From John Burton's Workers' Compensation Resources

WORKERS' COMPENSATION POLICY REVIEW

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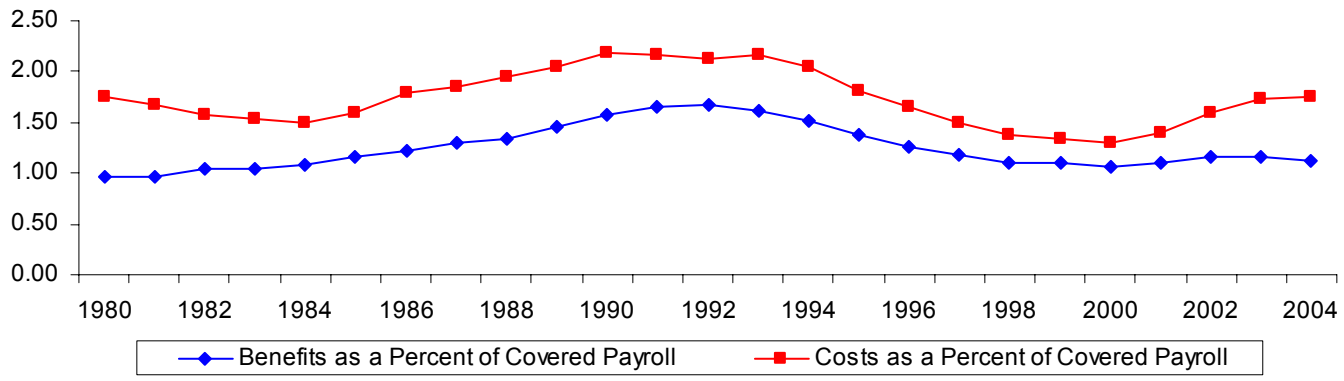
FEATURED TOPICS

Summary of the Contents

The National Academy of Social Insurance (NASI) provides the most comprehensive data on the U.S. workers' compensation program, since the information includes all states as well as all types of insurance arrangements, including private carriers, state and federal funds, and self-insurance. John Burton analyzes some of the NASI's latest data. As indicated in the figure below, benefits paid to workers as a percent of payroll declined to 1.13 percent of payroll in 2004 (the latest year with data). Costs to employers for the program increased to 1.76 percent of payroll in 2004, continuing a climb that began in 2001. Both benefits and costs measured as a percent of payroll remain well below their levels from the mid-1980s to the mid-1990s. Will costs and benefits increase after 2004? Burton provides a catalogue of conflicting developments that virtually assures that next year he can claim prescience.

Workers' compensation is normally the exclusive remedy for an injured employee against his employer for a workplace injury or diseases. Most states, however, allow the employee to also bring a tort action against the employer when the injury is a result of an intentional act of the employer. John Burton examines five approaches by states to the possibility of a tort suit when the employer engages in activity that at least arguably represents an intentional injury to the employee. The range of possible approaches varies from states in which there is no intentional injury exception to states in which a tort suit may result from negligent, wanton, reckless, or grossly negligent employer conduct. How many states are in these "extreme" approaches?

Workers' Compensation Benefits and Employers' Costs as a Percent of Covered Payroll, 1980-2004



Source: Benefits as a Percent of Covered Payroll: Table 1, Column (2).
Employers' Costs as a Percent of Covered Payroll, Table 3, Column (4).

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Workers' Compensation Benefits and Costs in 2004

by John F. Burton, Jr.

The National Academy of Social Insurance (NASI) released the 2004 data on the coverage, benefits, and costs of the workers' compensation program in July 2006 (Sengupta, Reno, and Burton 2006). The NASI report is the most comprehensive source of national data on benefits and costs since data are presented for employers with all types of insurance arrangements, including self-insuring employers as well as employers who purchase insurance from private carriers or state funds. The NASI report also reports data on benefit payments and coverage by state. This article focuses on national data on workers' compensation benefits paid to workers and on the costs of the program for employers.

The 2004 Developments in Perspective

Benefits Paid to Workers. The workers' compensation benefits paid to workers in selected years between 1960 and 2004 are shown in Table 1 and Figure A. Benefits in current dollars in 2004 were $55,968 million (or $55.968 billion), which is the eighth consecutive year that benefits in current dollars increased. Benefits in current dollars increased every year from 1980 to 1992, when the total payments reached $45.668 billion. Then benefits dropped for four years, before bottoming out at $41.837 billion in 1996. Benefits paid to workers then began to increase and reached a record amount of $55.968 billion in 2004.

Another way to assess developments in benefits paid to workers is to compare the benefits to the wages paid to workers covered by the workers' compensation program. This comparison not only reflects (at least roughly) changes in the general level of prices and average wages, but also the changes in the total of wage payments resulting from increases (or decreases) in employment. The increases in the dollars of benefits paid to workers did not keep up with the increases in wages between 1992 and 2000. As shown in Table 1, Column (2) and Figure B, workers' compensation benefits as a percentage of wages peaked at 1.68 percent of payroll in 1992 and then declined every year until 2000, when benefits were equal to 1.06 percent of wages. The eight-year decline in benefits paid relative to wages is the longest stretch of dropping benefits since 1946 (when annual data for the program are first available) and brought benefit payments relative to wages to a level not seen since the 1970s.

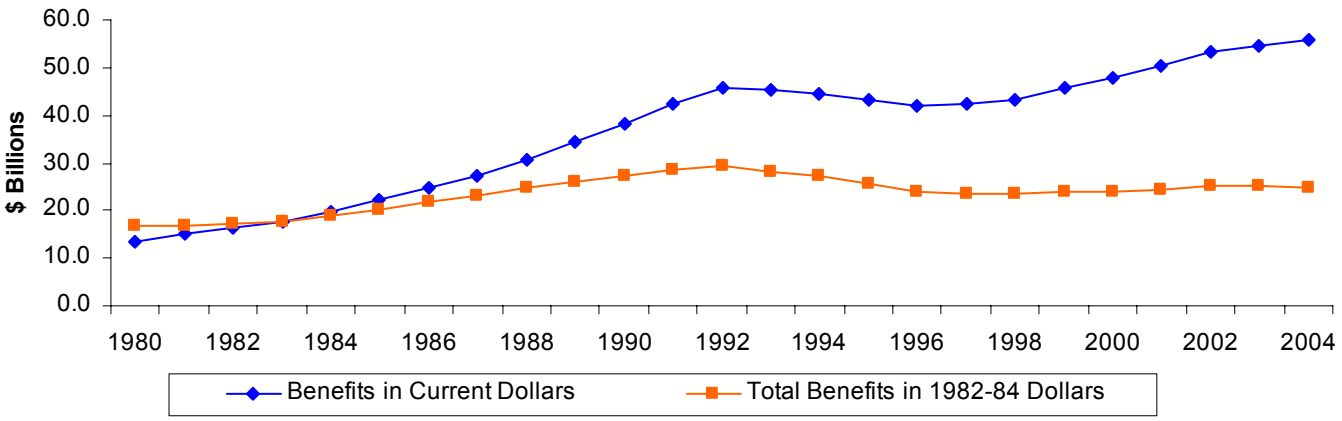
Table 1
Workers' Compensation Benefits in Current Dollars

Year	Benefits in Current Dollars (Millions) (1)	Benefits in Current Dollars as Percent of Covered Payroll (2)
1960	1,295	0.59
1970	3,031	0.66
1980	13,618	0.96
1981	15,054	0.97
1982	16,407	1.04
1983	17,575	1.05
1984	19,685	1.09
1985	22,217	1.17
1986	24,613	1.23
1987	27,317	1.29
1988	30,703	1.34
1989	34,316	1.46
1990	38,237	1.57
1991	42,170	1.65
1992	45,668	1.68
1993	45,330	1.61
1994	44,586	1.51
1995	43,373	1.38
1996	41,837	1.26
1997	42,314	1.18
1998	43,278	1.11
1999	45,581	1.10
2000	47,695	1.06
2001	50,533	1.10
2002	53,309	1.16
2003	54,715	1.16
2004	55,968	1.13

Sources: Benefits in Current Dollars (column 1): 1960-86 data from Social Security Administration (2005), Table 9.B1; 1987-2004 data from Sengupta, Reno, and Burton (2006), Table 4.

