC *Preliminary Evidence on the Implementation of Baseball Arbitration*, 1999
34. CHSWC *Compensation and the California Economy, April 2000*; CHSWC *Report: Update Workers' Compensation and the California Economy*, December 2000
35. CHSWC *Vocational Rehabilitation Benefit: An Analysis of Costs, Characteristics, and the Impact of the 1993 Reforms*, 1997
36. CHSWC *Study of the Cost of Pharmaceuticals in Workers' Compensation*, June 2000
37. CHSWC *Issue Paper on Labor Code Section 5814, 2000*; CHSWC *Background Paper on Labor Code Section 5814*, 1999
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41. Senate Bill 996

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A Synopsis of the Oregon Major Contributing Cause Study

by John F. Burton, Jr.

This issue contains an article by Sara Harmon, which is part of a series published in the *Workers' Compensation Policy Review (WCPR)* based on the *Oregon Major Contributing Cause Study* ("MCC Study") completed last year (Welch et. al. 2000). The primary author of the *MCC Study* was Edward M. Welch, director of the Workers' Compensation Center in the School of Labor and Industrial Relations at Michigan State University. Welch was also the author of "An Introduction to the Oregon Major Contributing Cause Study" (Welch 2001) in the March-April issue of the *WCPR*. In this Synopsis, I briefly explain the background for the *MCC Study*, capsule the contents of the articles in the series, and offer some comments on a recent Oregon Supreme Court decision that has significance for the workers' compensation programs in a number of states.

Background

In 1990, the Oregon legislature enacted SB 1197, which inter alia provided that permanent benefits were compensable under the Oregon workers' compensation statute only if work was the "major cause" of the permanent disability. This is the provision commonly 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."

The Oregon Supreme Court held in 1995 that when a disability is not compensable because work is not the major contributing cause, the worker may file a tort suit against the employer. That decision was based on the court's interpretation of the exclusive remedy language of the statute. The legislature then changed the language of the exclusive remedy provision to provide that a worker who was not eligible for workers' compensation benefits because of the MCC provision could not bring a tort suit. That provision was then invalidated on constitu-

tional principles in a case decided in May 2001, which is further discussed in this Synopsis and in the Harmon article that follows.

The Oregon Division of Workers' Compensation contracted with the Workers' Compensation Center at Michigan State University in 1999 to study the effects of the various amendments to the Oregon statute that had tightened eligibility, most notably the MCC provision. The *MCC Study* and the articles in the *WCPR* are the results of that inquiry.

Costs of the Tort Alternative

The April-May issue contained an examination by Biddle and Welch (2001) of how costs to Oregon employers would change if workers whose claims were denied under the MCC provision were given the right to sue their employers in civil courts. For these claims, the authors estimate that for those workers who brought tort suits the damages paid by employers would have ranged from 150 percent to 400 percent of the workers' compensation benefits these workers would have received if they had met the compensability standards for the program. However, the authors estimate that only 5 to 40 percent of the workers adversely affected by the MCC provision would actually bring tort suits. Thus total tort damages for the workers affected by the MCC provision (including those who did not file claims) would range from 7.5 percent (150 percent times 5 percent) to 160 percent (400 percent times 40 percent) of the workers' compensation benefits these workers would have received.

Effects on Workers' Benefits and Employers' Costs

The July-August issue will contain an article by Thomason and Burton (2001) that examines the effects of the MCC provision and other changes in the Oregon workers' compensation statute on the workers' compensation benefits

paid to workers and the costs to employers of the program. We estimate that by the mid-1990s, the legislative changes in the Oregon workers' compensation statute (including the MCC provision) had reduced the benefits paid to workers and the costs paid by employers by about 25 percent compared to the amounts that would have been paid if the legislative changes had not been made.

Statutory Compensability Standards

The March-April issue contained an article by Sara Harmon (2001a) that examined the changes in workers' compensation statutes that increased the obstacles to employees to establish their eligibility for workers' compensation benefits. She noted that historically, "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." Harmon then provided a careful and comprehensive review of a variety of statutory changes in recent years that have modified this general rule and "that have imposed a variety of constraints on compensability."

