From John Burton's Workers' Compensation Resources

Workers' Compensation Policy Review

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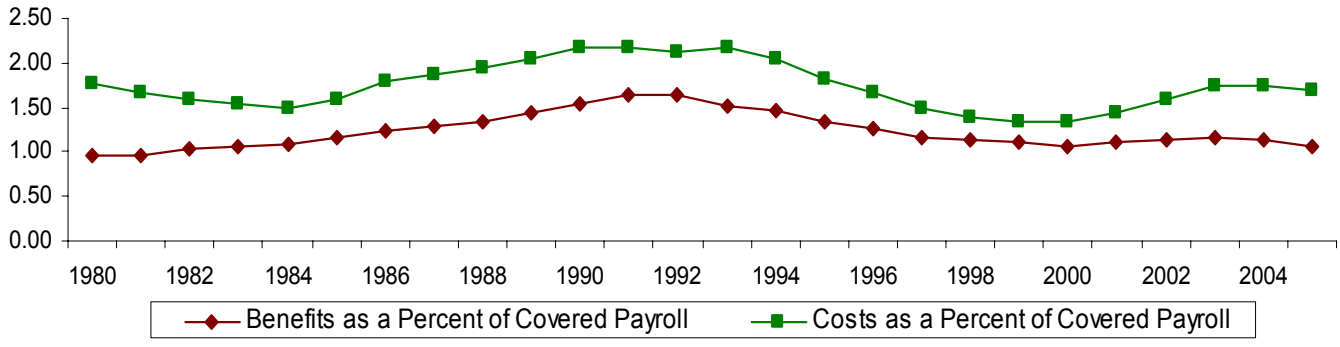
Featured Topics

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 payments from all types of insurers, namely private carriers, state and federal funds, and self-insuring employers. John Burton analyzes some of the NASI's latest data. As indicated in the figure below, total benefits (cash plus medical) paid to workers as a percent of payroll declined to 1.06 percent of payroll in 2005. The last time this measure of benefits was lower was in 1983. The decline in total benefits in 2005 reflected reductions in payments for both cash and medical benefits. Costs to employers also declined in 2005 to 1.70 percent of payroll, the lowest figure in several years.

David Torrey recently published a comprehensive law review article examining compromise settlements in state workers' compensation programs. Compromise settlements, often referred to as compromise and release agreements, usually involve a compromise about the amount of benefits to be paid for a claim; the payment of the compromised amount in a lump sum; and the release of the employer from further liability. Torrey, a Workers' Compensation Judge in Pennsylvania, drew on his own experience and on extensive information from all states to prepare the definitive treatment of compromise settlements. He prepared an abridged article for the *Workers' Compensation Policy Review*, which reflects his skepticism about the increasing reliance on compromise settlements in many states.

Workers' Compensation Benefits and Employers' Costs as a Percent of Covered Payroll, 1980-2005



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 2005

by John F. Burton, Jr.

The National Academy of Social Insurance (NASI) released the 2005 data on the coverage, benefits, and costs of the workers' compensation program in August 2007 (Sengupta, Reno, and Burton 2007). 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 2005 Developments in Perspective

Benefits Paid to Workers. The workers' compensation benefits paid to workers in selected years between 1960 and 2005 are shown in Table 1 and Figure A. Benefits in current dollars in 2005 were $55,307 million (or $55.307 billion) which is down slightly from the record amount of $56.074 billion in 2004. Benefits in current dollars increased every year from 1980 to 1992, when the total payments reached $44.660 billion. Then benefits decreased over the next four years (with one exception), before bottoming out at $41.960 billion in 1996. Benefits paid to workers then began to increase for eight years and reached a record amount in 2004 ($56.074 billion) before declining slightly in 2005 ($55.307 billion).

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 1.64 percent of payroll in 1991 and 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.

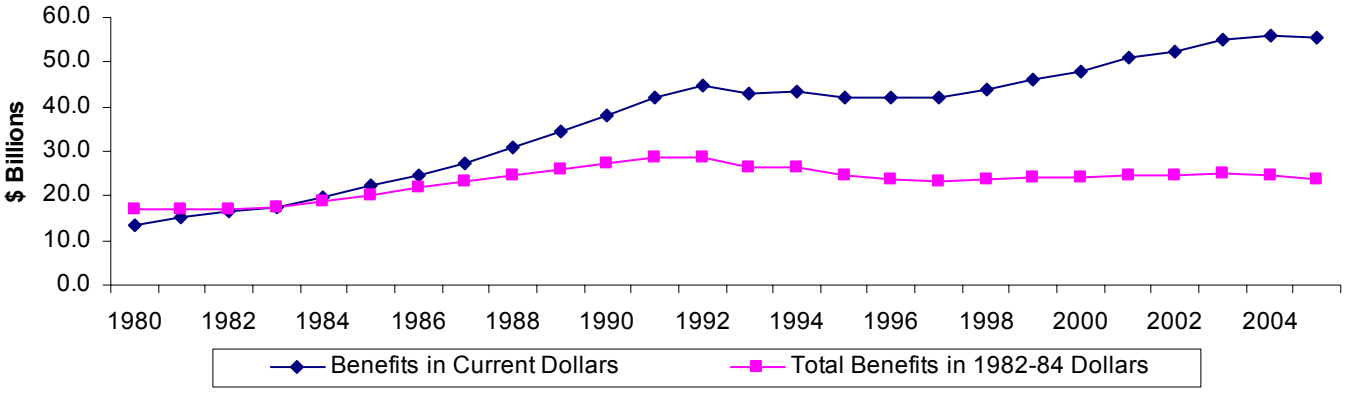
Table 1
Workers' Compensation Benefits in Current Dollars

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	1.45
1990	38,237	1.53
1991	42,187	1.64
1992	44,660	1.64
1993	42,925	1.52
1994	43,482	1.47
1995	42,122	1.34
1996	41,960	1.26
1997	41,971	1.17
1998	43,987	1.13
1999	46,313	1.12
2000	47,699	1.06
2001	50,827	1.10
2002	52,416	1.14
2003	55,066	1.17
2004	56,074	1.13
2005	55,307	1.06

Sources: Benefits in Current Dollars (column 1): 1960-86 data from Social Security Administration (2005), Table 9.B1; 1987-2005 data from Sengupta, Reno, and Burton (2007), Table 4.

Benefits as Percent of Covered Payroll (column 2): 1960-70 data from Social Security Administration (2005), Table 9.B1; 1980-88 data from Sengupta, Reno, and Burton (2007), Table A4; 1989-2005 data from Sengupta, Reno, and Burton (2007), Table 12.

Figure A
Workers' Compensation Benefits in Current and Constant Dollars, 1980-2005



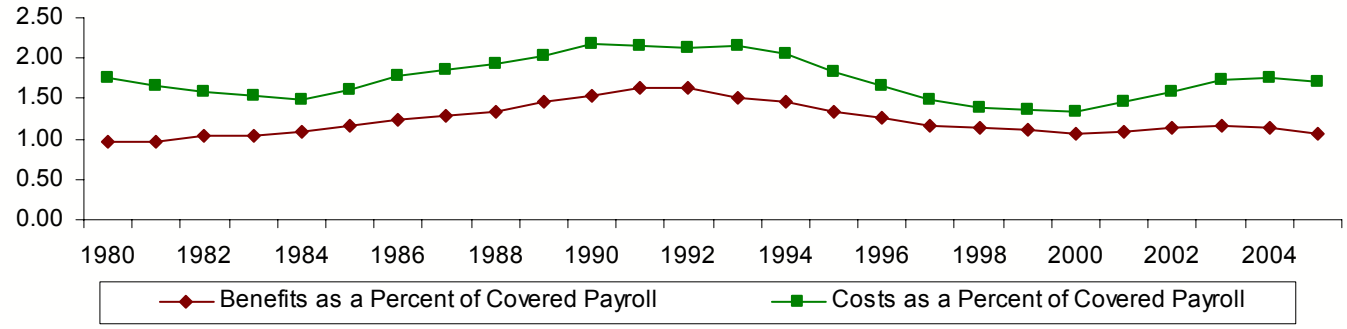
Source: Benefits in Current Dollars: Table 1, Column 1.
Total Benefits in 1982-84 Dollars, Table 2, Column 7.

Benefits paid to workers as a percent of payroll increased beginning in 2001 and reached 1.17 percent of payroll in 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 1.06 percent of payroll in 2005, which is lower than in any year between 1984 and 1999.

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 declined slightly from the record high of $29.718 billion in 2004 to $29.088 billion in 2005 (Table 2, column (1)). When adjusted by the CPI for non-medical items (Table 2, column (2)), cash benefits in constant dollars (1982-84 dollars) declined from $16.266 billion in 2004 to $15.415 billion in 2005, as shown in Table 2, column (3). Moreover, measured in constant dollars, the 2005 cash benefits were below the cash benefits paid every year since 1986, and were down almost 19 percent from the peak year of 1991, when cash benefits in constant dollars were $18.950 billion.