Benefits as Percent of Covered Payroll (column 2): 1960-70 data from Social Security Administration (2004), Table 9.B1; 1980-88 data from Burton (2005), Table A.2; 1989-2004 data from Sengupta, Reno, and Burton (2006), Table 12.

Figure A
Workers' Compensation Benefits in Current and Constant Dollars, 1980-2004

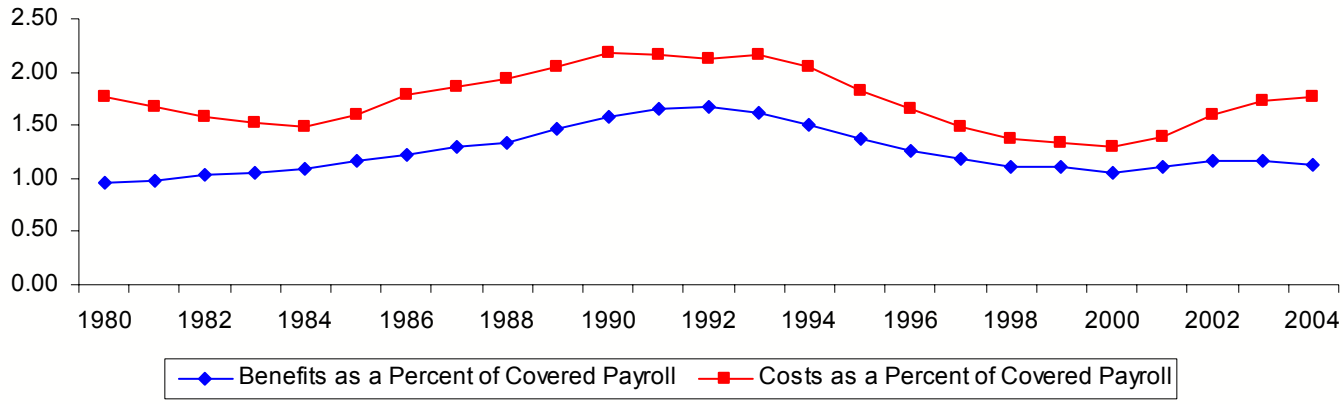


Benefits paid to workers as a percent of payroll increased beginning in 2001 and reached 1.16 percent of payroll in 2002 and 2003. The increases in these years in part resulted from the slowdown of the economy, which resulted in sluggish growth of employment and wages while benefit payments for injuries from previous years continued. Benefits as a percent of payroll then declined to 1.13 percent of payroll, which is lower than in any year between 1985 and 1997.

Still another way to measure benefits paid to workers is in constant dollars, which is current dollars adjusted for changes in the consumer price index (CPI). This approach was not used in the NASI report and so represents a contribution of this article. Table 2 presents information on benefits in current and constant dollars for both cash benefits and medical benefits, as well as for total (cash plus medical) benefits in constant dollars. Figure A includes data on benefits in current dollars (from Table 1, column (1)) and data on benefits in constant dollars (from Table 2, column (7)).

Cash benefits in current dollars reached a record $29.869 billion in 2004 (Table 2, column (1)). However, when adjusted by the CPI for non-medical items (Table 2, column (2)), cash benefits in constant dollars (1982-84 dollars) declined from $16.398 billion in 2003 to $16.349 billion in 2004, as shown in Table 2, column (3). Moreover, measured in constant dollars, the 2004 cash benefits were below the cash benefits paid in

Figure B
Workers' Compensation Benefits and Employers' Costs as a Percent of Covered Payroll, 1980-2004



Source: Benefits as a Percent of Covered Payroll: Table 1, Column (2).
Employers' Costs as a Percent of Covered Payroll, Table 3, Column (4).

every year between 1988 and 1996, and were down almost 17 percent from the peak year of 1992, when cash benefits in constant dollars were $19.639 billion.

Medical benefits in current dollars reached a record $26.099 billion in 2004 (Table 2, column (4)). However, when adjusted by the CPI for medical items (Table 2, column (5)), the 2004 medical benefits were below the medical benefits paid in every year between 1989 and 1993. The 2004 medical benefits of $8.416 billion in constant dollars were down 14 percent from the peak year of 1992, when medical benefits were $9.818 billion in 1982-84 dollars.

Total benefits paid to workers (cash plus medical) reached a new record of $55.968 billion in current dollars in 2004, as previously discussed in connection with Table 1. However, measured in constant dollars (Table 2, column (7)), total benefits declined from $24.984 billion in 2003 to $24.765 billion in 2004. In addition, total benefits in 2004 in constant dollars were lower than the amounts in every year between 1989 and 1995, and the 2004 figure of $24.765 billion was almost 16 percent lower than in the peak year of 1992, when total benefits were $29.457 billion.

Table 2
Workers' Compensation Benefits in Constant Dollars

Year	Cash Benefits Current Dollars (Millions) (1)	Consumer Price Index (1982-84=100) (Non-Medical) (2)	Cash Benefits in 1982-84 Dollars (Millions) (3)	Medical Benefits in Current Dollars (Millions) (4)	Consumer Price Index (1982-84=100) (Medical) (5)	Medical Benefits in 1982-84 Dollars (Millions) (6)	Total Benefits in 1982-84 Dollars (Millions) (7)
1960	860	30.2	2,848	435	22.3	1,951	4,798
1970	1,981	39.2	5,054	1,050	34.0	3,088	8,142
1980	9,671	82.8	11,680	3,947	74.9	5,270	16,950
1981	10,623	91.4	11,623	4,431	82.9	5,345	16,968
1982	11,349	96.8	11,724	5,058	92.5	5,468	17,192
1983	11,894	99.6	11,942	5,681	100.6	5,647	17,589
1984	13,261	103.7	12,788	6,424	106.8	6,015	18,803
1985	14,719	107.2	13,730	7,498	113.5	6,606	20,337
1986	15,971	108.8	14,679	8,642	122.0	7,084	21,763
1987	17,405	112.6	15,457	9,912	130.1	7,619	23,076
1988	19,196	117.0	16,407	11,507	138.6	8,302	24,709
1989	20,892	122.4	17,069	13,424	149.3	8,991	26,060
1990	23,050	128.8	17,896	15,187	162.8	9,329	27,225
1991	25,338	133.8	18,937	16,832	177.0	9,510	28,447
1992	27,004	137.5	19,639	18,664	190.1	9,818	29,457
1993	26,827	141.2	18,999	18,503	201.4	9,187	28,186
1994	27,392	144.7	18,930	17,194	211.0	8,149	27,079
1995	26,640	148.6	17,927	16,733	220.5	7,589	25,516
1996	25,270	152.8	16,538	16,567	228.2	7,260	23,798
1997	25,008	156.3	16,000	17,306	234.6	7,377	23,377
1998	25,157	158.6	15,862	18,121	242.1	7,485	23,347
1999	26,522	162.0	16,372	19,059	250.6	7,605	23,977
2000	26,768	167.3	16,000	20,927	260.8	8,024	24,024
2001	27,689	171.9	16,108	22,844	272.8	8,374	24,482
2002	28,829	174.3	16,540	24,480	285.6	8,571	25,111
2003	29,205	178.1	16,398	25,510	297.1	8,586	24,984
2004	29,869	182.7	16,349	26,099	310.1	8,416	24,765

Sources: Cash Benefits in Current Dollars (column 1): 1960-1986 data from Social Security Administration (2005), Table 9.B1; 1987-2004 data from Sengupta, Reno, and Burton (2006), Table 4 (Total Benefits minus Medical Benefits).

Consumer Price Index, Non-Medical (column 2): *Economic Report of the President*, February 2006, Table B-62, All items less medical care.

Medical Benefits in Current Dollars (column 4): 1960-1986 data from Social Security Administration (2005), Table 9.B1; 1987-2004 data from Sengupta, Reno, and Burton (2006), Table 4.