The Exclusive Remedy Shield

This issue contains a second article by Sara Harmon (2001b) that examines state court decisions interpreting the various statutory changes that have constrained compensability. One of the features of workers' compensation discussed by Harmon is that the program represented a trade-off. Workers received workers' compensation benefits for work-related injuries regardless of any fault by the employer (or the employee). Employers were then protected from tort suits for these work-related injuries. In short, in exchange for a no-fault system that benefited workers for work-related injuries, employers were protected by the exclusive remedy shield from tort suits for these injuries.

One issue examined by Harmon is what happens to the employers' protection from tort suits provided by the exclusive remedy shield when the workers' eligibility for workers' compensation benefits is narrowed by changes in compensability standards? Harmon examines recent court decisions that have dealt with this issue and places them in three categories, two of which hold that workers are free to sue the employer in tort when the worker is no longer able to qualify for workers' compensation benefits.

Observations on the Exclusive Remedy Principle

I now lapse into my role as commentator, as opposed to an objective reporter, which is a role I have attempted to perform in the previous portions of this Synopsis. As indicated in the Summary of the Contents for this issue, a May 2001 decision by the Oregon Supreme Court (discussed below and by Harmon (2001b) has revalidated the old adage: There's no such thing as a free lunch. As a former member of the University of Chicago, where I am told the adage originated, I am fond of reciting the maxim. But what does it mean in this context?

I understand and appreciate the concern of employers and carriers to the rapidly escalating costs of workers' compensation in the late 1980s and early 1990s. One of the tactics used to reduce costs was to restrict access to the workers' compensation program. Those who proposed this tact to reform, however, were jeopardizing the exclusive remedy shield. Whether this was done with knowledge of the underlying legal foundations of workers' compensation is unclear, but in any case the efforts to solve the problem of high workers' compensation costs by restricting compensability contained a threat to the fundamental principle of workers' compensation: the exclusive remedy provision is linked to the no-fault principle (which implies ready access to the program). Restricting access to the worker's compensation program by tightening eligibility standards looked like a free lunch to some reformers. You can fill in the rest of the analogy.

There are, to be sure, some courts that have served a zero-cost repast to the

reformers who tightened eligibility. Sarah Harmon (2001b) includes these states in her third category, and a casebook on employment law (Willborn, Schwab, and Burton 1998, at 972-979) presents a California Supreme Court decision, *Livitsanos v. Superior Court*, 838 P.2d 11956 (1992) that further illustrates how statutes can preclude both workers' compensation benefits and a tort remedy. Nonetheless, those who restrict access to the workers' compensation program in order to reduce costs face three possible types of legal challenges to the exclusive remedy principle.

Statutory Interpretation Challenges. *Errand v. Cascade Steel Rolling Mills, Inc.*, 888 P.2d 544 (Or. 1995) is an example of this type of challenge to the exclusive remedy principle. Harmon discusses the case in the following article. Essentially the court held that when the Oregon legislature restricted access to the workers' compensation program by enacting the MCC provision, the logical implication was that the exclusive remedy provision in the Oregon statute did not apply to the newly non-compensable conditions, and so therefore the worker affected by the MCC provision was eligible to file a tort suit.

State Constitutional Challenges. The Oregon legislature reacted to the *Errand* decision by amending the Oregon workers' compensation statute to make clear that workers who experience work-related injuries for which the work was not the MCC were eligible for neither workers' compensation benefits nor a tort suit. The Oregon Supreme Court responded in *Smothers v. Gresham Transfer*, ___ P.2d ___ (Or. 2001) in May 2001, which Harmon also discusses. Essentially the court held the Oregon Constitution protected the right of every man who suffers an injury to have a remedy at law, and therefore if *Smothers* was not entitled to workers' compensation benefits because of the restrictions imposed by the Oregon legislature, he had a Constitutional right to bring a tort suit. This provocative case is worth reading.

U.S. Constitutional Challenges. The most intriguing question is whether the recent restrictions on compensabil-

ity in state workers' compensation statutes would survive a challenge based on the U.S. constitution. The constitutionality of the 1914 New York state workers' compensation statute was challenged in the New York courts and ultimately before the U.S. Supreme Court in *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917). A number of the features of the New York statute were challenged and upheld as constitutional, including the no-fault liability for employers and the exclusive remedy provision that limited the right of employees to sue their employers for common law (tort) remedies. This is a fascinating and insightful decision that is also worth reading. Among the observations by the Court is this admonition (in dictum):

Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

This, of course, is not to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.