Figure B
Workers' Compensation Benefits and Employers' Costs as a Percent of Covered Payroll, 1980-2005



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

Medical benefits in current dollars declined to $26,219 billion in 2005 after reaching a record $26.356 billion in 2004 (Table 2, column (4)). However, when adjusted by the CPI for medical items (Table 2, column (5)), the 2005 medical benefits were below the medical benefits paid in every year between 1988 and 1994. The 2005 medical benefits of $8.112 billion in constant dollars were down 17 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 $55.307 billion in current dollars in 2005, as previously discussed in connection with Table 1. However, measured in constant dollars (Table 2, column (7)), total benefits declined from $24.765 billion in 2004 to $23.527 billion in 2005. In addition, total benefits in 2005 in constant dollars were lower than the amounts in every year (except 1997) between 1988 and 2004, and the 2005 figure of $23.527 billion was almost 18 percent lower than in the peak year of 1992, when total benefits were $28.724 billion.

Costs to Employers. The employers' costs of workers compensation for selected years between 1960 and 2005 are shown in Table 3 and Figure C.

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	25,355	133.8	18,950	16,832	177.0	9,510	28,460
1992	25,996	137.5	18,906	18,664	190.1	9,818	28,724
1993	24,422	141.2	17,296	18,503	201.4	9,187	26,483
1994	26,288	144.7	18,167	17,194	211.0	8,149	26,316
1995	25,389	148.6	17,085	16,733	220.5	7,589	24,674
1996	25,221	152.8	16,506	16,739	228.2	7,335	23,841
1997	24,574	156.3	15,722	17,397	234.6	7,416	23,138
1998	25,365	158.6	15,993	18,622	242.1	7,692	23,685
1999	26,258	162.0	16,209	20,055	250.6	8,003	24,211
2000	26,766	167.3	15,999	20,933	260.8	8,026	24,025
2001	27,690	171.9	16,108	23,137	272.8	8,481	24,590
2002	28,106	174.3	16,125	24,310	285.6	8,512	24,637
2003	29,234	178.1	16,414	25,832	297.1	8,695	25,109
2004	29,718	182.7	16,266	26,356	310.1	8,499	24,765
2005	29,088	188.7	15,415	26,219	323.2	8,112	23,527

Sources: Cash Benefits in Current Dollars (column 1): 1960-1986 data from Social Security Administration (2005), Table 9.B1; 1987-2005 data from Sengupta, Reno, and Burton (2007), Table 4 (Total Benefits minus Medical Benefits).

Consumer Price Index, Non-Medical (column 2): *Economic Report of the President*, February 2007, 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; 1987-2005 data from Sengupta, Reno, and Burton (2007), Table 4.

Consumer Price Index, Medical (column 5): *Economic Report of the President*, February 2007, Table B-60, medical care.

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

Costs in current dollars were $88,832 million (or $88.832 billion) in 2005, which is the seventh consecutive year that costs in current dollars have increased (Table 3, column (1)). For the fifth year in a row, the costs in 2005 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 $40.826 billion in 2002 to $44.591 billion in 2003 to $45.976 billion in 2004 before dropping slightly to $45.485 billion in 2005 (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 B. 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 1.34 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 1.34 percent of payroll in 2000 and reached 1.75 percent of payroll in 2004 before declining to 1.70 percent of payroll in 2005. This decrease to 1.70 percent left costs as a percent of payroll in 2005

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	1.50
1984	25,122	103.9	24,179	1.49
1985	29,185	107.6	27,124	1.64
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	55,835	166.6	33,514	1.35
2000	60,065	172.2	34,881	1.34
2001	66,642	177.1	37,630	1.45
2002	73,446	179.9	40,826	1.59
2003	82,047	184.0	44,591	1.74
2004	86,849	188.9	45,976	1.75
2005	88,832	195.3	45,485	1.70

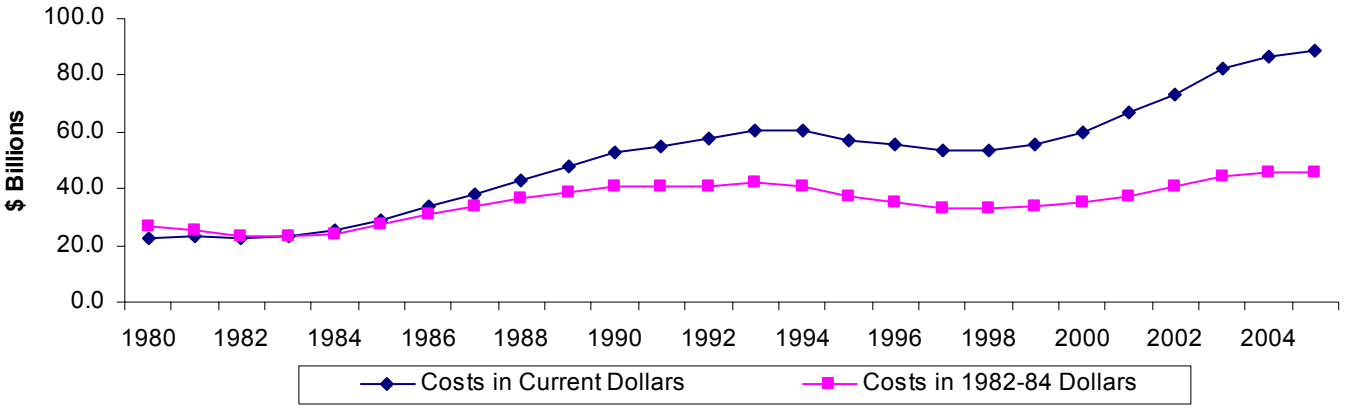
Sources: Costs in Current Dollars (column 1): 1960-86 data from Nelson (1992), Table 7; 1987-2005 data from Sengupta, Reno, and Burton (2007), Table 11.

Consumer Price Index (1982-84=100) (column 2): *Economic Report of the President,* February 2007. 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 Sengupta, Reno, and Burton (2007), Table A4; 1989-2005 data from Sengupta, Reno, and Burton (2007), Table 12.

Figure C
Workers' Compensation Costs to Employers in Current and Constant Dollars, 1980-2005



Source: Costs in Current Dollars: Table 3, Column 1.
Costs in 1982-84 Dollars: Table 3, Coiumn 3.

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 2005 – Ohio, North Dakota, Washington, West Virginia, and Wyoming. The share of all benefit payments accounted for by private carriers was at least 50 percent in all years except for 1994 and 1995. In recent years, the share accounted for by private carriers declined from 57.0 percent in 1999 to 50.8 percent in 2005.

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 2005, the share accounted for by state funds fluctuated within a relatively narrow range of 15 to 19 percent of all benefit payments. Recently, the share accounted for by state funds increased from 15.5 percent in 2000 to 19.8 percent in 2004 and to 19.4 percent in 2005. 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 declined in most years from 7.6 percent in 1990 to 5.9 percent in 2005.

The final source of benefits is self-insuring employers, an option that is available to qualifying employers in all states but North Dakota and Wyoming. Self-insuring employers increased their share of benefit payments from 19.0 percent in 1990 to 26.7 percent in 1995. Since 2000, the relative importance of self-

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	18.9	100.0
1992	53.8	17.5	7.1	21.6	100.0
1993	50.7	18.9	7.4	23.0	100.0
1994	49.2	17.0	7.3	26.5	100.0
1995	47.7	18.2	7.4	26.7	100.0
1996	50.1	19.2	7.3	23.4	100.0
1997	51.6	17.1	6.6	24.7	100.0
1998	53.6	16.3	6.5	23.5	100.0
1999	57.0	15.3	6.2	21.6	100.0
2000	56.3	15.5	6.2	22.0	100.0
2001	54.9	15.8	6.0	23.3	100.0
2002	53.7	17.8	6.0	22.5	100.0
2003	51.9	19.1	5.8	23.2	100.0
2004	50.2	19.8	5.8	24.2	100.0
2005	50.8	19.4	5.9	23.8	100.0

Source: Sengupta, Reno, And Burton (2007), Table 5.