Consumer Price Index, Medical (column 5): *Economic Report of the President*, February 2006, Table B-60, medical care.

Entries in columns (3), (6), and (7) calculated by Florence Blum.

Costs to Employers. The employers' costs of workers compensation for selected years between 1960 and 2004 are shown in Table 3 and Figure C. Costs in current dollars were $87,402 million (or $87.402 billion) in 2004, which is the sixth consecutive year that costs in current dollars have increased (Table 3, column (1)). For the fourth year in a row, the costs in 2004 in current dollars set a record for employers' costs.

An alternative measure of employers' costs, namely expenditures measured in constant dollars (adjusted for changes in the consumer price index since 1982-84) increased from $41.062 billion in 2002 to $44.384 billion in 2003 to $46.269 billion in 2004 (Table 3, column (3)). The 2003 employers' costs in constant dollars broke the previous record of $42.089 billion, which had been set in 1993, and the record was again broken in 2004.

A third measure of employers' costs compares employers' expenditures on workers' compensation to the wages received by workers covered by the program. There was an extraordinary decline in this measure of employers' costs during the 1990s, as shown in Table 3, column (4) and Figure A. Employer costs peaked at 2.18 percent of payroll in 1990, and then declined almost every year during the decade before reaching a low of 1.30 percent of payroll in 2000. This multi-year decline in the employers' costs of workers' compensation as a percent of payroll was unprecedented in magnitude and duration since at least 1946.

Workers' compensation costs as a percent of payroll began to increase from the recent low of 1.30 per-

Table 3
Workers' Compensation Costs in Current and Constant Dollars

Year	Costs in Current Dollars (Millions) (1)	Consumer Price Index (1982-84=100) (2)	Costs in 1982-84 Dollars (Millions) (3)	Costs in Current Dollars as Percent of Covered Payroll (4)
1960	2,055	29.6	6,943	0.93
1970	4,898	38.8	12,624	1.11
1980	22,256	82.4	27,010	1.76
1981	23,014	90.9	25,318	1.67
1982	22,765	96.5	23,591	1.58
1983	23,048	99.6	23,141	1.53
1984	25,122	103.9	24,179	1.49
1985	29,185	107.6	27,124	1.60
1986	33,964	109.6	30,989	1.79
1987	38,095	113.6	33,534	1.86
1988	43,284	118.3	36,588	1.94
1989	47,955	124.0	38,673	2.04
1990	53,123	130.7	40,645	2.18
1991	55,216	136.2	40,540	2.16
1992	57,395	140.3	40,909	2.12
1993	60,819	144.5	42,089	2.16
1994	60,517	148.2	40,835	2.05
1995	57,089	152.4	37,460	1.82
1996	55,293	156.9	35,241	1.66
1997	53,544	160.5	33,361	1.49
1998	53,431	163.0	32,780	1.38
1999	55,386	166.6	33,245	1.33
2000	58,565	172.2	34,010	1.30
2001	64,663	177.1	36,512	1.40
2002	73,870	179.9	41,062	1.60
2003	81,667	184.0	44,384	1.73
2004	87,402	188.9	46,269	1.76

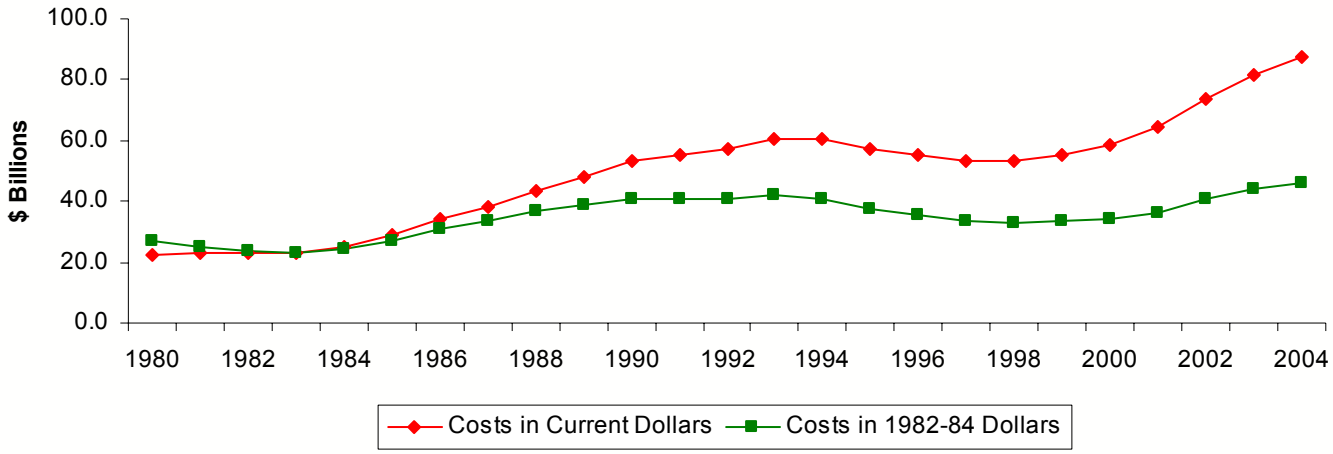
Sources: Costs in Current Dollars (column 1): 1960-86 data from Nelson (1992), Table 7; 1987-2004 data from Sengupta, Reno, and Burton (2006), Table 11.

Consumer Price Index (1982-84=100) (column 2): *Economic Report of the President,* February 2006. Table B-60; all items.

Costs in 1982-84 Dollars (column 3) = (column 1)/(column 2).

Costs as Percent of Covered Payroll (column 4): 1960-70 data from Social Security Administration (2005) Table 9.B1; 1980-88 data from Burton (2005), Table A.2; 1989-2004 data from Williams, Reno, Burton (2006), Table 12.

Figure C
Workers' Compensation Costs to Employers in Current and Constant Dollars, 1980-2004



cent of payroll in 2000 and reached 1.76 percent of payroll in 2004. This is a significant increase, but still left costs as a percent of payroll in 2004 below this measure of costs for all of the years between 1986 and 1995.

Sources of Insurance Coverage. Workers' compensation benefits are provided by four sources of insurance coverage, and the relative importance of the sources has varied in recent years, as shown in Table 4. Private carriers were permitted to sell workers' compensation insurance in all but the five states that had exclusive state funds in 2004 – Ohio, North Dakota, Washington, West Virginia, and Wyoming. The share of all benefit payments accounted for by private carriers was at least 50 percent from 1990 to 1994 and from 1997 to 2004. In recent years, the share accounted for by private carriers declined from 56.4 percent in 1999 to 50.6 percent in 2004.

In addition to the five states with exclusive state funds, there are 21 other states that operate state funds that compete with private carriers. Between 1990 and 2000, the share accounted for by state funds fluctuated within a relatively narrow range of 15 to 18 percent of all benefit payments. Recently, the share accounted for by state funds increased from 15.6 percent in 2000 to 19.7 percent in 2004. In addition to funds operated by the states, the federal government also pays benefits to civilian employees and certain other workers. The federal share of benefit payments has slowly but steadily declined from 7.6 percent in 1990 to 5.8 percent in 2004.

The final source of benefits is self-insuring employers, an option that is available to qualifying employers

Table 4
Sources of Workers' Compensation Benefits

Year	Private Carriers	State Funds	Federal	Self-Insured Employers	Total
1990	58.1	15.4	7.6	19.0	100.0
1991	58.1	15.9	7.1	18.8	100.0
1992	55.4	16.4	6.9	21.3	100.0
1993	53.2	16.3	7.0	23.4	100.0
1994	50.0	17.0	7.1	25.9	100.0
1995	48.8	18.2	7.2	25.9	100.0
1996	48.7	18.2	7.3	25.8	100.0
1997	51.2	17.2	6.6	25.1	100.0
1998	53.1	16.7	6.6	23.6	100.0
1999	56.4	15.1	6.3	22.2	100.0
2000	56.3	15.6	6.2	21.9	100.0
2001	55.3	15.8	6.1	22.8	100.0
2002	54.0	17.5	5.9	22.6	100.0
2003	52.2	19.1	5.8	22.9	100.0
2004	50.6	19.7	5.8	23.8	100.0

Source: Sengupta, Reno, And Burton (2006), Table 5.

in all states but North Dakota and Wyoming. Self-insuring employers increased their share of benefit payments from 19.0 percent in 1990 to 25.9 percent in 1994 and 1995. Since 1998, the relative importance of self-insurance has varied in a relatively narrow range of 22 to 24 percent of all benefit payments.

