

Fifty Years After “Inadequate and Inequitable”: Reflections on the Report of the National Commission on State Workmen’s Compensation Laws

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Introduction

It has been fifty years since the National Commission on State Workmen’s Compensation Laws released its landmark report concluding that the workers’ compensation system in the United States “was neither adequate nor equitable.”¹ Workers’ compensation is the state-based mechanism for providing legal remedies to workers suffering injuries “arising out of and in the course of employment.”² Issuance of the report has been commemorated by American governmental agencies and non-profits throughout 2022.³ Many feel the report improved the workers’ compensation system by shining a light on the system’s worst practices.⁴ It is also true that the low benefits structure revealed by the report forced many states to (finally) index workers’ compensation benefits to inflation.⁵ Of course, that may have made the benefits structure “better.” But better than bad is not always good.

Other students of workers’ compensation (the present writer included) are disappointed that recommendations made in the report

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1. THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN’S COMPENSATION LAWS, at Transmittal Letter of John Burton (1972), <https://workerscompresources.com/national-commission-report> [hereinafter REPORT OF THE NATIONAL COMMISSION].

2. LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 1.03 (discussing theory of “compensation principle.”).

3. See generally James M. Gallen, *50th Anniversary of Report of National Commission Plans in the Works*, ABA TORT TRIAL & INS. PRAC. SECTION (June 22, 2022), https://www.americanbar.org/groups/tort_trial_insurance_practice/https://www.americanbar.org/groups/tort_trial_insurance_practice/committees/workers_comp/national-commission [<https://perma.cc/Q5PV-BPPQ>].

4. See, e.g., Price V. Fishback & Andy Yuan, *Trends in Accident Compensation Before and After the 1972 Burton Commission*, 37 ABA J. LAB. & EMP. L. ____ (2023) [to be filled in once the issue is paginated; it will be section III]

5. *Id.* at ____.

were never fully implemented.⁶ In retrospect, it may be that the only reason the report generated “buzz” in the first place was that it carried within it an implicit threat of federalization of workers’ compensation.⁷ Once the threat of mandated federalization dissolved, so too did serious efforts at implementation.⁸ The only way that a justice advocate can feel good about the outcome is to accept that it emerged, after due reflection, as “the best of all possible worlds.”⁹ Not only do I not accept the conclusion, I have serious misgivings on a deeper level about the original justice of the workers’ compensation system, which I have expressed elsewhere,¹⁰ but which is beyond the scope of this article.

Whatever else the report of the National Commission may have been, I contend that it was the fruit of the most sustained and focused *national* conversation about the workers’ compensation system ever held in the United States, leaving to one side the original conversation surrounding American implementation of workers’ compensation during the 1910s.¹¹ This article is part of a symposium held at the Saint Louis University School of Law on October 11, 2022, which has sought in various ways to remember and commemorate the Commission and the report, and to reflect upon lessons that the report continues to convey.¹² Here, I discuss some of the history surrounding the report and the aftermath of its issuance.

I. The Congressional Call to Action

In 1970, Congress noted in its prelude to enactment of the monumental Occupational Safety and Health Act¹³ (OSH Act) that

serious questions have been raised concerning the fairness and adequacy of present workmen’s compensation laws in the light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated

6. U.S. DEP’T OF LAB., DOES THE WORKERS’ COMPENSATION SYSTEM FULFILL ITS OBLIGATIONS TO INJURED WORKERS 2 (2016), <https://www.dol.gov/sites/dolgov/files/OASP/files/WorkersCompensationSystemReport.pdf> [<https://perma.cc/LX7J-M3WV>].

7. *Id.*

8. *Id.*

9. See generally VOLTAIRE, CANDIDE, OR THE OPTIMIST (1759).

10. See generally Michael C. Duff, *Fifty More Years of Ineffable Quo? Workers’ Compensation and the Right to Personal Security*, 111 KY. L.J. 1 (2023) (criticizing the contours of the workers’ compensation “grand bargain”).