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 (2007a). 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 1.64 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 political opposition from employers and insurers to compensation programs that had been liberalized in the 1970s and 1980s. Over half of the state legislatures

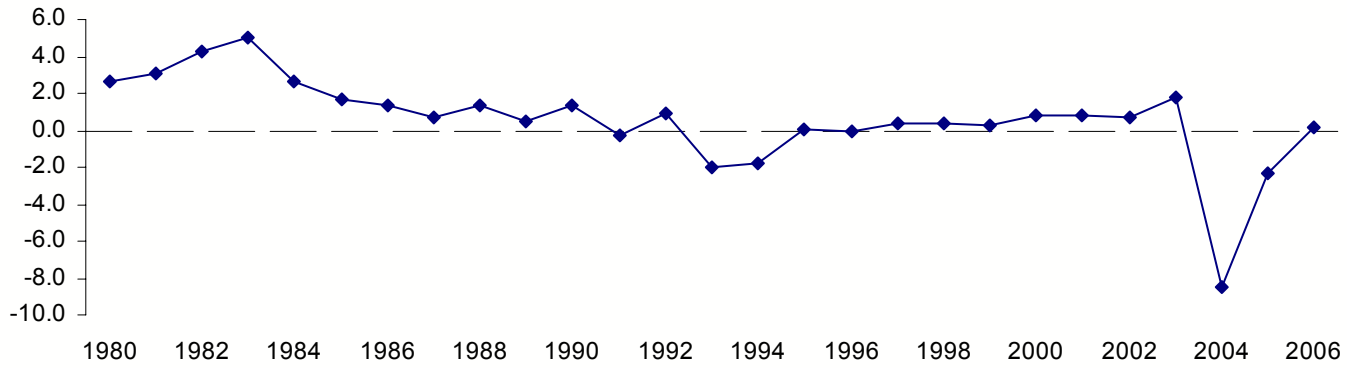
Table 5
Workers' Compensation Insurance Premium Level Changes Due to Changes in Benefits, 1980-2006

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	-8.5
2005	-2.3
2006	0.2

Sources: Data for 1980-2004 from National Council on Compensation Insurance (NCCI), reprinted with permission in Burton and Blum (2005), Table 9, pg. 47. Data for 2005-06 from NCCI (2007), Exhibit 1, pg. 6.

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, 1980-2006

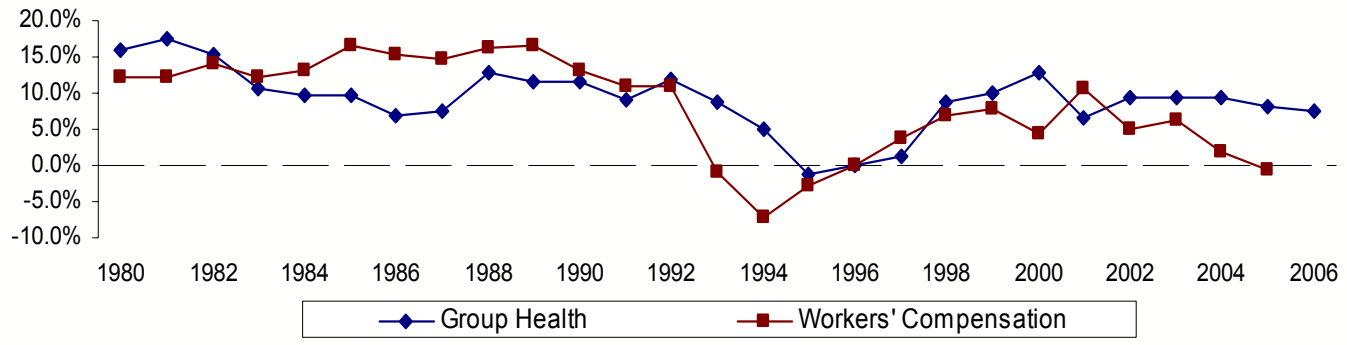


Source: Table 5.

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 time in a decade. Benefits continued their climb through 2003, before declining slightly in 2004 and again in 2005, while costs as a percent of payroll increased every year between 2001 and 2004 before declining slightly in 2005 (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.

Figure E
Annual Rates of Increase in Employers' Expenditures
on Medical Benefits, 1980-2006



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

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 2007b). 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 66.1 in 2005 and to 59.7 in 2006, while the overall operating ratio (which considers all expenses and revenue, including investment income) declined to 90.5 in 2005 and 83.9 in 2006. The relatively profitable underwriting experience in 2005 and 2006 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, 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

Table 6
Employers' Expenditures on Medical Benefits, 1980-2006

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%	16.7	0.0%
1997	246.1	1.3%	17.4	3.9%
1998	267.6	8.7%	18.6	7.0%
1999	294.1	9.9%	20.1	7.7%
1990's Average	235.9	6.5%	17.6	4.3%
2000	331.4	12.7%	20.9	4.4%
2001	353.3	6.6%	23.1	10.5%
2002	386.5	9.4%	24.3	5.1%
2003	423.4	9.5%	25.8	6.3%
2004	463.1	9.4%	26.4	2.0%
2005	500.2	8.0%	26.2	-0.5%
2006	537.0	7.4%		

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 September 4, 2007 from www.bea.gov/bea, updated August 1, 2007.

Column (3): 1979-1986 data from Social Security Administration (2000), Table 9.B1; 1987-2005 data from Sengupta, Reno, and Burton (2007), Table 4.

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

(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 4.3 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 7.4 percent a year in 2004, 2005, and 2006, while workers' compensation medical expenditures were up 2.0 percent in 2004 and decreased by 0.5 percent in 2005. One possible scenario is that the relatively modest increases in workers' compensation health care in 2003 and 2004 and the decline in 2005 are aberrations and that when NASI issues its report next year, we will find that workers' compensation medical care expenditures increased in 2006.

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!

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Compromise Settlements Under State Workers' Compensation Acts: Law, Policy, Practice, and Ten Years of the Pennsylvania Experience (An Abridgement)

By David B. Torrey

Introduction

Many states rely on compromise settlements (or compromise and release agreements) to close workers' compensation cases.[1] "Such an agreement usually involves three elements: a compromise between the plaintiff's claim and the employer's previous offer concerning the amount of benefits to be paid; the payment of the compromised amount in a lump sum; and the release of the employer from further liability."[2]

The idea that an injured worker may, in a compromise settlement, freely give up weekly workers' compensation benefits, or the potential right thereto, tender a release, and in exchange take a lump sum, has always given pause. Society is concerned that the worker will rush to the opportunity to secure the large payment and then dissipate the funds in an improvident fashion. That scenario would in turn leave society, that is, the taxpayers or other insurance programs, with the likely task of providing for the individual's maintenance and medical needs. Meanwhile, the critical purposes of the workers' compensation program, income maintenance and rehabilitation, would be undermined.

Surrounding this uneasiness has been the additional worry that the worker, particularly the nonrepresented, will be taken advantage of by the employer or insurance company.

In light of these concerns, all jurisdictions have, at least traditionally, regulated the settlement of workers' compensation claims. The injured worker's right to benefits is not conceptualized, as elsewhere in the law, as a mere contract between worker and employer. Instead, as society has a large stake in the agreement, the workers' compensation authorities, or courts in some situations, review and, when appropriate, approve the proposed compromise and release.

Regulation of compromise settlements over the years has taken various forms. Some states have maintained an outright ban on such settlements, though usually allowing lump-sum payments without final release. This process is referred to universally as "commutation."

Today, only a few states maintain outright proscriptions on compromise settlements, but virtually all regu-

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He is the creator and co-author of Torrey & Greenberg, *Pennsylvania Workers' Compensation: Law & Practice 2nd Edition,* published by West in 2002. He served in the U.S. Army (1976-1979) and in the West Virginia National Guard (1979-1982). He is a Fellow of the College of Workers' Compensation Lawyers, an organization affiliated with American Bar Association workers' compensation sections.

The article in the *Workers' Compensation Policy Review* (*WCPR*) is an abridgement of "Compromise Settlements Under State Workers' Compensation Acts: Law, Policy, Practice, and Ten Years of the Pennsylvania Experience," 16 *Widener Law Journal* 199-469 (2007). The 271 page article is an impressive compendium of facts and analysis on compromise and release agreements that is essential reading for anyone with an interest in this important topic. The complete *Widener Law Journal* article is available from the on-line legal services published by Lexis and by Westlaw. Single copies of the article are available without charge from David Torrey (dtorrey@state.pa.us). I greatly appreciate the effort that David devoted to preparing the abridged article, which should be of great interest to subscribers to the *WCPR*.

John Burton

late by way of oversight by state workers' compensation agencies. Though approaches vary, such bodies typically review proposed settlements to ensure that the settlements are in the injured worker's best interests and that he or she understands the arrangement. Some statutes require that the worker reach a plateau in his or her medical condition or, in the alternative, set forth a post-injury waiting period before the worker may tender a release. Some jurisdictions perform their review by way of hearing or conference, whereas others undertake only document review.

The level of oversight varies considerably among states, and the national trend has been in the direction of *lessened* scrutiny. Indeed, the traditional prejudice against compromise settlement of workers' compensation claims has been on the wane. Pennsylvania,[3] New York,[4] and West Virginia,[5] long known as jurisdictions strictly prohibiting compromise settlements, all passed laws legitimating them in the mid-1990s.