An Overview of Costs and Benefits Since 1985

Thomason, Schmidle, and Burton (2001:19-32) provide an overview of workers' compensation costs and benefits since 1960, and divided 1960 to 1998 into five subperiods. An updated version of a portion of the book is Burton (2004). I summarize here the analysis of the subperiods since 1985, since they are interrelated.

The Seeds for Neo-Reform Are Sown: 1985-91. Workers' compensation payments for medical benefits increased at 14.6 percent per year between 1985 and 1991, more rapidly than both the annual increases of 11.0 percent in cash benefits and the generally high rate of medical cost inflation elsewhere in the economy. A partial explanation for the high rate of medical cost increases in workers' compensation was the relatively limited use of managed care (such as health management organizations (HMOs) and preferred provided organizations (PPOs) in workers' compensation. The result of the higher payments for both cash and medical benefits is that benefits increased from 1.09 percent of payroll in 1984 to 1.65 percent of payroll in 1991 (Figure B).

The rapid increase in benefit payments was the major contributor to the increasing costs of workers' compensation employers, which rose from 1.49 percent of payroll in 1984 to 2.16 percent of payroll in 1991 (Figure B). As this period progressed, the workers' compensation insurance industry declared itself in a crisis mode. Several factors contributed to the industry's problems. Benefit payments increased rapidly, but in many states, insurance carriers were unable to gain approval from regulators for rate filings with the significant premium increases the industry felt were justified. As a result, the workers' compensation insurance industry lost money every year between 1984 and 1991, even considering investment income.

The Neo-Reform Era: 1992-2000. As previously noted, the multi-year decline in benefits between 1992 and 2000 (shown in Figure A) was unprecedented in duration and magnitude since at least 1946. The employers' costs of workers' compensation also declined sharply between 1992 and 2000. As benefits and costs declined in the 1990s, insurer profitability quickly improved. The period from 1994 to 1997 was the most profitable period in at least twenty years for workers' compensation insurance.

The developments between 1992 and 2000 can best be understood as a reaction to the escalating costs in the period from 1985 to 1991, which galvanized

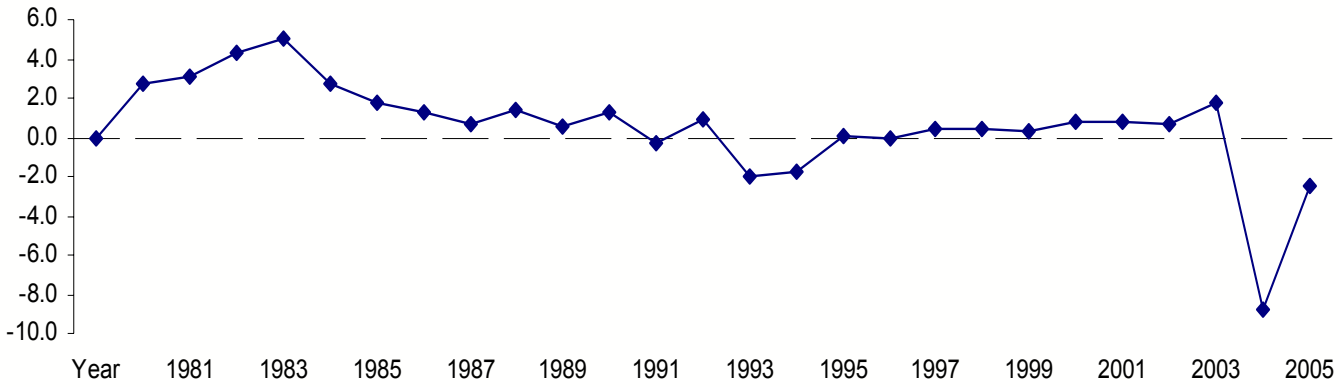
Table 5
Workers' Compensation Insurance Premium Level Changes Due to Changes in Benefits, 1980-2005

Year	Benefit Change
1980	2.7
1981	3.1
1982	4.3
1983	5.0
1984	2.7
1985	1.7
1986	1.3
1987	0.7
1988	1.4
1989	0.5
1990	1.3
1991	-0.3
1992	0.9
1993	-2.0
1994	-1.8
1995	0.1
1996	-0.1
1997	0.4
1998	0.4
1999	0.3
2000	0.8
2001	0.8
2002	0.7
2003	1.8
2004	-8.8
2005	-2.5

Source: National Council on Compensation Insurance, reprinted with permission in John F. Burton, Jr. and Florence Blum, *Workers' Compensation Compendium 2005-06, Volume 2*, Table 9, pg. 47.

Note: The benefits change refers to adjustments in premium levels to account for statutory benefit changes adopted by state legislatures, as well as changes in medical fee schedules and hospital rates.

Figure D
Workers' Compensation Insurance Premium Level Changes
Due to Changes in Benefits, 1980-2005

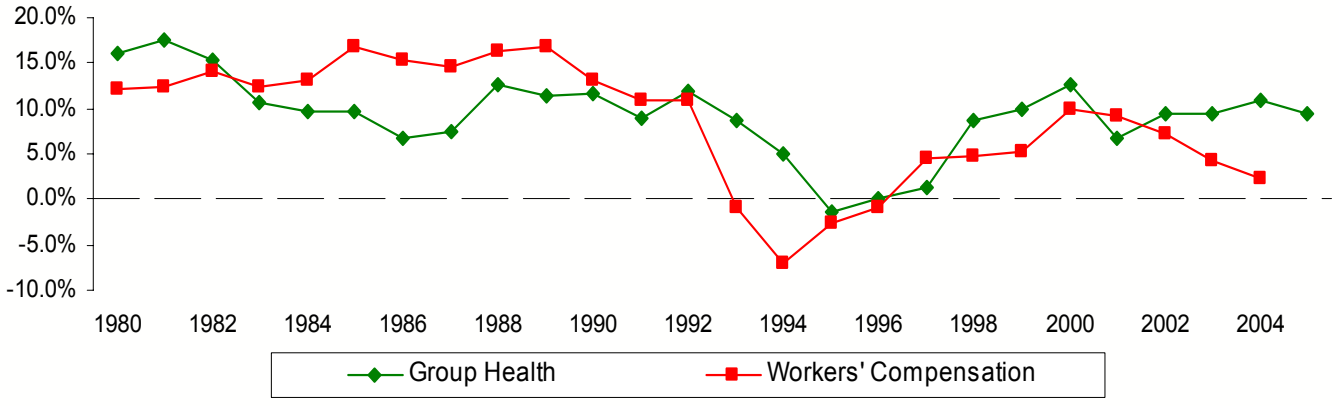


Source: Table 5.

political opposition from employers and insurers to compensation programs that had been liberalized in the 1970s and 1980s. Over half of the state legislatures passed major amendments to workers compensation laws between 1989 and 1996, generally reducing benefits and attempting to contain health care costs. Eligibility rules for workers' compensation were tightened in many states, making it harder for workers to qualify for benefits. The statutory levels of cash benefits were reduced in a number of jurisdictions, especially permanent partial disability benefits (paid to workers with long-term consequences of their injuries). The workers' compensation health care delivery system was transformed, including in many jurisdictions the introduction of managed care and the shift of control for the choice of the treating physician from workers to employers. In addition to precipitating these statutory changes in workers' compensation programs, the higher workers' compensation costs of the late 1980s resulted in increased efforts at prevention and disability management by employers during the 1990s. These developments are examined in Spieler and Burton (1998), Burton and Spieler (2000), Thomason and Burton (2001), and Burton and Spieler (2004).