11. Workers’ compensation was originally developed in Europe during the last quarter of the nineteenth century. See generally Michael C. Duff, *How the U.S. Supreme Court Deemed the Workers’ Compensation Grand Bargain “Adequate” Without Defining Adequacy*, 54 TULSA L. REV. 375 (2019).

12. The conference benefited from the contributions of professors Price Fishback and Jason Bent; scholar Andy Yuan; and well-known Illinois and Missouri practitioner James Gallen. This writer came along for the ride. All except Mr. Gallen contributed conference papers.

13. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590.

with various types of employment, new technology creating new risks to health and safety, and increases in the general level of wages and the cost of living.¹⁴

Motivated by this sentiment, Congress established, as it was enacting the OSH Act, a National Commission on “Workmen’s”¹⁵ Compensation to “undertake a comprehensive study and evaluation of State workmen’s compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation.”¹⁶ This body was tasked with providing a “detailed statement of the findings and conclusions of the Commission, together with such recommendations as it deems advisable,” no later than July 31, 1972.¹⁷

II. The National Commission

The *New York Times*, in its “Washington for the Record” section of June 16, 1971, identified to the general public the membership of the National Commission.¹⁸ The *Times* explained that John Burton, then an associate professor at the University of Chicago, now Professor Emeritus of the School of Management and Labor Relations at Rutgers University and the School of Industrial and Labor Relations at Cornell University, would chair the Commission.¹⁹ It would further be comprised of fifteen members from state workmen’s compensation agencies, business, labor, insurance carriers, the medical profession, educators, and the general public.²⁰ In addition, the OSH Act designated three members of the President’s cabinet as ex-officio Commissioners.²¹ Professor Burton, who remains to this day fully engaged in national workers’ compensation policy discussion, has recently chronicled events surrounding the Commission’s report.²²

The Commission rendered a total of eighty-four recommendations for operation of what it described as a modern workers’ compensation

14. *Id.* § 27, 84 Stat. 1616.

15. The term is, alas, heavily gendered.

16. *See supra* note 14.

17. *Id.*

18. *Washington for the Record*, N.Y. TIMES, June 16, 1971, at 16.

19. *Id.*

20. *Id.*; *see also National Commission on State Workmen’s Compensation Laws: Announcement of Appointment of 15 Members and Designation of Chairman and Vice Chairman*, 7 WEEKLY COMP. PRES. DOCS. 923 (1971).

21. *Id.* at 924.

22. Interview by Susan V. Hamilton with John F. Burton, Jr., Reflections on the National Commission on State Workmen’s Compensation Programs (Aug. 8, 2022), <https://www.lexisnexis.com/LegalNewsRoom/workers-compensation/b/recent-cases-news-trends-developments/posts/reflections-on-the-national-commission-on-state-workmen-s-compensation-programs-an-interview-with-john-f-burton-jr> [https://perma.cc/TE7N-EMW5] [hereinafter Burton Reflections].

system,²³ nineteen of which it deemed essential.²⁴ These essential recommendations were as follows:

- Coverage by workers' compensation laws should be compulsory with no waivers permitted;
- Employers should not be exempted because of the number of their employees;
- Farmworkers should be covered like other employees;
- Household workers/casual workers should be covered if they are covered by social security;
- Workers' compensation should be mandatory for government employees;
- No exemptions should be allowed for classes of employees like athletes or employees of charities;
- Employees or their successors should be permitted to file claims in the state of injury/death, of employer location, or of hire;
- All states should provide full coverage for work-related diseases;
- Temporary Total Disability (TTD) should comprise at least 66 2/3% of a worker's gross weekly wage;
- The maximum TTD benefit should be 66 2/3% of the state average weekly wage by July 1, 1973 and 100% of the state average weekly wage by July 1, 1975;
- Permanent Total Disability (PTD) definitions as used in most states should apply (employees with substantial earning capacity are not PTD);
- PTD should be paid at a rate of at least 66 2/3% of a worker's gross weekly wage;
- PTD should be paid for the duration of a disability or for life without limitation;
- The maximum PTD benefit should be 66 2/3% of the state average weekly wage by July 1, 1973 and 100% by July 1, 1975;
- Death benefits should be paid at a rate of at least 66 2/3% of a worker's gross weekly wage;
- Death benefits should be paid at a rate of at least 66 2/3% of the state's average weekly wage by July 1, 1973, and 100% by July 1, 1975;

23. See generally REPORT OF THE NATIONAL COMMISSION, *supra* note 1, at 15–24.

24. *Id.* at 26.