The 1996 amendment to the Pennsylvania Workers' Compensation Act, which is reflective of this trend, was enacted as part of the pro-business reforms known as Act 57.[6] At first, litigants were shy to engage in compromise settlements, denominated by the statute as compromise and release agreements or "C&Rs." Ten years later, however, the Pennsylvania compromise and release ("C&R") has become immensely popular and a critical aspect of the system. Hundreds of cases are settled each month, and hundreds of millions of dollars are paid in lump sums each year.

Social scientists evaluating the adequacy and effectiveness of workers' compensation systems have, over the years, undertaken efforts at comparative analysis of state compromise settlement laws. Such a comprehensive effort, to my knowledge, has not been embarked upon since the early 1970s, when the National Commission on State Workmen's Compensation Laws ("National Commission") studied, among other things, settlement laws and practices and published its findings and recommendations. Those recommendations in general cautioned *against* the indiscriminate approval of compromise settlements.[7]

I believe that a revisitation of the issue is appropriate in this era of decreased prejudice and lessened scrutiny. In this regard, I have identified a slow trend towards allowing settlements on an indiscriminate basis. Some apologists of the trend have abandoned or have simply forgotten the social insurance aspect of the system. Others, meanwhile, are animated by the laissez-faire, highly revisionist idea that injured workers should be allowed to do as they please with their workers' compensation claims.

In the original version of this article, I not only revisited the issue of C&R oversight but I also undertook a 50-state review of the history, structure and interpretation of settlement approval and related laws. This analysis, with explanatory tables, comprises the bulk of the original version of the article. I also undertook a thorough literature review, summarizing the considerable historical commentary and criticism of settlement practices. The original version also addresses contemporary issues surrounding the C&R: how such settlements are affected by the Social Security Disability program, the Medicare system's requirement of "Set Aside" Trusts, and laws surrounding structured settlements.

In this summary version of the article, I omitted those discussions and instead focused on three tasks: identifying the traditional policy concerns surrounding C&Rs; analyzing trends in regulation—and deregulation—of the settlement process; and explaining the Pennsylvania experience with C&Rs over the last ten years. My intent was to analyze the Pennsylvania experience in light of traditional criticisms, and based upon a review of other state laws, practices, and experiences.

With regard to Pennsylvania, I concluded, among other things, that the system has been a success in large part because of the on-the-record "open hearing" requirement prescribed by the statute. I concluded, *in general*, that state oversight of the settlement process remains essential to the integrity of the workers' compensation system.

Background

Compromise & Release Settlements in Workers' Compensation Laws. The introduction of settlements featuring compromise and release in states like Pennsylvania, New York, and West Virginia was a dramatic change, altering over a half-century of law and practice. Many states, however, had long allowed such settlements, and some always have. California, Connecticut, Missouri, and Wisconsin are among the jurisdictions that allowed C&R from the outset. Michigan and Kansas also allowed such resolutions and even borrowed the religious-sounding term "redemption" of the predecessor English workers' compensation law. Other jurisdictions originally disallowed settlements. Statutes did not typically prohibit, in so many words, the entering into and/or approval of C&R. Instead, most commissions and courts concluded that this must be the rule in the face of fairly uniform provisions that forbade a waiver or release of workers' compensation rights ("anti-waiver" provisions).

In a few jurisdictions, the statute was originally silent on whether C&R was allowed or forbidden. There, in light of the silence, the authorities *allowed* settlements, and courts would ultimately ratify the practice by holding that authority to review and approve settlements could be inferred, even in the presence of an anti-waiver proviso. As discussed below, a notable persisting exception is the case of Washington.

Complete settlement of cases, with a release tendered even for future medical treatment, seems, at least at one time, to have been the minority approach among states.[8] In the present day, the situation is different. The author's analysis reveals that forty-two states and the Longshore & Harborworkers Compensation Act (LHWCA) permit C&R. Only seven maintain outright proscriptions of such resolutions. Kentucky nominally allows compromise settlement with release but provides the worker considerable ability to reopen.

Numbers and estimates based upon statutory analysis, as so often the case, do not tell the whole story. Observers have long noted that, where prohibition has been the official rule, parties often settle *sub rosa*, sometimes with the involvement and even encouragement of the agency. Parties in Pennsylvania, for example, settled the disability aspects of cases via "commutations,"[9] whereas in New York this was accomplished via non-scheduled adjustment.[10]

Trends and Recent Histories. John Burton remarked, in 2005, "my perception is that galloping myopia has made C&R agreements easier to obtain in many jurisdictions now than in the olden days [the early 1970s] of the National Commission."[11] This perception is certainly correct. Since the Commission's recommendations counseling caution and restriction on C&Rs, many states have in fact become more permissive in allowing settlements. This is typically in response to employer and insurer demands, usually under the auspices of a broad reform movement that insists on increased "efficiency" in the system.

As discussed above, the mid-1990s saw the allowance of C&R in three states that had long forbidden it: New York (1996), Pennsylvania (1996), and West Virginia (1995, 2003). In each instance, employer interests drove this type of reform. Other states have seen incremental changes. Oklahoma, in 2005, for the first time permitted a self-represented claimant to settle an original claim.[12] California over the last few years moved to allow the release of now eliminated, but once near-sacrosanct, vocational rehabilitation ("VR") rights (2003).[13] Oregon first allowed partial settlement (disability only) of *open claims* in 1990,[14] while Rhode Island first allowed settlement of *disputed claims* in the same year.[15] Indiana[16] and Iowa[17] began allowing settlements in the 1970s.

The most dramatic change has been in Florida. As discussed below, that state amended its statute in 2001 to permit settlements in cases where the claimant is represented by counsel without *any* review by the compensation authorities.[18] Settlements, in certain cases, may also now be concluded in Alabama[19] and Alaska[20] without review. Abolition of *all review*, as observed in Florida, is still a minority approach. It seems likely, however, that employers and insurers will argue for this dramatic deregulation in other states, particularly in those where exceptional delay in adjudication is encountered.

Some states have maintained immunity from the trend. Texas and New Mexico, indeed, have gone counter to the trend and have strictly regulated settlements to the point that they are effectively prohibited. Washington, meanwhile, maintains a reputation for its persistent prohibition of the practice. Other jurisdictions, like Massachusetts, are well known for maintaining a careful eye on how cases are resolved.[21]

The 2001 Florida Amendment. Since 2001, Florida law has provided that when a claimant is *self-represented*, the Judge of Compensation Claims ("JCC") possesses, as before, significant paternalistic powers, and a hearing is convened for review of the proposal.[22]

When the claimant is *represented*, however, the parties *do not seek approval* of the settlement from the workers' compensation authorities. The JCC does not undertake review of the proposal either by way of paperwork review or via scrutiny at a hearing for "best interests," or its equivalent, or even whether the claimant appreciates the nature of the agreement.[23] With this change, the advisability of settlement was completely outsourced to the attorneys. Importantly, the JCC still has the power and duty to review the fee arrangement entered into between the claimant and his or her counsel.[24]

A pair of commentators opined that, in light of this regime, "when a settlement agreement is effectuated, any attempt to overturn that agreement would fall outside a workers' compensation context and would be interpreted and governed by contract law."[25] Thus, Florida attorneys must prepare and examine releases with care and must know the law utilized in civil proceedings when a party tries to set aside a settlement.[26]

According to an authority on Florida workers' compensation: "The impetus in eliminating judicial review in cases where the claimant is represented was twofold.

First, the workload of the judges was getting out of hand and the legislature did not want to fund new judgeships. Second, the insurance industry was interested in eliminating the judicial review in an effort to get all settlements approved as well as to reduce their cost to obtain the approval."[27]

Questioning C&R: Texas, New Mexico, and the Aborted Michigan Reform. Texas, for many years, had a flourishing compromise settlement regime, but this was brought to an end in the course of 1989 reforms.[28] New Mexico, which similarly allowed many settlements, followed in 1991, enacting essentially the same limited settlement statute.[29] Massachusetts also changed its law to restrict, in accepted injury cases, release of medical treatment rights.[30]

In Texas, the C&R (referred to as the "CSA") was at one time so prevalent that a critic, Barton, writing in 1971, identified compromise settlement as what one would now call the "default" method of claim adjustment. Among other things, Barton pointed out that adjusters sought compromise settlements even in cases of *amputations*—cases where, given the existence of benefit schedules, benefit entitlements were subject to a sum-certain calculation. As such claims were not usually faked or exaggerated, the idea that a worker would be leveraged into taking a compromised benefit amount seemed to the author outrageous.[31] In the critic's view, injured workers were poorly served by such a system.