A New Era of Increasing Benefits and Costs: 2001- ? Benefits as a percent of payroll and costs as a percent of payroll both increased in 2001 for the first

Figure E
Annual Rates of Increase in Employers' Expenditures
on Medical Benefits, 1980-2005



Source: Group Health Annual Rates of Increase: Table 6, Column (2).
Workers' Compensation Annual Rates of Increase: Table 6, Column (4).

time in a decade. Benefits continued their climb through 2003, before declining slightly in 2004, while costs as a percent of payroll increased every year between 20001 and 2004 (Figure B). Do these recent developments mean we have entered a new era of increasing benefits and costs? There is no clear answer to this question because of conflicting factors influencing costs and/or benefits.

First, the increase in employer's costs between 2000 and 2004 were due in part to the workers' compensation insurance industry increasing premiums more rapidly than incurred losses (benefits). The incurred loss ratio (losses as a percent of premium) declined from 73.5 in 2000 to 69.7 in 2004 (Burton 2006). These developments suggest that the rapid increases in the employer's costs of workers' compensation between 2000 and 2004 were partially due to the increased spread between incurred losses (benefits) and premiums. The incurred loss ratio further dropped to 65.6 in 2005, while the overall operating ratio (which considers all expenses and revenue, including investment income) declined to 90.6. The relatively profitable underwriting experience in 2005 may result in slower increases in insurance rates for the next few years.

Second, presumably the states that were the easiest to "reform" had their benefits cut and eligibility tightened during the 1990s, which suggests that similar reforms should be harder to achieve in the current era, thereby making benefit reductions of the magnitude achieved in the 1990s less likely in the current era. However, as shown in Figure D and Table 5,

Table 6
Employers' Expenditures on Medical Benefits, 1980-2005

Year	Group Health Insurance (Billions) (1)	Group Health Annual Rate of Increase (Percent) (2)	Workers' Compensation Medical (Billions) (3)	Workers' Compensation Annual Rate of Increase (Percent) (4)
1979	52.6	--	3.5	--
1980	61.0	16.1%	3.9	12.1%
1981	71.7	17.5%	4.4	12.3%
1982	82.6	15.3%	5.1	14.2%
1983	91.5	10.7%	5.7	12.3%
1984	100.3	9.7%	6.4	13.1%
1985	110.0	9.7%	7.5	16.7%
1986	117.4	6.7%	8.6	15.3%
1987	126.2	7.5%	9.9	14.7%
1988	142.3	12.7%	11.5	16.1%
1989	158.6	11.5%	13.4	16.7%
1980's Averages	101.3	11.7%	7.3	14.3%
1990	176.9	11.5%	15.2	13.1%
1991	192.8	9.0%	16.8	10.8%
1992	215.7	11.9%	18.7	10.9%
1993	234.3	8.6%	18.5	-0.9%
1994	246.0	5.0%	17.2	-7.1%
1995	242.8	-1.3%	16.7	-2.7%
1996	242.9	0.0%	16.6	-1.0%
1997	246.1	1.3%	17.3	4.5%
1998	267.6	8.7%	18.1	4.7%
1999	294.1	9.9%	19.1	5.2%
1990's Average	235.9	6.5%	17.4	3.8%
2000	331.4	12.7%	20.9	9.8%
2001	353.3	6.6%	22.8	9.2%
2002	386.5	9.4%	24.5	7.2%
2003	423.4	9.5%	25.5	4.2%
2004	469.7	10.9%	26.1	2.3%
2005	514.5	9.5%		

Sources: Column (1): Private Group Health Insurance, National Income and Product Accounts Table 7.8 Supplements to Wages and Salaries by Type, Bureau of Economic Activity, Department of Commerce, downloaded October 18, 2006 from www.bea.gov/bea/dn/nipaweb/TableView.asp, updated August 2, 2006.

Column (3): 1979-1986 data from Social Security Administration (2000), Table 9.B1; 1987-2004 data from Sengupta, Reno, and Burton (2006), Table 4.

Columns (2) and (4): calculated from data in columns (1) and (3).

the National Council on Compensation Insurance (NCCI) reported that the statutory level of benefits were reduced more in 2004 and 2005 than in any year in the 1990s (and indeed the two-year drop reduction in benefits is the largest such decline since the NCCI series began in 1960). The NCCI data reflect statutory benefit changes adopted by state legislatures (mainly involving cash benefits) plus changes in medical fee schedules and hospital rates. Presumably these changes in statutory provisions and fee schedules will result in lower payments of workers' compensation benefits in subsequent years.

While the first two factors suggest that benefit payments and costs may have slower rates of increase (or possibly even declines) in the next few years, a third factor is likely to result in higher benefit payments and employers' costs. Employers' expenditures on group health insurance and the payments of medical benefits by the workers' compensation program generally move in a roughly parallel fashion, as shown in Figure E and Table 6. During the 1980s, for example, employers' expenditures on group health insurance increased 11.7 percent a year, while workers' compensation medical benefits increased by 14.3 percent a year. In the 1990s, both types of expenditures declined from the previous decade: employers' expenditures on group health insurance increased 6.5 percent a year, while workers' compensation medical benefits increased by 3.8 percent a year.

The results shown in Figure E and Table 6 make clear that the employers' expenditures on group health insurance and payments of medical benefits do not exactly track each other, and that the paths in expenditures can diverge for a few years. Nonetheless, over time there is a rough correspondence between the two types of medical care paid for by employers. What is particularly intriguing is that employer expenditures on group health insurance increased by at least 9.5 percent a year in 2003, 2004, and 2005, while workers' compensation medical expenditures were up 4.2 percent in 2003 and 2.3 percent in 2004. One possible scenario is that the relatively modest increases in workers' compensation health care in 2003 and 2004 are an aberration and that when NASI issues its report next year, we will find that workers' compensation medical care expenditures accelerated in 2005.

Because of the uncertain net effect of the three factors discussed in this section plus possible other factors influential but unknown, it is not clear whether the increase in benefits and costs in the workers' compensation program since 2001 will continue, moderate, or accelerate. Stay subscribed for further data and analysis!

REFERENCES

Burton, John F., Jr. 2004. "A Primer on Workers' Compensation." *Workers' Compensation Policy Review*, Vol. 4, No. 6 (November/December): 2-16. Reprinted in Burton, Blum, and Yates (2005): 1-16.

Burton, John F., Jr. 2006. "Workers' Compensation Insurance Industry Increases Profitability in 2005." *Workers' Compensation Policy Review*, Vol. 6, No. 5 (September/October): 29-35.

Burton, John F., Jr. and Emily A. Spieler. 2000. "Workers' Compensation and Older Workers." In Peter P. Burdett, Richard V. Burkhauser, Janice M. Gregory, and H. Allan Hunt, eds. *Ensuring Health and Income Security for an Aging Workforce.* Kalamazoo, MI: W. E. Upjohn Institute for Employment Research.

Burton, John F., Jr. and Emily A. Spieler. 2004. "Workers' Compensation and Older Workers." *IAIABC Journal*, Vol. 41, No. 2 (Fall): 26-30. Reprinted in Burton, Blum, and Yates (2005): 244-45.

Burton, John F., Jr., Florence Blum, and Elizabeth H. Yates. 2005. *Workers' Compensation Compendium 2005-06, Volume One*. Princeton, NJ: Workers' Disability Income Systems, Inc.

Nelson, William J. 1992. "Workers' Compensation: 1984-88 Benchmark Revisions." *Social Security Bulletin*, Vol. 55, No. 3 (Fall): 41-58.

Sengupta, Ishita, Virginia Reno, and John F. Burton, Jr. 2006. *Workers' Compensation: Benefits, Coverage, and Costs, 2004*. Washington, DC: National Academy of Social Insurance. The publications can be downloaded at no charge from: www.nasi.org.

Social Security Administration, Office of Policy, Office of Research, Evaluation, and Statistics. 2005. *Annual Statistical Supplement, 2004, to the Social Security Bulletin.* Washington, DC: Social Security Administration.

Spieler, Emily A. and John F. Burton, Jr. 1998. "Compensation for Disabled Workers: Workers' Compensation." In Terry Thomason, Douglas E. Hyatt, and John F. Burton, Jr., eds. *New Approaches to Disability in the Workplace.* Ithaca, New York: Cornell University Press and Industrial Relations Research Association. Excerpts reprinted in Burton, Blum, and Yates (2005): 229-243.