Does the MCC provision in Oregon, or similar provisions in other state workers' compensation statutes, represent a "question of that kind?"

(Synopsis continued on p. 27)

The Impact of Higher Compensability Standards on the Exclusive Remedy Shield

by Sara T. Harmon

Historical perspective

Prior to the introduction of workers' compensation laws, an employee could sue the employer for a work-related injury. The employee had to show that the employer was negligent and that the worker was free from negligence. If the employee could do that, the employee could receive as damages almost anything a jury would award, including damages for pain and suffering.

Workers' compensation was a trade off. A worker is compensated for a work-related injury regardless of fault, but the damages are limited to certain wage replacement benefits, medical care, and in some cases vocational rehabilitation benefits. These workers' compensation benefits are the worker's "exclusive remedy." The worker cannot file a civil or "tort" action against the employer for personal injury.

In the years since workers' compensation acts were adopted throughout the nation, coverage has gradually been expanded. In 1972, the National Commission on State Workmen's Compensation

Laws made a number of recommendations, including: mandatory coverage for all employers; universal coverage for all employees; full coverage for work-related diseases; a minimum set of benefits; and lifetime unlimited medical care.

In response to these recommendations, many states expanded benefits in the 1970s and early 1980s. Then, beginning in the late 1980s, the trend reversed. At that time, costs were increasing rapidly and some employers were having a difficult time obtaining workers' compensation insurance. State legislatures responded by amending workers' compensation statutes in ways that tended to reduce the benefits available and make it more difficult to prove compensability. In some states, a parallel process occurred in the courts, even without legislative action.

As a result of changes in compensability standards, questions have arisen concerning how those changes affect the exclusive remedy shield. To the extent that a disability or class of disabilities is excluded from coverage under workers' compensation, does the employer lose

the exclusive remedy protection? Stated differently, if the worker is denied a remedy in workers' compensation for certain conditions, does this imply a restoration of the civil remedy? What follows is a review of how several states have addressed these questions.

Oregon

In 1990, the Oregon Legislature raised the bar for compensability. A condition is not compensable unless the employment is the "major contributing" cause. That statutory change was interpreted in *Errand v. Cascade Steel Rolling Mills, Inc.*, 888 P.2d 544 (Or. 1995).

Errand had a preexisting condition—chronic infectious paranasal sinusitis—that predisposed him to airway irritation. That preexisting condition became symptomatic in his workplace, a manufacturing plant in which he was exposed to particulate matter. He sought medical treatment and filed a workers' compensation claim. The claim was denied by the insurance carrier, and so Errand pursued his claim before the state workers' compensation agency.

The hearing referee found that Errand's work exposure was not the major cause of his chronic infectious paranasal sinusitis and upheld the claim denial. The Workers' Compensation Board agreed. Neither party took any further appeals. Instead, the worker sued his employer in a tort action.

The employer asked the court to dismiss the lawsuit, arguing that the workers' compensation act was Errand's exclusive remedy. The trial court agreed with the employer, as did the Court of Appeals. But the Oregon Supreme Court concluded that the Act was only the exclusive remedy for *compensable* injuries and occupational diseases. Because the 1990 Oregon reform made Errand's condition non-compensable, he was permitted to seek redress outside the workers' compensation act.

About the Author

Sara Harmon has been involved in workers' compensation since June 1982, when she was hired as an Industrial Appeals Judge in Washington State. She continued in that position until June 1987, when the Governor appointed her to chair the Board of Industrial Insurance Appeals. In June 1991, Ms. Harmon left Washington for Oregon, where the Governor appointed her Administrator of the Workers' Compensation Division. She served in that capacity until June 1994, when she took a break to explore other interests.

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. As of April 2, 2001, she became a Workers' Compensation Judge with the New Mexico Workers' Compensation Administration. She is also one of the Seminar Leaders for Michigan State University's certification program for workers' compensation professionals.

The views expressed in this article are the author's alone.