- Death benefits should be paid to a deceased worker’s spouse until remarriage and to the deceased worker’s children until age eighteen (or longer if the child is disabled or attending school);
- Once initiated, there should be no time or monetary limits for receipt of medical care or rehabilitation for work-related impairment; and
- The right to medical and physical rehabilitation for work-related impairment should not expire.²⁵

III. Why Was the 1972 Report Sought by the OSH Act Congress?

Throughout the Congressional Record of the OSH Act, there is frequent conversation about safety regulation being necessary in part because of the inadequacies of workers’ compensation systems. As the Senate Committee on Labor and Public Welfare reported:

During the hearings and research conducted by the Committee and its staff on the adequacy of State programs to prevent occupational injury and disease, the Committee’s attention was, inevitably, also drawn to the nature of State workmen’s compensation programs upon which injured or diseased workers, and their families are frequently wholly dependent for the replacement of lost income, proper medical treatment, and rehabilitation. Testimony received by the Committee, as well as other information available to the Committee, raises serious questions about the present inadequacy of many State workmen’s compensation laws.²⁶

To be sure, the 1970 concerns were not the first national level suggestions concerning the potential for improvements to state workers’ compensation. As mentioned in the National Commission report itself,²⁷ the Council of State Governments had proposed a draft state workers’ compensation statute in 1963, and the Council’s starting point had been a 1955 model state statute drafted by the U.S. Department of Labor.²⁸ Throughout this period there had been concerns raised about the radiation hazards to which radiologic workers were exposed, and about black lung disease faced by coal miners; and the Senate Report to S. 2193—the Senate’s version of what would become the OSH Act—made specific mention of earlier model state statute efforts that might have led to state coverage of these diseases. But, according to the Senate Report, the efforts had failed:

25. For an in-depth discussion of the recommendations see David B. Torrey, *The Report of the National Commission on State Workmen’s Compensation Laws 50 Years Later: The Document That Remade the Program*, ABA BRIEF, Spring 2022, at 8.

26. S. COMM. ON LABOR & PUB. WELFARE, OCCUPATIONAL SAFETY & HEALTH ACT OF 1970, S. REP. NO. 91-1282, at 23 (1970).

27. NATIONAL COMMISSION REPORT, *supra* note 1, at 14.

28. *Id.*

[A]lthough for many years the U.S. Department of Labor and the International Association of Industrial Accident Boards and Commissions have published recommended standards for State laws, the overall ratio of compliance with such standards today is less than 50%. Similarly, a model workmen's compensation law, even though developed under the auspices of the Council of State Governments, appears to have been largely ignored.²⁹

As evidenced by the topics that Congress ultimately asked the National Commission to broach, there were ongoing concerns with the operation of state workers' compensation: covered workers; waiting periods; medical reimbursement limitations (only twelve states had neither medical benefit nor medical time limitations); disability benefit limitations (roughly half of states failed to pay compensation for the full duration of a disability); and death benefit limitations.³⁰ This criticism, as an aside, failed to explicitly take notice of the shortcomings of original state workers' compensation statutes,³¹ and the deficiencies discussed were viewed merely as aberrational structural weaknesses of the system.

In any event, it was Senator Jacob Javits and his allies who made the push for creation of a National Commission: "We made a very strong case for the inequities and the inequalities in workmen's compensation."³² Other strong supporters of creation of a National Commission included Senators William Hathaway (Maine), Ralph Yarborough (Texas), and Alan Cranston (California); and Representative Phillip Burton (California) in the House of Representatives.³³

But the general, overall sentiment in the ninety-first Congress of fall 1970, in favor of workplace safety, was obviously very strong. The Senate Report accompanying the OSH Act repeated comments of the former Secretary of Labor George Shultz:

[D]uring the hearings on this bill, 14,500 persons are killed annually as a result of industrial accidents; accordingly, during the past four years more Americans have been killed where they work than in the Vietnam War. By the lowest count, 2.2 million persons are disabled on the job each year, resulting in the loss of 250 million man days of work—many times more than are lost through strikes.