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

Thomason, Terry and John F. Burton, Jr. 2001. "The Effects of Changes in the Oregon Workers' Compensation Program on Employees' Benefits and Employers' Costs." *Workers' Compensation Policy Review*, Vol. 1, No. 4 (July/August): 7-23. Reprinted in Burton, Blum, and Yates (2005): 387-405.

The Exclusive Remedy Doctrine and the Intentional Injury Exception

by John F. Burton, Jr.

Workers' compensation statutes in all jurisdictions incorporate the workers' compensation principle, which has two elements.[1] Workers benefit from a no-fault system, which enables them to receive benefits in many situations in which tort suits against their employers would be unsuccessful because the employers were not negligent. Employers benefit from limited liability, which means that the cash and medical benefits provided in the workers' compensation statutes are the exclusive remedy of employees against their employers for workplace injuries and diseases. The workers' compensation benefits are often less than a plaintiff in a successful tort suit would receive since, for example, the cash benefits replace only a portion of lost wages, and there are no payments for pain and suffering.[2]

There are, however, several exceptions to the exclusive remedy doctrine that allow injured workers to bring tort suits against their employers. One of these exceptions occurs when there is an intentional injury of the employee by the employer. This commentary provides an introduction to the intentional injury exception by providing an overview of the various approaches used by the states to the exception, by tracing the evolution of the doctrine in Michigan, and by examining developments in New Jersey, including several recent Supreme Court case.[3]

Approaches to the Intentional Injury Exception

When will an employee be able to bring a tort suit against the employer because the employer engaged in activity that at least arguably represented an intentional injury to the employee? There are at least five possible answers to this question.

(1) There is no intentional injury exception.

Larson and Larson (2006, §103.01) identify several states that do not recognize the intentional injury exception to the exclusivity of the workers' compensation remedy, including Alabama, Indiana, and Pennsylvania.

(2) The exception requires an actual intent to injure.

Larson and Larson (2006, §103.03) indicate the "almost unanimous rule" is that the intentional injury exception requires misconduct of the employer that represents "a conscious and deliberate intent directed to the purpose of inflicting an injury." Thus "accidental injuries caused by the gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence, [or] breach of statute" are not sufficient to satisfy the intentional injury exception. Since there appears to be some overlap in these excerpts from the same sentence in the Larsons' treatise of what would and would not constitute an exception based on actual intent, the authors later in the section provide further clarification: the actual intent to injure exception only applies when there was "deliberate infliction of harm comparable to an intentional left jab to the chin."

Larson and Larson (2006, §103.03) cite a number of cases that illustrate conduct that does not represent the kind of actual intention to injure that would allow an exception to the exclusive remedy doctrine, including: knowingly permitting a hazardous work condition to exist; knowingly ordering an employee to perform an extremely dangerous job; willfully violating a safety statute; refusing to respond to an employees' medical needs and restrictions; and withholding information about worksite hazards. These decisions are from Missouri, California, Illinois, and New York.

(3) The exception requires employer conduct that is substantially certain to cause injury or death.

There are almost a dozen jurisdictions that allow injured employees to bring tort suits against employers when the employers' conduct was substantially certain to cause the injury, according to Larson and Larson (2006 §103.04). The states cited by Larson and Larson as adopting the broader definition of intentional injury include Florida, Michigan, New Jersey, North Carolina, and West Virginia.

Although Larson and Larson suggest that this standard subjects employers to common law suits for actions that "might under ordinary circumstances be viewed as gross negligence," the states listed by the authors involve decisions that appear to require more than gross negligence. Thus, the West Virginia decision cited by the Larsons as the first decision to depart from what they characterized as the "pure intent" standard, *Mandolidis v. Elkins Industries, Inc.,* 161 W. Va. 695, 246 S.E.2d 907 (1978), allowed tort suits for employer

behavior that involved "willful, wanton, and reckless behavior."[4]

Whatever the merits of the substantially-certain approach to the exclusive remedy provision, the authors of the leading legal treatise express reservations, particularly because the approach could undermine the requirement that the employer must have subjectively intended the injury to have occurred in order to be subject to tort suits. Thus, Larson and Larson (2006, §103.04) provide this admonition:

> In jurisdictions that have adopted the "substantial certainty" theory, courts sometimes have failed to examine what the employer believed and simply looked to the hazard condition to determine whether harm was "substantially certain" to occur. Because of this potential for abuse, it is advisable for states to avoid this superficially attractive test.

(4) The exception requires employer conduct that is willful.

A unique approach was adopted by the New Mexico Supreme Court in *Delgado v. Phelps Dodge Chino, Inc.,* 34 P.3d 1148) (N.M. 2001), which was analyzed by Robert Aurbach (2003):

> The facts alleged by the plaintiff were truly horrific. The worker [was ordered to remove a ladle overfilled with molten material]. The worker complied, despite protesting that he was unqualified to deal with the emergency. The worker's efforts failed catastrophically, resulting in severe burns over virtually his entire body, causing his death a few weeks later….
>
> The court went on to criticize the actual intent to injure rule, saying that it unbalanced the Workers' Compensation Act in favor of employers. The court noted that statutory language denied compensation to workers when they were intoxicated, when they engaged in willful conduct resulting in their injury, and when they intentionally self-inflicted injury. The actual intent to injure standard absolved the employer of tort liability for "willful" behavior resulting in injury to the worker, while the worker was denied a workers' compensation remedy if they engaged in "willful" behavior resulting in their injury….
>
> The court established a three-prong test for determination of "willful" conduct by the employer that would deprive him of exclusive remedy protection for injuries to a worker, holding that:
>
> …willfulness renders a worker's injury non-accidental, and therefore outside the scope of the Act, when: (1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker; (2) the worker or employer expects the intentional act or omission to result in the injury, or has utterly disregarded the consequences; and (3) the intentional act or omission proximately causes the injury.

(5) The exception requires employer conduct that is negligent, wanton, reckless, or (arguably, even) grossly negligent.

I am unaware of any jurisdiction that allows an employee to bring a tort suit against an employer because the employer engaged in conduct that was merely negligent, wanton, or reckless. Moreover, despite the assertion by Larson and Larson to the contrary, I am unaware of cases in which gross negligence made an employer subject to a tort suit (short of facts that indicated the employer was actually aware the employee was exposed to conditions that made it substantially certain the employee was going to be injured, which I consider involving more than gross negligence).

The Intentional Injury Exception in Michigan

The ability of injured workers to successfully use the intentional injury exception depends in part on the language in the particular state's workers' compensation statute. Michigan provides a good example of how that language can change over time. The Michigan Supreme Court in *Beauchamp v. Dow Chemical Co.,* 398 N.W.2d 882 (Mich. 1986), held that an intentional tort provided an exception to the exclusive remedy doctrine, and that "intention" included any injury in which the employer intended an act and believed that the injurious consequence was "substantially certain" to occur.

The Michigan legislature reacted in 1987 by amending the workers' compensation statute to provide that an intentional injury occurs only when "the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." MICH. COMP. LAWS §418.131(1). The Michigan Supreme Court interpreted this language in *Travis v. Dreis & Krump Manufacturing Co.,* 551 N.W.2d 132 (Mich. 1996). Travis had been assigned to work on an unfamiliar machine that her supervisor knew (but did not tell her) had a history of unpredictable malfunctions. The tool room supervisor had told the supervisor that the machine needed to be shut down and fixed or rebuilt, or

that someone would be hurt. After this conversation, some repairs were made on the machine and the supervisor believed it was functioning properly. However, the machine malfunctioned and Travis suffered amputation of two fingers and multiple crushing injuries to both hands. The trial court granted summary disposition of the case because it could not find that the facts constituted an intentional injury, and the Michigan Supreme Court agreed because the 1987 legislation requires an "extremely high standard" of showing that an injury was "certain" to occur. *Id*. at 143.