Although administrative reforms were thereafter undertaken, this prevalence of CSAs continued into the 1980s. Indeed, "[b]efore the 1989 reforms, workers resolved approximately 85% of disputes through lump-sum settlements, also known as 'compromise settlement agreements' or 'CSAs.' "[32] Ultimately, a 1987 crisis in the system generated a study that found such "settlements were sometimes inequitable or inappropriate for the injury."[33] As part of a plan to improve benefits and benefit delivery, lump-sum settlements were severely restricted.[34]

In the present day, the statute proscribes virtually all lump-sum resolutions, and no release may ever be taken for medical. An exception exists: A worker and carrier can agree that impairment income benefits will be commuted in cases where the employee has returned to work for at least three months and is earning at least 80% of his or her preinjury average wages.[35] *No authority* exists for compromise of an *original claim*.

New Mexico, at one time, had a flourishing C&R regime, but this system was in effect abolished in 1991 reform amendments. Under current practices, only workers who have returned to work for at least six months, "earning at least eighty percent" of prior wages, may accept a lump-sum settlement.[36] The amended statute declares in its first sentence, notably, "It is stated policy for the administration of the Workers' Compensation Act . . . that it is in the best interest of the injured worker or disabled employee that he receive benefit[s] . . . on a periodic basis. . . ."[37] A concern over shifting of costs to the welfare program was likely a contributing factor to the abolition of C&R.

In the late 1970s, a movement developed in Michigan favoring the abolition of redemptions. This movement was animated by the idea that allowing lump-sum settlements *promoted* litigation (that is, the prosecution of frivolous cases) and caused workers' compensation cost escalations. This ban was actually enacted into law, but remarkably, was never effective, as the legislature repealed the ban even before its effective date.[38] The amended law, which ultimately made it into the books, in fact *sustained* provisions for redemptions and refined the "requisites of the redemption process . . ."[39] An analyst explains that the: "essence of the [original, aborted] protest was that redemptions are a buy-off of questionable claims, that insurance companies should be restricted from such short-term gains, that attorneys should not pursue cases that have little or no merit, and that workers should know that dubious cases will be carefully reviewed. The dissenters expressed the belief that redemptions added to the high cost of worker's compensation in Michigan."[40]

The Case of Washington. Washington, an exclusive fund state (without private insurance carriers), does not permit lump-sum compromise and release agreements. No provision of the law authorizes such resolutions, and a landmark precedent put an end to their routine informal approval in the 1950s.[41] The State Fund, according to one expert, has since been "fixed on its trusteeship."[42]

This inability to settle has caught the attention of business groups that have complained recently of the increasing costs of workers' compensation in Washington state. Unhappy business proponents have raised several complaints about the current system, and "[o]ne simple reform [proposed] would be to authorize the state to 'compromise and release' certain claims as most other states do. This would allow the Department and an injured worker to agree to a lump sum settlement to resolve an outstanding claim, without resorting to costly litigation and appeals. . . ."[43]

Employer and Insurance Industry as Proponents of Decreased Oversight. Businesses and insurance carriers (usually, though not always, allies) believe that their costs, in terms of both payouts to workers and administrative expenses, will be reduced

when they are able to settle cases and take final releases. Indeed, the business interest groups that have largely driven the general retractive reforms of the last twenty years or so have also lobbied for the liberalization of C&R regimes. The 2005 Oklahoma reforms, for example, intended to speed resolution, were backed by business interests.[44] The Alaska reforms of the same year were meant "to lower costs and improve efficiency . . . ."[45] In Hawaii, time-consuming, two-level review of proposed settlements was abolished in 1995, apparently after businesses complained.[46] Employers in Ohio also complained that procedures to get settlements approved were cumbersome, and they were successful in achieving reform.[47] And, as foreshadowed above, liberalization of C&R in Pennsylvania, New York, West Virginia, and Florida were all the result of business lobbying.

Currently, business interests are vocal in calling for the institution of compromise settlements in Washington state. The 2006 business-backed reforms enacted in New York, meanwhile, included the remarkable proposal that employers *must* offer workers the alternative to take a Section 32 lump-sum settlement (a C&R) instead of installments in all PPD cases.[48] A business-friendly group, the New York Professional Insurance Agents ("PIANY"), favored the change as a cost-saving device: "Currently, workers' compensation law provides for settlement agreements whereby claimants receive an agreed-on amount and thereby free themselves, the employer and the insurer from further involvement in the procedures demanded by the workers' compensation system. These settlements promise lower long-term costs, so provisions encouraging greater access to and use of the 'Section 32' settlement provisions should be considered."

That business groups back C&R is, of course, no great secret, and critics of permissive C&R regimes have long cautioned against allowing settlements simply to let a carrier close its books. Larson warned that state administrators should be wary of the perennial carrier desire "to get the case off their books once and for all . . . ."[49]

A principal *countervailing* concern over allowing C&Rs is that such a permissive regime will encourage the filing of frivolous lawsuits. Critics have long recognized this perverse result as a C&R hazard,[50] and this was the express thought process behind the aborted reforms in Michigan in the 1980s. Employers, and particularly their carriers, seem willing to risk the possible development of such unsatisfactory litigation cultures in seeking the goal of closing files.

Because carriers value finality, the business community has found *less* than optimal settlement regimes that allow only the settlement of disability checks and keep the case open for medical treatment benefits. In West Virginia, for example, settlements only really became popular when the parties were allowed to settle not only disability (1995 amendments), but medical payments as well (2003). In that state, the original limitation on the ability to settle made the advantage of settlement elusive to many employers who did not embrace the new procedure with the same enthusiasm as their counterparts in Pennsylvania and New York.[51]

The Pennsylvania Experience (1996-2006)

In analyzing the Pennsylvania experience with C&Rs, the original version of this article:

- Recounted my own experiences in reviewing such settlements;
- Summarized the court precedents that have interpreted the law; and
- Presented data with regard to all C&Rs I approved for two recent fiscal years, July 2004-June 2005 (130 cases) and July 2005-June 2006 (114 cases). These data were compared with corresponding statewide data.

The intent of the data analysis was to provide an accurate snapshot of the characteristics of workers settling their cases, the type of claims subject to C&R, and the nature and amount of settlements. The information collected also reveals something highly subjective, but still critical, to take into account when assessing the operation of the system—worker *motivation* for compromising a claim.

The original version of this article then presented my impressions of the system and of the litigation culture that has evolved ten years after creation of the C&R. I attempted to determine whether the three C&R policy concerns—dissipation of funds, lack of income maintenance for the disabled, and shifting of costs—remain concerns in the modern era in Pennsylvania. This final part of the article concluded with my recommendations for the system. In this summary version of the article, I present only the highlights of the results of my research, but most of the recommendations are set forth in full.

The Prior Practice: Decline and Fall of Commutations. Pennsylvania was a state where the traditional prejudice against compromise settlements was a fundamental aspect of the system. As discussed in the introduction, however, the 1996 Pennsylvania amendment that created the C&R changed the situation dramatically. Since that time, an employee may compromise a claim, whether it be an original, contested claim, or one

that is fully accepted as compensable, and he or she may tender a release with regard to both disability and medical benefits.

The critical aspects of the prior practice are worth recalling. Under that system, in certain cases dealing with *accepted* injuries—usually where the claimant had reached a plateau in condition—the parties would stipulate that claimant was partially disabled. They would then agree that the 500 weeks maximum of such payments[52] were payable in a lump sum. In practice, the lump sum was always negotiated first, and the stipulation would adopt a weekly partial disability amount that, over 500 weeks, would equal such lump sum.

Under this system, the employer could not secure a release of medical, and the claimant could still attempt to reopen within three years. The proposed commutation was subject to approval[53] by the WCJ or Board (sitting as a fact-finder) under a best-interests standard of approval. To satisfy that standard, claimants were usually coached to say that they would start a business with the money or invest the lump sum in high-yield securities.

Within two years of the 1996 Pennsylvania reform, the C&R had become immensely popular and, essentially, the only method utilized for closing a case via a compromise settlement. By 2000, the process of filing for commutation to achieve approval of a settlement had essentially disappeared.[54]

The Pennsylvania Statute and Popularity of C&R's. The Pennsylvania statute, section 449, is based roughly on the California C&R provision. Indeed, the term "compromise and release" is borrowed from the California statute.[55] As noted above, the statute was enacted in 1996 as part of the pro-business reform commonly known as Act 57. The law, among other things, allows the compromise and release of "any and all liability that is claimed to exist under this act on account of injury or death."[56] The proposed agreement is to be considered by the WCJ "in open hearing . . . ."[57] The standard of approval is not one of best interests. Instead, the WCJ is to approve the agreement if "the claimant understands the full legal significance of the agreement."[58]

Thus, the Pennsylvania system is fairly unique: an on-the-record hearing is mandatory, and the claimant must swear under oath that he or she understands the implications of tendering the release. Despite this considerable formality, the WCJ ultimately has no paternalistic review power, and he or she is obliged to approve the proposed if claimant does, indeed, understand the settlement terms.