The Oregon Legislature responded to *Errand* immediately, amending the statute to say that the workers' compensation act is the exclusive remedy for all "injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment," not just for compensable injuries. SB 369; ORS 656.012 and 656.018.¹

Advocates for workers argued that the new language violated the Oregon Constitution which provides "every man shall have remedy by due course of law for injury done in his person, property, or reputation." OR Const. Art I § 10. In *Smother's v. Gresham Transfer, Inc.*, 941 P.2d 1065 (Or. Ct. App. 1997), the Court of Appeals held that the new language passed constitutional muster. The Oregon Supreme Court accepted *Smother's* for review in 1998. On May 10, 2001, the Supreme Court issued its opinion, reversing the Court of Appeals.

Smother's was a lube technician who alleged that he was exposed to sulfuric, hydrochloric, and hydrofluoric acid mist and fumes at work. The insurer denied his workers' compensation claim because the exposure was not the major contributing cause of his respiratory condition and other ailments. The Workers' Compensation Board upheld the denial, noting that the exclusivity provisions of ORS 656.018 did not provide the employer with immunity from a civil lawsuit. This was prior to the 1995 amendment.

Smother's sued his employer, alleging that the employer's negligence in subjecting him to "acid mist and fumes at work had caused permanent injury to his lungs; skin blisters, pain and swelling in the joints of his hands, elbows and knees; degeneration of his toenails, fingernails, and teeth; and other physical ailments." The employer moved to dismiss based on the 1995 amendment to the exclusive remedy provision. The trial court granted the motion and the Court of Appeals affirmed.

After an exhaustive analysis, a unanimous Supreme Court held that Smother's should have been allowed to proceed with his negligence lawsuit against his employer. The effect of the 1990 Oregon reform was to make it more difficult to prove causation within the workers' com-

pensation system than within the tort system. The workers' compensation standard is major contributing cause; the tort standard is contributing cause. So, if a worker cannot meet the lower contributing cause standard, then he cannot recover workers' compensation benefits and the exclusive remedy shield holds. That is, he cannot sue his employer in tort because a true substitute remedy has been provided. But if a worker is unable to meet the major contributing cause standard within the workers' compensation system, he may sue his employer in tort and attempt to meet the lower contributing cause standard. Otherwise the 1995 amendment would violate the Oregon constitutional guarantee of "a remedy by due course of law for injury done in his person...."

Washington

A similar analysis has been applied in Washington. *McCarthy v. DSHS*, 759 P.2d 351 (Wash. 1988) is illustrative. When Washington's Industrial Insurance Act was enacted in 1911, it only covered industrial injuries, not occupational diseases. Washington courts therefore routinely held that workers could sue their employers for negligence with respect to occupational diseases that were not covered under the Act.

It was only when the Washington Legislature expanded coverage to include occupational diseases in 1937 that employer immunity was extended to cover occupational diseases. But in the 1980s the Washington courts began to interpret the causation standard for occupational diseases more narrowly. The worker in *McCarthy* was not able to satisfy that higher standard. She was an employee at the State Department of Social and Health Services. From 1978 to 1980 she was required to work in an office environment that exposed her continuously to tobacco smoke. She complained, but her employer did nothing. Eventually, she developed chronic obstructive pulmonary disease (COPD). By 1980, the condition was totally disabling, forcing her to terminate employment.

She filed a workers' compensation claim that was denied. She appealed to the Board of Industrial Insurance Appeals,

which concluded that her condition was not compensable under either an industrial injury or occupational disease theory. No further appeals were taken.

Instead, the worker sued her employer, alleging negligence, based on the argument that the employer breached its duty to provide a working environment reasonably free from tobacco smoke. The trial court dismissed the lawsuit, apparently concluding that workers' compensation was the exclusive remedy. Both the Court of Appeals and Supreme Court disagreed with the trial court.

According to the Supreme Court, a worker cannot be barred from suing an employer for negligence at common law unless a substitute remedy has been provided under the workers' compensation act. There must be one remedy or the other. Otherwise, the employer's end of the bargain that is at the heart of the creation of the workers' compensation system has not been held up.