An alternative set of facts further clarifies the meaning of "certain" in Michigan. An employee's job included pouring wet scrap metal objects into a furnace containing molten aluminum. The employee warned the employer about the dangerous circumstances under which he was required to work and the lack of protective devices. He suffered minor burns from this task and was sent home. He was then called back the same day to perform the same job function, and was severely burned this time. The Michigan Supreme Court held this employer conduct constituted an intentional injury under the 1987 Michigan legislation, *Golec v. Metal Exch. Corp.,* 551 N.W.2d 132 (Mich. 1996), because of the actual knowledge of a specific injury which had already been proven "certain" to occur.

The Intentional Injury Exception in New Jersey

The meaning of the intentional injury exception in New Jersey has benefited from progressive revelations in state supreme court decisions. *Millison v. E.I. du Pont De Nemours & Co.,* 101 N.J. 161, 501 A.2d 505 (1985), involved two counts alleging that the employer had engaged in conduct that resulted in an intentional injury to the employees. In the first count, the employer was charged with intentionally exposing the workers to asbestos and with deliberately concealing from employees the health hazards associated with asbestos exposure. In the second count, du Pont was alleged to have fraudulently concealed from the workers the fact that company medical exams revealed certain workers had already contracted asbestos-related diseases. As part of the second count, the workers further alleged that, rather than provide medical treatment for these ailing employees, the employer sent them back into the workplace where their diseases were aggravated by additional asbestos exposure.

The New Jersey workers' compensation statute provides that when an employee qualifies for workers' compensation benefits, ordinarily the employee is barred from the pursuit of other remedies, but that an exception to the exclusivity provision is available when the worker can prove an "intentional wrong." The court noted that previous New Jersey decisions had provided an exception to the exclusive remedy only when there was a deliberate or actual intent to injure the worker, and quoted from the Larson treatise to illustrate the meaning of this standard: there must be a "deliberate infliction of harm comparable to an intentional left jab to the chin."

The court recognized that if the intentional wrong exception is interpreted too broadly,

> this single exception would swallow up the entire "exclusivity" provision of the Act, since virtually all employee accidents, injuries, and sicknesses are a result of the employer or a co-employee intentionally acting to do whatever it is that may or may not lead to eventual injury or disease.

Millison v. E.I. duPont De Nemours & Co., 101 N.J. 161, 177, 501 A.2d 505 (1985),

The court chose a standard for what constitutes an intentional injury that was easier to meet than the actual intent to injure approach espoused by Larson but that also insured "that as many work-related disability claims as possible be processed exclusively within the Act." In order to achieve this middle ground, the court adopted the intent analysis of Dean Prosser, who had indicated that:

> the mere knowledge and appreciation of a risk – something short of substantial certainty – is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong . . . .
> *Id.*

The court further clarified its position by referring to the Restatement of Torts, which indicates that the:

> meaning of intent is that actor desires to cause consequences of his act or is substantially certain that such consequences will result from his actions.
> *Id*. at 178.

The New Jersey court thus adopted the "substantially certain" standard for determining when the employer's conduct constituted an intentional injury. The court also added a second component to the level of risk exposure that will satisfy the intentional injury exception, namely

> the context in which that conduct takes place: may the resulting injury or disease, and the circumstances in which it is inflicted on the worker, fairly be viewed as a fact of life of industrial employment, or is it rather plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the Compensation Act?
>
> *Id*. at 178-79.

Using the two components involved in the intentional wrong exception (namely the employer's conduct and the context in which that conduct takes place), the New Jersey Supreme Court concluded that count one of the workers' complaints must fail. The court indicated that mere knowledge and appreciation of a risk, and even the strong probability of a risk resulting in harm, does not constitute employer conduct that represents an intentional harm. Moreover, the legislature was aware of occupational diseases as a fact of industrial employment when the workers' compensation statute was enacted, and therefore the context indicated that occupational diseases would be encompassed by the workers' compensation exclusive remedy provision.

The court decided, however, that count two did provide an exception to the exclusive remedy provision. The court distinguished between employer conduct that tolerates workplace conditions that result in injuries and diseases and conduct that actively misleads employees who have already contracted those diseases, and concluded that the latter type of behavior represents intentional harm. Moreover, the court concluded that such "intentionally-deceitful action goes beyond the bargain struck by the Compensation Act. . . . The legislature, in passing the Compensation Act, could not have intended to insulate such conduct from tort liability." In short, the second count satisfied both the conduct and context components of the intentional injury exception to the exclusive remedy provision.[5]

The New Jersey Supreme Court revisited the intentional injury exception to the exclusive remedy provision in *Laidlow v. Hariton Machinery Co.,* 170 N.J. 602, 790 A.2d 884 (2002). Laidlow worked for the company from 1978 until 1992, when he was injured when his hand was pulled into a rolling mill. The rolling mill had been purchased in 1978 and the company arranged to have a safety guard installed. However, the safety guard was "never" engaged, and from 1979 to Laidlow's accident, the guard was always "tied up" and inoperative. The only exception was when the OSHA inspectors came to the plant, when Laidlow's supervisor, Portman, would instruct the employees to release the wire holding up the safety guard. However, as soon as the OSHA inspector left, the safety guard would again be disabled. The employer conceded that the guard was removed for speed and convenience.

Although the employer operated the mill without the safety guard for about 12 or 13 years, there were no accidents before 1992. However, on occasions prior to 1992, both Laidlow and a fellow worker had close calls when they were able to pull their hands out of the machine just in time to escape injury. Those incidents had been reported to the employer. Moreover, in the period immediately prior to his accident, Laidlow had spoken to Portman three times about the safety guard, but Portman had never restored the guard. Also, a professional engineer retained by Laidlow certified that the employer knew there was a "'virtual' certainty of injury" to Laidlow or other workers from operation of the mill without a guard.

The trial court concluded that the facts alleged by Laidlow failed to demonstrate an intentional wrong. Accordingly, the court granted the employer's and Portman's motions for summary judgment. The Appellate Division (New Jersey's first level of appeals court) affirmed the dismissals in a split decision.

The New Jersey Supreme Court reversed the judgment of the Appellate Division and remanded the case for trial. In the decision, the court clarified its holding in the 1985 *Millison* case. A key passage (at 613) is:

> What is critical, and what often has been misunderstood, is that we cited Professor Larson and the cases relying on his approach for informational, not precedential, purposes. *Millison*, in fact, specifically rejected Professor Larson's thesis that in order to obtain redress outside the Workers' Compensation Act an employee must prove that the employer subjectively desired to harm him. In place of Larson's theory, we adopted Dean Prosser's broader approach to the concept of intentional wrong.
>
> Under Prosser's approach, an intentional wrong is not limited to action taken with a subjective desire to harm, but also includes instances where an employer knows that the consequences of those acts are substantially certain to result in such harm.

The New Jersey Supreme Court also clarified the additional requirements for the intentional wrong exception to the exclusive remedy provision in New Jersey (*Id* at 614-15).

> In addition to adopting Prosser's "substantial certainty" test relative to conduct, in *Millison* we added a crucial second prong to the test:
>
> Courts must examine not only the conduct of the employer, but also the context in which that conduct takes place: may the resulting injury or disease, and

> the circumstances in which it is inflicted on the worker, fairly be viewed as a fact of life of industrial employment, or is it rather plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the Compensation Act? . . .
>
> In other words, under *Millison,* if only the conduct prong is satisfied, the employer's action will not constitute an intentional wrong . . . . That standard will be met only if both prongs of *Millison* are proved.

The court then applied these principles to the facts involving the suit by Laidlow. The court said that a directed verdict was inappropriate because the facts could have led a jury to conclude that the employer was aware of the virtual certainty of injury from the unguarded rolling mill. The court was not persuaded that the absence of prior accidents obviates a possible finding of "substantial certainty" by the jury. Rather, the other facts – such as the purchase of the safety guard, the reports of close calls, the activation of the safety guard when the OSHA inspectors appeared, and the three requests from Laidlow to his supervisor to restore the guard – could have served as the basis for a jury's determination that the employer's conduct was substantially certain to cause death or injury.