The collapse of the taboo against settling, the decline and fall of commutations in favor of C&Rs, and the popularity of the new system have been striking phenomena. With the 2006 addition of mandatory mediation,[59] Pennsylvania has gone from a jurisdiction where compromises could not even be mentioned to one where they are not only authorized but *encouraged*.

A few basic numbers tell the story well. In FY 2004/05, 13,288 requests for C&R approval were granted. Fifteen requests for approval were *denied*. For FY 2005/06, 14,112 requests for C&R approval were granted. Six were denied. The total dollar amount of lump sums paid also reveals the significant role the C&R plays in the system. In this regard, the compensation paid in 2003/04 C&Rs was $676,836,931.71. The *total amount* of *all* compensation statewide paid for calendar year 2004, meanwhile, was $2,595,558,561. Thus, C&R monies constituted approximately 26% of all benefits paid. The breakdown for FY 2002/03 is 24%.

Amount of Settlements. The dollar amount of individual C&Rs varies widely. In FY 2005/06, for example, I approved 114 C&Rs, and the lump-sum amounts ranged from $700 (an original claim where the claimant's physician ultimately refused to provide a report) to $375,000 (an original quadriplegia claim that I had awarded, and which, thereafter, settled on appeal). Only twenty-three of these settlements featured the employer paying $100,000 or more. Of these twenty-three, the workers in eighteen cases signed a release with regard to both disability and medical benefits. The average C&R lump sum in 2005/06, in cases presented for approval to me, was $59,538.23. The average lump sum for 2004/05 was $53,844.86.

An analysis of C&R amount is of interest in determining whether the C&R, with its medical release aspect, has materially increased the amount of C&R lump sums paid over those that were typically paid in *commutations*. In 2001, I wrote that "I and many of [my] colleagues, [were] entirely unimpressed, that the employee's release of the employer from future medical care responsibilities has increased the average amount of settlement beyond the level of commutations."[60] The above figures, and the common experience of many lawyers, tend to reinforce this impression.

Genesis of Settled Cases. C&R has its genesis in either a litigated case or a case in which no litigated dispute currently exists. In FY 2004/05, I approved a total of 130 proposed settlements, and of these, exactly half had their immediate genesis in a litigated case. The other half, meanwhile, were original C&Rs where no litigation was pending. In the majority of the cases I dis-

cerned, after an inquiry, that potential litigation by the employer was usually in the works or at least threatened. This was typically after a medical evaluation that held the promise of a vocational expert's earning power assessment. This would, in turn, support a modification petition requesting that temporary total disability (TTD) be reduced to temporary partial disability (TPD). In other cases, however, the employer had no evidence to support adjustment of benefits. Indeed, in a number of cases, an adjuster had cold-called the claimant to propose a lump-summing of the case and the worker, on occasion, agreed immediately.

Of the 130 settlements, only 17% had their genesis in completely original claims. The vast majority, thus, involved cases where the injury had been admitted and liability had been accepted. Eight of the 130 settlements involved an employer that had, in my opinion, denied the claim on an unreasonable basis—that is, the claimant had suffered an obvious, traumatic accident, and the employer still chose to deny the claim and obliged the worker to prove his case in court. I found approving these settlements troublesome. In three cases, I approved the settlement but made a finding of fact that the agreement was not in the best interests of the employee.

Extent of Release. Statewide, 83% of approved C&Rs in FY 2004/2005 had the claimant tendering a release with regard to both future disability and medical benefits. In the C&R's I approved, 88% gave a complete release. In a number of cases, the C&R was structured so that claimant settled and released disability payments but kept the claim open for medical treatment for a defined, limited period. In 2004/05, 10% of the C&Rs *statewide* were in this class. Another 7%, meanwhile, involved claimants who settled only their disability claims, with medical treatment rights completely open.

The statewide totals of all categories for FY 2004/05 were as follows:

Pennsylvania C&Rs:
Totals and Liability for Medical Expenses, FY 2004/05

Total Approved	Medical Abolished	Medical Limited	Medical Open	Total Dollar Value
13,288	11,037	1,366	885	$706,399,917.86

The distribution of the 130 C&Rs I approved was as follows:

Torrey-Approved C&Rs:
Totals and Liability for Medical Expenses, FY 2004/05

Total Approved	Medical Abolished	Medical Limited	Medical Open	Total Dollar Value
130	113	4	13	$6,938,330.89

Reopening of Settlements. To date, the Pennsylvania system has been remarkably free from reopening or set-aside attempts. C&R set-aside attempts, and attempts at avoiding the release, do exist. Still, such attempts are in the category of the "exotic fowl" glimpsed by only a very few. This is likely due to lawyer unwillingness to file such actions, claimant resignation to the reality that the settlement is final, the shifting of costs to other programs, and the lack of true severity and permanence of most of the injuries subject to settlement. By December 2007, none of the 130 claimants from FY 2004/05 had petitioned to set aside their C&Rs. Indeed, to the best of my knowledge, no C&R I approved since 1996 has been subject to a set-aside or release-avoidance attempt.

Claimant Demographics. For FY 2004/05, FY 2005/06, I collected meticulous demographic data to secure an idea of the type of workers engaging in C&R agreements. For both years studied, the results are essentially the same. This shows that the majority of claimants handing over releases are middle-aged, male, possessing no college education, and many with no access to private healthcare.

Some workers did indeed have significant average weekly wages and were covered under their spouse's healthcare plan. By and large, however, my survey shows that a significant portion of claimants engaging in C&R are highly disempowered, both educationally and financially, at time of settlement. These workers are in the vast majority of cases tendering releases for both disability checks and future medical care. Most will admit to having no job to which to return, and nearly half must in fact submit a resignation or agreement not to reapply to the employer.

Claimant Motive for Settling. Precisely why claimants are compromising their cases has, at least traditionally, been an important question to analysts seeking to determine whether a workers' compensation system is operating effectively. Analysts and policymakers in the past, for example, were always keenly interested in whether the lump sum was used for retraining

at light work or for starting a workable business enterprise. The virtue of allowing the lump sum was, after all, frequently said to be the worker's opportunity to engage in these positive rehabilitative endeavors.

The Pennsylvania system does not systematically assess claimant motive or otherwise record the reasons why a claimant is settling his or her case. This omission results from the limited discretion that the WCJ ultimately exercises on the critical approval/disapproval issue. Because the standard is claimant's understanding – and not his or her "best interests" – the underlying reason for the compromise can recede to the background and not be well developed.

In any event, to attempt such an assessment, for FY 2004/05 and FY 2005/06, I asked claimants to describe, in their own words, why they were giving up a weekly check, and, instead, were asking for a lump sum. Notably, only on a rare occasion did the worker's spontaneous verbal account mirror the pro forma inclusions of the agreement in its inquiry as to "why the parties are entering into the agreement."

One unmistakable result may be stated at the outset: The vast majority of workers would not admit to any plan to utilize the lump sum on retraining or opening a business. The researchers of old would, among the C&R approvals I made, find scant evidence of lump-summing as vocational rehabilitation. In FY 2005/06, for example, only three of 114 settling claimants told me that they were going to consider retraining or the like.

In contrast, a sizeable group of claimants, many of whom were quite vocal, stated that their motive was relief from the claims adjustment process and/or the stress of litigation. Workers frequently stated that, while their impairment continued and while they were not fit for work, they were willing to compromise and release to be free of such stress.

Of course, workers in litigated cases often cited the concern that the judge might rule in favor of the employer. Claimants frequently provided this reason in disputed original claims. The majority of claimants expressed their reason for settling in a simple fashion: "to get on with my life."

Workers also cited a number of other reasons for settling. Occasionally, claimants with accepted claims and current payments, with no threat to their entitlement pending, desired lump sums for strategic financial reasons.[61] A few, meanwhile, noted that they had reached a plateau in condition with non-work related conditions now acting as the proximate cause of disability. Only one worker in FY 2004/05 stated that he was prompted to lump sum his case because of the inability to meet the cost of living on weekly workers' compensation checks. I heard this account on only one occasion, as well, in FY 2005/06.

Observations, Pennsylvania System

Most members of the Pennsylvania workers' compensation community have agreed that the displacement of the old commutation practice and the advent of the C&R have been positive developments. The C&R innovation of 1996 has been considered positive for the Pennsylvania system for the following reasons:

- The ability of the parties to engage in a C&R has provided an efficient case resolution method with regard to workers who have permanent but not seriously-disabling injuries. Under the Pennsylvania wage-loss system, such workers can remain on TTD for years.[62] This generous potential duration of benefits can result in the temptation of a minority of workers to unreasonably extend their disabilities. Final settlement can cut short this tendency.