Georgia

Like the *McCarthy* case, *Synalloy Corp. v. Newton*, 326 S.E.2d 470 (Ga. 1985) also involved a change in the compensability of occupational diseases. Prior to 1971, the Georgia statute only covered listed diseases. After 1971, it covered both the listed diseases and any disease where the worker could prove all five statutory elements:

- (i) A direct causal connection between the conditions under which the work is performed and the disease;
- (ii) That the disease followed as a natural incident of exposure by reason of the employment;
- (iii) That the disease is not of a character to which the employee may have had substantial exposure outside of the employment;
- (iv) That the disease is not an ordinary disease of life to which the general public is exposed;
- (v) That the disease must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence.

O.C.G.A. § 34-9-280

Additionally, an occupational disease claim is only compensable if there is some showing of a disability. O.C.G.A. § 34-9-281 (b) (1).

The former employees of Synalloy sued the company alleging that the employer had negligently exposed them to a known carcinogen, beta-naphthylamine, and failed to warn them of the dangers of exposure. The employees argued that they could sue in tort because "in no instance have all five of the statutory elements combined to create a compensable claim."

The Georgia Supreme Court disagreed, concluding that the employees' claims came within the coverage of the workers' compensation act. They were not yet compensable, however, because there was no disability. "While workers' compensation is the exclusive remedy of Synalloy's employees, there can be no claim without disability. As no plaintiff yet has become disabled, as required by O.C.G.A. § 34-9-281 (b) (1), none has at this time a workers' compensation claim." *Synalloy*, 326 S.E.2d at 473.

Kentucky

The Kentucky Supreme Court reached a similar result in *Shamrock Coal v. Maricle*, 5 S.W.3d 130 (Ky. 1999). In 1996, the Kentucky Legislature amended the workers' compensation act to eliminate benefits for workers who had less than a 20 percent respiratory impairment as a result of black lung disease. Within thirty days of the passage of that bill, the employer laid off the nineteen plaintiffs. All of them would have been entitled to benefits under the prior law, but none of them were entitled to benefits under the new law because they did not meet the new threshold respiratory impairment requirement.

They sued the employer, alleging negligence in the mining operations, gross disregard for workers' health, safety, and welfare, intentional violation of safety standards, and intentional infliction of emotional distress. The employer sought the protection of the exclusive remedy. The trial court denied the employer's motion to dismiss. The Court of Appeals affirmed. But the Supreme Court reversed, holding that the statute

did not violate the constitutional guarantee of a remedy. The Court's analysis echoes that used by the Georgia Supreme Court in *Synalloy*. Black lung disease as a condition is still compensable under the Kentucky workers' compensation act. The Legislature has merely limited compensability to the situation where the disability rises to a certain level. According to the Kentucky Supreme Court, the Legislature can reduce workers' compensation benefits without depriving employers of the exclusive remedy shield.

Louisiana

Louisiana has provided fertile ground for challenges to the exclusive remedy when an injury or disease does not come within the basic coverage of the workers' compensation act. Louisiana's statute used to cover only listed occupational diseases and Louisiana courts routinely allowed workers to sue their employers if they contracted a non-listed disease.

**The general rule is that,
if a particular injury does
not come within the basic
coverage of the workers'
compensation act, the worker
can sue the employer.**

Even more interesting for our purposes is Louisiana's statutory presumption that a disease contracted during fewer than twelve months of employment is non-occupational. La. R.S. 23:1031.1. A worker can only overcome that presumption by an "overwhelming preponderance of the evidence."

In *O'Regan v. Preferred Enterprises*, 758 So. 2d 124 (La. 2000), the worker was exposed to methoxyethanol when she worked for a dry cleaner for four months. She was later diagnosed with a form of aplastic anemia. She filed a workers' compensation claim that was denied because she was unable to overcome the statutory presumption.

So the worker sued her employer in tort. Her employer attempted unsuccessfully to raise the exclusive remedy shield.

The Louisiana Supreme Court concluded that by establishing the presumption of non-compensability, the Legislature had "withdrawn the quid pro quo between labor and industry for this class of laborers," i.e., those employed for fewer than twelve months. The Court allowed the worker to sue her employer in tort.