As to the second prong of the intentional harm exception – the context indicates the employer conduct was beyond anything the legislature could have contemplated as confining the employee to recover only under workers' compensation – the New Jersey Supreme Court indicated that this determination was for the court to make. And the court indicated that if Laidlow's allegations were proved, the context prong could be met.

> Indeed, if an employee is injured when an employer deliberately removes a safety device from a dangerous machine to enhance profit or production, with substantial certainty that it will result in death or injury to a worker, and also deliberately and systematically deceives OSHA into believing that the machine is guarded, we are convinced that the Legislature would never consider such actions or injury to constitute simple facts of industrial life. On the contrary, such conduct violates the social contract so thoroughly that we are confident that the Legislature would never expect it to fall within the Workers' Compensation bar.
>
> Our holding is not to be understood as establishing a per se rule that an employer's conduct equates with an "intentional wrong" . . .whenever that employer removes a guard or similar safety device from equipment or machinery, or commits some other OSHA violation. Rather, our disposition in such a case will be grounded in the totality of the facts contained in the record and the satisfaction of the standards established in *Millison* and explicated here. *Id.* at 622-23.

The New Jersey Supreme Court examined the limits of the intentional injury exception in two other cases. A worker was killed when he fell into a sand hopper. OSHA had previously cited the employers for *inter alia* failing to identify permit-required confined spaces, to implement lockout procedures and to train employees in safety matters. In addition, a professional engineer contended the employer deliberately provided information to OSHA indicating it was addressing each of the violations but did not follow through. Under these circumstances, the court in *Crippen v. Central Jersey Concrete Pipe Co.*, 176 N.J. 397, 823 A.2d 789 (N.J. 2003), allowed the plaintiff to proceed with a tort suit. However, the court did not authorize a tort suit in *Tomeo v. Thomas Whitesell Construction Co., Inc.*, 176 N.J. 366, 823 A.2d 64 (N.J. 2003). In that case, a worker who normally installed sprinkler systems was asked to assist with snow removal. A safety lever that normally stops the blades on a snow blower when the operator takes his or her hands off the handle bar was taped by someone unknown to allow the blades to continuously spin. Tomeo conceded there were two visible labels warning about the danger of "inserting a body part into the chute." The worker nonetheless pushed some snow down the clogged chute and injured his fingers. The court drew a distinction between industrial machinery and a consumer product, for which there is a presumption that users will heed the warnings about inherent dangers.

Conclusions

As with many aspects of workers' compensation programs, there are differences among states in the extent to which the exclusive remedy provision protects employers from tort suits for an intentional injury to the employee. A few states do not recognize the intentional injury exception regardless of the circumstances; most states confine the exceptional injury exception to misconduct that represents a deliberate attempt to inflict an injury on the workers (the Larson view); and about a dozen states allow an exception to the exclusive remedy provision when the employer conduct is substantially certain to cause injury or death (the Prosser view).

Despite the fears expressed by Larson and Larson about the threats to the exclusive remedy provision from use of the exception when the employer conduct is substantially certain to cause injury or death, the

states that adopted that approach, such as New Jersey, appear to have effectively limited that exception to extreme circumstances that do not threaten the integrity of the exclusive remedy doctrine. The New Jersey Supreme Court has clearly indicated that gross negligence, or willful or wanton behavior, are not sufficiently egregious behavior to warrant tort suits.

Whether the two-prong approach used in New Jersey is a good idea is less obvious. The distinction seems strained between the content of the employer's conduct, which is assessed by the jury to determine if there is evidence of behavior "substantially certain" to harm the employee, and the context for the employer's conduct, which is assessed by the courts to determine if the circumstances that resulted in the injury are beyond anything the legislature could have contemplated as entitling the employee to recover under workers' compensation. Generally the employer conduct that satisfies the content requirement should also satisfy the context requirement, and so the two prongs are largely redundant. To the extent the prongs produce different results, the context requirement seems to be a way for the New Jersey courts to nullify conduct decisions by the jury that the courts do not like. In essence, the best solution appears to be the "substantially certain" approach used in New Jersey to determining what employer actions represent an intentional injury without the second New Jersey "prong" involving a judicial determination of context.

ENDNOTES

1. The article is largely based on Willborn et al (2007): 869-80.

2. Workers' compensation statutes were enacted in most states between 1910 and 1920. Prior to these statutes, workers injured on the job were required to sue their employers in tort suits based on negligence. While successful suits could result in substantial awards, including full losses of wages and payments for payment and suffering, employees were generally unsuccessful because of the necessity to establish employer negligence and because of several defenses that negligent employers could invoke to avoid liability. The history of the emergence of workers' compensation in response to the deficiencies of the negligence law approach is briefly recounted in Burton and Mitchell (2002).

3. This analysis represents an updated version of Burton (2002).

4. The West Virginia legislature amended the workers' compensation statute in response to the decision in *Mandolidis v. Elkins Industries, Inc.,* 161 W. Va. 695, 246 S.E. 2d 907 (1978), which in turn led to other West Virginia Supreme Court decisions. "The West Virginia Story" is recounted in Larson and Larson (2006, § 103.04[3][a]).

5. Several years after the *Millison* case was decided, Arthur Larson (1988) analyzed several cases in which deceit or fraud are used as a basis for tort suits that arguably constitute exceptions to the exclusive remedy provision. Larson distinguished between single-injury cases and dual-injury cases. In single-injury cases, the employer deceives the worker about the hazards of the job, such as chemical exposure, and the worker is injured as a result. Larson indicates that this kind of effort to avoid the exclusive remedy provision almost always fails because the deceit merges into the compensable injury itself. In dual-injury cases, the employer deceives an employee after the injury has occurred, with the result that the employee suffers a second harm. While not all courts have adopted the dual-injury approach and allowed the employees to bring tort suits, Larson cites the *Millison* decision as providing important support for the doctrine. While Larson indicates that the key to recovery in these fraud or deceit cases is whether there is a single injury or a dual injury, Willborn, Schwab, and Burton (2002, 974-975) argued that a more useful distinction is whether the fraud or deceit preceded the injury to the worker (in which case the worker cannot recover in a tort suit) or whether the injury precedes the fraud or deceit (in which case a tort suit is possible.)

REFERENCES

Aurbach, Robert. 2003. "*Delgado v. Phelps Dodge Chino, Inc*: A Case Study in Judicial Legislation." *Workers' Compensation Policy Review* 3, no. 3 (May/June): 9-12. Reprinted in Burton, Blum, and Yates (2005) at pp. 252-55.

Burton, John F., Jr. and Daniel J.B. Mitchell. 2002. "Employee Benefits and Social Insurance: The Welfare Side of Employee Relations." In Bruce E. Kaufman, Richard A. Beaumont, and Roy B. Helfgott, eds. *From Industrial Relations to Human Resources and Beyond: The Evolving Management of Employee Relations*. Armonk, NY: M.E. Sharp.

Burton, John F., Jr. 2002. "The Intentional Injury Exception to the Exclusive Remedy Provision." *Workers' Compensation Policy Review* 2, no. 4 (July/August): 23-27. Reprinted in Burton, Blum, and Yates (2005) at pp. 246-51.

Burton, John F., Jr., Florence Blum, and Elizabeth H. Yates. 2005. *Workers' Compensation Compendium 2005-06, Volume One*. Princeton, NJ: Workers' Disability Income Systems, Inc.

Larson, Arthur. 1988. "Tensions of the Next Decade." In John F. Burton, Jr., ed. *New Perspectives in Workers' Compensation.* Ithaca, NY: ILR Press.

Larson, Arthur and Lex K. Larson. 2006. *Larson's Workers' Compensation (Desk Edition)*. Newark, NJ: LexisNexis.

Willborn, Steven L., Stewart J. Schwab, and John F. Burton, Jr. 2002. *Employment Law: Cases and Materials. Third Edition.* Newark, NJ: LexisNexis

Willborn, Steven L., Stewart J. Schwab, John F. Burton, Jr., and Gillian Lester. 2007. *Employment Law: Cases and Materials. Fourth Edition*. Newark, NJ: LexisNexis

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