- The C&R, at the same time, has reduced the serial filing of adjustment petitions by employers. All agree that the large number of cases that would stay open for years or decades, going through multiple rounds of costly litigation, has been reduced. While the now-displaced commutation was also a remedy for the chronic claim, the C&R has proven itself a superior settlement method for such case.

- The ability of the parties to engage in a C&R has led to the facilitation of mediation, both at the WCJ level and on appeal. When parties could not settle on a legitimate basis and use of the term "compromise" was a complete taboo, a litigation culture which valued mediation could not evolve.

- The popularity of the C&R has reduced the adjudication caseload and the accompanying backlog of cases waiting for decision that long plagued the Pennsylvania system. This reduction should have the beneficent effect of allowing judges to adjudicate more promptly the serious cases that are simply not going to settle, like those involving a novel legal issue or the core issue of whether an injury arose in the course of employment.

- The open hearing requirement ensures that the claimant understands his or her rights. The hearing requirement also operates as a prophylactic to exclude most proposals that are manifestly inconsistent with the claimant's best interests.

- A litigation culture of frivolous claims filing, that is, routine petitions where claimants are merely "fishing for settlements," has not developed.

Negatives surrounding the C&R have included the following:

- The lack of a bona fide dispute requirement allows the phenomenon of the adjuster cold-call. In such cases, no material dispute over the claimant's disability and impairment exists, yet the adjuster, seeking to pare off claims, succeeds in persuading the worker to compromise and release. In many of these cases, the claimant lacks counsel and is unsophisticated about his or her rights. Indeed, some accept the first miserly offer.

- The lack of a best interests standard of review allows the occasional approval of a manifestly bad deal. Some, perhaps most, WCJs will wave off the self-represented claimant from the proposal that "shocks the conscience." Others, however, remain silent and approve the ill-advised settlement. The judges who do so are acquiescing in the law's admonitions that a paternalistic standard does not apply. They do not apply some special unwritten rule dictating that the pro se worker is entitled to special protection.

- The lack of any special rule capping fees in non-litigated C&R cases on occasion provides a windfall to the claimant's attorney. (In Pennsylvania, the maximum fee is 20%, and judges have no discretion to alter the agreed-upon fee in any case, C&R or otherwise.) As observed at another time and place, settlement review day can be an unreasonably generous "gravy day" for lawyers.

- Because the statute does not require that the authorities perform follow-up on workers who have settled, a full evaluation of the success or failure of the C&R process cannot effectively be achieved.

- A small number of workers settle because they are being leveraged by arbitrary and capricious denials. The availability of the C&R method of settling has facilitated the "starve-out" strategy. However, I cannot say that I perceive this to be rampant in practice.

- Some workers in open cases give a *full* C&R even though they are still receiving medical treatment and their medical condition is worsening. They do so to escape having to deal with an unsatisfactory relationship with the claims adjuster or the stress of litigation. In many of these cases, the claimant tenders a release of future medical treatment even when the employer has no evidence of full medical recovery.

Essential Recommendation: Retain the Open Hearing Requirement

Because the Pennsylvania system is generally working well, this article sets forth only one essential recommendation: retention of the statutory requirement of the open, on-the-record hearing where the claimant appears personally and testifies under oath with regard to his understanding of the effect of the C&R. If this hearing requirement endures and is taken seriously, additional reform to equip the judge with paternalistic approval power is not essential at the present time.

I submit that members of the workers' compensation community should be *resistant* to what will likely be future calls to amend the C&R approval process by *deleting* the hearing requirement. Such proposals, identifying the evil of delay, will almost surely be heard. Florida, notably, in 2001 did away with state oversight after employers and insurance carriers complained of delay. Employers and carriers will soon demand to know why a hearing and its accompanying time and expense must be convened in Pennsylvania.

Conclusions

In my complete article, I drew three major conclusions from the foregoing review of state laws and practices and from my own ten years of observation of the Pennsylvania C&R experience. In this summary, I set forth two of these conclusions.[63]

C&R as an Appropriate Part of the System. First, a purist stance, holding that compromises of compensation cases are antithetical to the system, is noble but unrealistic. In theory, a program that pays all deserving cases promptly on a no-fault basis and denies accurately all unmeritorious cases would perhaps be ideal. Many disputes in the compensation system, however, are not subject to resolution on an objective basis.[64] Further, the American regime of paying work-injury benefits in disputed cases pits two private parties against each other in a controversy over money. This is an adversarial system.[65] The proposition that the system is adversarial may be "foreign to the ideology of modern positive programs of income support,"[66] but it is nevertheless a reality of workers' compensation.

Room exists, accordingly, for fair compromises in close cases. This is so, in any event, when the worker understands what he or she is doing and the agreement is in the worker's best interests.

Paternal Review Still Appropriate. Second, oversight is still necessary. An injured worker should still be required to demonstrate to the state authorities that the

proposed C&R is in his or her best interests or at least to appear personally and testify that he or she understands the full legal significance of settling. Only when the judge or hearing officer makes a principled judgment on these criteria should the proposed agreement be authorized.

This is not simply my recycling of the old-time religion. Paternalism is justified for a number of reasons. First, injured workers remain, as a class, limited in education and, in my experience, unsophisticated about legal matters. Such workers are often suffering from chronic injuries and are being forced to resign and/or give up reemployment rights. Many have no other insurance to which to turn for their health problems. This class of highly disempowered individuals needs and deserves the protection of the state authorities. Before they tender a release and receive "perhaps the largest sum of money [they have] ever seen in one piece,"[67] a responsible official should review the proposal with them.

It is no piety to say that the injured worker deserves state protection...

Second, concerns over employer or carrier overreaching persist. Employers and carriers crave the finality of a release and are often highly aggressive in trying to persuade claimants to settle.[68]

Third, concerns over dissipation of lump sums persist. Granted, empirical studies documenting dissipation are hard to come by, and celebrated follow-up reports, like that authored in 1959 by Morgan, Snider, and Sobol, are nearly impossible to find.[69] However, experience and anecdote suggest that settlement recipients often do not act as responsible stewards of their lump sums.

The Essential Conclusion. Paternal review of C&Rs should remain the rule. It is no piety to say that the injured worker deserves state protection and that society has a large stake in his or her agreement to give up his or her weekly check and hand over a release. To the contrary, the essential hoary tenets of the old-time religion are still viable. The commission or agency should, indeed, "hold the line against turning the entire income-protection system into a mere mechanism for handing over cash damages as retribution for industrial injury[.] . . ."[70]

ENDNOTES

1. This article uses the terms "compromise settlement," compromise and release agreement," "compromise and release," and "C&R" interchangeably.

2. National Commission 1972: 109.

3. Section 449 of the Act, 77 Pa. Stat. Ann. § 1000.5 (West 2002).

4. N.Y. Workers' Comp. Law § 32 (McKinney 2005).

5. W. Va. Code Ann. § 23-5-7 (LexisNexis 2005).

6. See Torrey and Greenberg 2002: §§ 15:10, 15:92 to 15:118.

7. Recommendation R6.16 of the National Commission (1972:110) provides an example of the concern about the use of settlements: "We recommend that the workmen's compensation agency permit compromise and release agreements only rarely and only after a conference or hearing before the workmen's compensation agency and approval by the agency."

8. Larson and Larson 2004: § 132 ("As to both uncontested and contested claims, the majority rule forbids agreements by which the claimant gets less than the amount specified in the statute; but in a substantial minority of jurisdictions, claims involving controversial issues of liability may be compromised and settled like any other claims, usually subject to approval by the Compensation Commission."). In the early 1970's, Louis Russell, a researcher for the National Commission, arrived at a somewhat different estimate. She reported that "[of] the 55 jurisdictions that responded … 38 allow [C&R] settlements …. Another nine permit compromise lump-sum settlements, but not the release stipulation. The remaining eight do not allow any kind of compromise settlements." She stressed, however, that "[t]his classification does not fully reflect the variety of practice in the jurisdictions." Russell 1973: 184-185.

9. See Torrey and Greenberg 2002: §§ 6:91-105 (discussing prior commutation practice). Ms. Russell, the National Commission researcher, was told of frequent under-the-table methods of settling in Pennsylvania. Russell 1973: 199.

10. Thomason 1991:204-204, 204 n.26. See also Thomason and Burton 1993: S14-S15.

11. Burton 2005: 30-31.

12. Okla. Stat. Ann. tit. 85, § 26(B) (West 2006).

13. Cal. Lab. Code § 4646(a) (West 2003).

14.Or. Rev. Stat. § 656.236 (2005). *See Krieger v. Future Logging*, 842 P.2d 428, 429-30 (Or. Ct. App. 1992).