Another issue of interest in Louisiana relates to a 1990 statutory change, which increased the level of proof needed for heart-related or perivascular injuries. Louisiana now requires "clear and convincing evidence that: (i) The physical work stress was extraordinary and unusual in comparison to the stress or exertion experienced by the average employee in that occupation, and (ii) The physical work stress or exertion, and not some other source of stress or preexisting condition, was the predominant and major cause of the heart-related or perivascular injury, illness, or death." La.R.S.23:1021(7)(e). This provision has been interpreted to permit workers to sue their employers in tort.

For example, the workers in *Ellis v. Normal Life of Louisiana*, 638 So.2d 422 (La. Ct.App. 1994) and *Hunt v. Womack*, 616 So.2d 759 (La. Ct. App. 1993) both sustained heart attacks at work. *Ellis* died and her husband filed a wrongful death suit against her employer, contending that stress and understaffing at the group home for retarded adults where his wife worked caused or contributed to her death. *Hunt* was a carpenter, engaged in the construction of a chemical plant when he suffered his heart attack. He sued his employer for negligent failure to provide a safe workplace, alleging that the extreme heat, lack of breaks, and lack of air circulation caused his heart attack. He argued that his preexisting arteriosclerosis precluded him from recovering workers' compensation benefits. In both cases, the Court of Appeals held that the employers were not entitled to the exclusive remedy shield because of the 1990 legislation.

New Mexico

An analogous situation arises when the legislature eliminates a particular type of injury or condition from compensability. The general rule is that, if a particular injury does not come within

the basic coverage of the workers' compensation act, the worker can sue the employer. See, 6 A. Larson & L. Larson, *Larson's Workers' Compensation Law*, §100.04 (2000). The New Mexico case of *Coates, et al., v. Wal-Mart Stores, Inc.*, 976 P.2d 999 (N.M. 1999) is illustrative.

Coates involved numerous incidents of sexual harassment inflicted on two employees by a supervisor. Management was aware of the incidents and did nothing other than finally transferring the supervisor to a different department. Even after the supervisor was convicted of assaulting, kidnapping, and raping his girlfriend, his employment was not terminated. He was finally fired because his absence from work violated Wal-Mart's leave policy.

The two employees quit because of the harassment, then sued Wal-Mart, alleging negligent supervision and intentional infliction of emotional distress. Wal-Mart filed a motion for summary judgment, claiming that the workers' compensation act was the exclusive remedy. The District Court denied the motion, the case went to trial, and the jury found in favor of the plaintiffs on both counts. The jury awarded almost \$2,000,000 in damages, including punitive damages, to the plaintiffs.

On appeal, Wal-Mart argued that the workers' compensation act is the exclusive remedy for any personal injury in the workplace. The New Mexico Supreme Court disagreed, saying that a claim falls outside the workers' compensation act if the injuries are not compensable under the Act. The employees had psychological problems as a result of the harassment. In New Mexico, only primary and secondary mental impairments are compensable. Primary mental impairments must be the product of "sudden, emotion-provoking events of a catastrophic nature...as opposed to gradual, progressive stress-inducing causes such as...harassment...over [a] period of time. [citations omitted]" *Coates*, 976 P.2d at 1006. Secondary mental impairments must be caused by an accidental physical injury.

Because neither of these requirements was met here, the employees did not have compensable workers' compen-

sation injuries and thus the court held they were free to sue their employer in tort.

Montana

In Montana, the Supreme Court reached a similar result in *Stratemeyer v. Lincoln County (Stratemeyer I)*, 855 P.2d 506 (Mont. 1993) and *Stratemeyer v. Lincoln County (Stratemeyer II)*, 915 P.2d 175 (Mont. 1996).

Gary Stratemeyer had been a deputy sheriff for eight years. On May 4, 1990, he responded to an attempted suicide call. Upon his arrival, he found a seventeen-year-old girl who had shot herself in the head. Stratemeyer removed the girl from her father's arms and administered first aid until the ambulance arrived. He escorted the ambulance to the hospital, where he learned that the girl had died. He was then called away to another accident scene.

As a result of this incident, Stratemeyer suffered from posttraumatic stress disorder. He filed a workers' compensation claim that was denied by the workers' compensation insurer. He petitioned the Workers' Compensation Court, which determined that he had not suffered a compensable workers' compensation injury because the Montana Legislature had eliminated coverage for mental/mental claims. (Mental-mental claims are those where both the cause and the result are mental.) On appeal, the Montana Supreme Court agreed that the worker's injury was not compensable. Stratemeyer then sued his employer, alleging negligent failure to train, supervise, treat, and debrief him after the incident. The District Court dismissed the lawsuit based in part on the exclusive remedy. The Montana Supreme Court reversed.