15. R.I. GEN. LAWS § 28-33-25.1 (Supp. 2006). See Carey 2005.

16. *See Goff v. Wal-Mart Stores, Inc.*, 719 N.E.2d 1260, 1261-62 (Ind. Ct. App. 1999) (citing Ind. Code § 22-3-2-15 (2005)).

17. Iowa Code Ann. § 85.35 (West Supp. 2006).

18. Fla. Stat. § 440.20(11)(c) (2006) (indicating that settlements by represented claimants do not require approval by workers' compensation authorities).

19. Ala. Code § 25-5-292 (LexisNexis 2000). *See Stubbs v. Brookwood Med. Ctr.*, 767 So. 2d 359, 361-62 (Ala. Civ. App. 2000) (holding that settlements having their genesis in ombudsman programs do not require court review under a best interests criterion).

20. Alaska Stat. § 23.30.012 (2006) (indicating that settlements with release for *disability payments only* do not require Commission review).

21. Massachusetts maintains a regime of penalties and fines on lawyers and adjusters who insert impermissible clauses into proposed releases. See Mass. Gen. Laws Ann. ch. 152, § 48(2) (West 2005).

22. Torrey 2005 (citing Memorandum from Albert M. Frierson, Esq. to author (Apr. 17, 2005)).

23. Fla. Stat. § 440.20(12)(c) (2006).

24. *Id.* § 440.20(11)(c)-(12)(c) ("The settlement agreement requires approval by the [JCC] only as to the attorney's fees paid to the claimant's attorney by the claimant.").

25. McConnaughhay and Moniz 2002: 71.

26. McConnaughhay and Moniz 2002.

27. Torrey 2002: 65 (quoting Frierson Memorandum, *supra* note 22).

28. Barth and Eccelston 1995: 44-45.

29. N.M. Stat. § 52-5-12 (2007).

30. Mass. Gen. Laws Ann. ch. 152, § 48(2) (West 2005).

31. Barton 1971: 264-65 ("death and dismemberment cases leave little room for uncertainty, yet 39.6 percent of the fatalities and 87.8 percent of permanent partial disability cases were compromised . . . . [T]he settling of nearly nine-tenths of such injuries by CSA's (supposedly based on 'uncertainty') seems indefensible.").

32. Hardberger 2000: 42.

33. H. Comm. on Bus. & Indus., Interim Report to the House of Representatives, 79th Tex. Legis., at 34 (2004).

34. Tex. Lab. Code Ann. § 408.005 (Vernon 2006). See Texas Department of Insurance, About Workers' Compensation, http://www.tdi.state.tx.us/wc/ information/aboutwc.html. (last visited Mar. 7, 2007).

35. Tex. Lab. Code Ann. § 408.128 (Vernon 2006). See Barth and Eccleston 1995: 45.

36. N.M. Stat. § 52-5-12 (2007). For an extensive analysis of the statute, see *Cabazos v. Calloway Construction*, 879 P.2d 1217, 1219-21 (N.M. Ct. App. 1994).

37. N.M. Stat. § 52-5-12(A) (2007).

38. Campbell 1990: 6-7 n.9.

39. Campbell 1990: 7 n.9.

40. Campbell 1990:7 n.9.

41. Southern v. Dep't of Labor & Indus., 236 P.2d 548, 551 (Wash. 1951).

42. Interview with Judge James W. Sherry, Wash. Bd. of Indus. Ins. of App. (May 23, 2002). While the parties cannot engage in a full C&R in Washington, cases are nonetheless settled (without the employer taking a release). Indeed, mediation of cases is very common in Washington. Judges from that system have, under the auspices of the IAIABC, instructed Pennsylvania judges in mediation skills.

43. Allison Demeritt & Paul Guppy, Washington Policy Center, *Policy Brief: Reforming Washington's Workers' Compensation System* (2004), *available at* http://www.washingtonpolicy.org. See Ass'n of Wash. Bus., *Workers' Comp & 2004 Rate Hike: Facts About Washington's Workers Compensation System*, http://www.awb.org/policy/workerscomp/ summary.html (last visited Mar. 7, 2007) (calling for wage simplification, managed care, restriction on claimant counsel's attorney fees, and final settlement agreements, *i.e.*, C&R's).

44. See generally Press Release, Am. Justice P'ship, *Workers' Compensation Reform Passes in Oklahoma* (June 8, 2005), *available at* http://www.legalreforminthenews.com/StateProfiles/OK/OK_Workers_Comp_6-8-05.html (discussing workers' compensation reform in Oklahoma).

45. The 2005 changes, said to be the "most comprehensive reform of the . . . Act since statehood," were "meant to lower costs and improve efficiency of the workers' comp system—which has the second highest rates in the country, just behind California . . . ." "Alaska Efforts to Reform WC System May Not Yield Results for Years," 16 *Workers' Compensation Report* (LRP Publications), Sept. 13, 2005, at 364.

46. Leider and Thom 1996. The 1995 amendments to the Hawaii Act, known as Act 234, were made "[i]n response to business demands for relief from rising workers' compensation insurance rates . . . ."

47. See Fulton 2002: § 10.4.

48. The language is as follows: "Every insurance carrier . . . shall offer each claimant the opportunity to enter into an agreement settling upon and determining the compensation and other benefits due, in the case of disability, within two years after the date the claim was indexed by the board or six months after the claimant is classified with a permanent disability, whichever is later . . . ." Act of Mar. 13, 2007, ch. 6, § 73(a), 2007 N.Y. Laws 6 (to be codified at N.Y. Workers' Comp. Law § 32(a)).

49. Larson and Larson 2004: § 132.07[1].

50. Somers and Somers: 161 (complaining that "'[a]mbulance chasing' by lawyers, medical malpractices, and malingering by workers are induced by the attraction of a single large sum of money. . . .").

51. Interview with Chief Admin. Law Judge Timothy G. Leach, W. Va. Offices of the Ins. Comm'r, Office of Judges (Oct. 14, 2004).

52. Section 306(b)(1) of the Act, 77 Pa. Stat. Ann. § 512 (1) (West Supp. 2006).

53. See Torrey and Greenberg: § 6:100. Under the pre-C&R practice, no even superficially legitimate means existed to compromise an original, *contested* claim.

54. Pa. Bureau of Workers' Compensation, Dep't of Labor & Indus., Pennsylvania Workers' Compensation & Workplace Safety: Annual Report Fiscal Year 1999/2000 35 (2000).

55. For a detailed comparison, see Torrey 2006.

56. Section 449 of the Act, 77 Pa. Stat. Ann. § 1000.5(a) (West 2002).

57. 77 Pa. Stat. Ann. § 1000.5(b).

58. 77 Pa. Stat. Ann. § 1000.5(b).

59. Act 2006-147 § 401, 77 Pa. Stat. Ann. § 701 (West, Westlaw through Nov. 2006 amendments) (definition of mediation); §401.1, *id.* § 710 (judges to schedule mediation sessions).

60. Torrey 2001: 36.

61. Such a worker could be one with SSD, Social Security Retirement (SSR), and/or pension entitlements, who has determined that his cash flow or overall wealth would be increased by agreeing to a lump sum C&R.

62. When a worker in Pennsylvania reaches maximum medical improvement (MMI), he or she is not systematically assigned a permanent partial disability (PPD) rating, with consequent reduction in payments, as in many jurisdictions. Instead, he or she may potentially receive temporary total disability (TTD) until full medical recovery. For an employer to reduce TTD to partial disability, the employer must prove the availability of work either through job placement or expert testimony. The Pennsylvania Act does allow for percentage ratings *after two years of TTD* if MMI has been achieved, but even at that point, the claimant's *rate* as it was at TTD is not reduced. Instead, he or she is simply considered on PPD and thus limited to a potential maximum of five hundred weeks. Only by proving earning power through job placement or expert testimony may an employer seek to reduce the *amount* of the weekly cash payment.

63. My third conclusion is that the medical cost-shifting problems inherent in workers' compensation C&R's could be ameliorated by introduction of a federally mandated single-payer program.

64. See Mashaw 1988: 107.

65. See Mashaw 1988: 107.

66. Mashaw 1988: 106.

67. Larson and Larson 2004: § 132.07[1].

68. See, for example, the study by Thomason and Burton 1993: S1, S5, S33-S34. These researchers, noting that critics alleged that "insurance carriers often pressure financially vulnerable claimants into accepting [disadvantageous] settlements," studied a sample of resolved New York claims. They concluded, among other things, that insurer adjustment activities increased the probability of settlement.

69. For a 2007 study of the Maine experience, see Most and Most 2007. The original version of this article summarizes at length the Morgan, Snider, and Sobol Michigan Redemption Study (1959), in which the researchers followed up on seriously injured workers who took lump sums and gave final releases to determine how they had fared.

70. Larson and Larson 2004: § 132.07[1].

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