Many states' exclusive remedy provisions focus on removing the common law remedy for personal injuries. The Montana exclusive remedy statute has a somewhat different focus. MCA 39-71-411 provides:

For all employments covered under the Workers' Compensation Act ... an employer is not subject to any liability whatever for the death of or personal injury to an employee covered by

the Workers' Compensation Act ...

The employer argued that, since the worker's *employment* was covered by the Act, the exclusive remedy provision applied even though the worker's *injury* was not compensable. The worker argued that the injury itself must be compensable before the exclusive remedy provision is triggered. The Court found the employer's argument unpersuasive, stressing that the "quid pro quo between employers and employees is central to the Act; thus, it is axiomatic that there must be some possibility of recovery by the employee for the compromise to hold." *Stratemeyer II*, 276 Mont. at 75. Because there was no quid pro quo for stress claims, the employer could not benefit from the exclusive remedy shield.

Ohio

In *Bunger v. Lawson*, 696 N.E.2d 1029 (Oh. 1998), the Ohio Supreme Court reached a similar result. Like Montana, the Ohio statute excludes mental/mental stress claims from coverage. The worker was working alone at night at a Dairy Mart when she was robbed. As a result, she required treatment for post-traumatic stress. The Industrial Commission denied her workers' compensation claim. She sued her employer, alleging that the robbery and the subsequent psychological injury were due to the employer's negligence. The trial court dismissed the lawsuit, saying that the workers' compensation act was the exclusive remedy.

In reversing the trial court, the Ohio Supreme Court said:

"If a psychological injury is not an injury according to the statutory definition of 'injury,' then it is not among the class of injuries from which employers are immune from suit. Any other interpretation is nonsensical, and leads to an untenable position that is unfair to employees. The lower court's interpretation would force us to say that for compensation purposes psychological injury is not an injury, but for immunity purposes it is. It is an absurd interpretation that seems borrowed from the pages of *Catch-22*." *Bunger*, 696 N.E.2d at 1031.

The court suggested that the Legislature might want to consider including stress claims within the coverage of the workers' compensation act.

Conclusion

The Oregon Legislature attempted to eliminate both the workers' compensation remedy and the civil remedy in situations where the employment is not the major contributing cause of the resulting condition. But the Oregon Supreme Court has recently held that, when a worker is denied workers' compensation benefits because he cannot meet the higher major contributing cause standard, he may seek a civil remedy using the lower contributing cause standard. This outcome is consistent with the national trends.

Typically, the courts have permitted legislatures to limit or reduce workers' compensation benefits without affecting the exclusive remedy. But when legisla-

tures have removed any possibility of recovery under workers' compensation, courts have allowed workers to seek a civil remedy.

The court cases appear to fall into three categories:

1. When a condition is specifically removed from basic workers' compensation coverage, like certain mental claims in Montana, New Mexico and Ohio, state courts have held that the worker is free to sue the employer in tort.

2. If, as in Oregon, Washington and Louisiana, a worker is unable to meet a heightened threshold compensability standard or overcome a presumption of non-compensability, state courts have held that the employer is deprived of the exclusive remedy shield.

3. But when, as in Georgia and Kentucky, the legislature limits but does not eliminate compensability for certain con-

ditions, the exclusive remedy shield remains. That is, when a condition must reach a certain level of disability before it becomes compensable, the exclusive remedy shield remains intact.

ENDNOTE

1. Because the statutory change made in 1995 in response to Errand was scheduled to sunset on December 31, 2000, and because the Oregon Legislature only meets every other year, the 1999 Legislature once again amended the exclusive remedy provisions. SB 460. That Bill created a new sunset date for the 1995 language—December 31, 2004. A study was also commissioned as a result of that legislation. Part of that study was this review of the national trends with respect to workers suing their employers in the civil court system as a result of the elimination of a remedy within the workers' compensation system.

(Synopsis continued from p.22)

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