In addition to the individual human tragedies involved, the economic impact of industrial deaths and disability is staggering. Over \$1.5 billion is wasted in lost wages, and the annual loss to the Gross

29. S. COMM. ON LAB. & PUB. WELFARE, OCCUPATIONAL SAFETY & HEALTH ACT OF 1970, S. REP. NO. 91-1282, at 24.

30. See generally Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 27, 84 Stat. 1590, 1616.

31. See Duff, *supra* note 10, at 8–9 (discussing original inadequacy of the statutes).

32. 116 CONG. REC. 37,624 (1970).

33. See throughout the congressional debates but particularly those of October 6, *id.* at 35,096–94; October 13, *id.* at 36,508–09, 36,511–23, 36,529–39; and November 17, 1970, *id.* at 37,601–40.

National Product is estimated to be over \$8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen’s compensation benefits and medical expenses.

This “grim current scene” . . . represents a worsening trend, for the fact is that the number of disabling injuries per million man hours worked is today 20% higher than in 1958. The knowledge that the industrial accident situation is deteriorating, rather than improving, underscores the need for action now.³⁴

Senator Ralph Yarborough of Texas added in debate on the Senate floor that “in 1966, there were 14,500 industrial deaths—2.2 million disabled—and a total of 7 million who sustained some injury in industrial accidents.”³⁵ In a similar vein, during related Senate debates on November 16, 1970, other senators drew repeated parallels between the number of workers killed in industrial accidents and soldiers killed in Vietnam.³⁶

The bipartisan spirit in matters of employee safety is perhaps best reflected by President Nixon’s recommendations for safety legislation made *in advance* of legislative deliberations on the OSH Act:

What have we done about this problem [of deaths and work-related injuries]? The record is haphazard and spotty. For many decades, governmental responsibility for safe workplaces has rested with the States. But the scope and effectiveness of State laws and State administration varies widely and discrepancies in the performances of State programs appear to be increasing. Moreover, some States are fearful that stricter standards will place them at a disadvantage with other States.³⁷

When the President, hailing from what might be imagined as the “opposing” political party, signaled advance agreement with seminal principles of worker safety, the legislature of the in-party (the Democrats controlled both houses of Congress in 1969)³⁸ very likely “felt” aggressive in drafting proposed safety legislation.

IV. Workers’ Compensation as a Federal Interest?

The observation that Democrats and Republicans essentially agreed on the need for governmental intervention to assure workplace safety omits analysis of whether the federal or state governments should provide the assurance. Modern readers of the National Commission

34. S. COMM. ON LAB. & PUB. WELFARE, OCCUPATIONAL SAFETY & HEALTH ACT OF 1970, S. REP. NO. 91-1282, at 2 (1970).

35. 116 CONG. REC. 37,344–45 (1970).

36. *Id.* (see, for example, remarks of Sen. Williams).

37. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATIVE TO OCCUPATIONAL SAFETY AND HEALTH, H. DOC. 91-144, 115 CONG. REC. 22,547–48 (1969).

38. See *Congress Profiles, 91st Congress (1969–1971)*, HISTORY, ART & ARCHIVES, U.S. HOUSE OF REP., <https://history.house.gov/Congressional-Overview/Profiles/91st/> [<https://perma.cc/578Z-S5CX>]; Party Division, U. S. SEN., <https://www.senate.gov/history/party-div.htm> [<https://perma.cc/KH2R-7RG4>] (scroll down to 91st Congress).

Report are sometimes surprised by the extent to which the Commission spoke openly about the prospect of workers' compensation federalization.³⁹ In the end, the Commissioners did not agree on federalization.⁴⁰ But although the Report was issued unanimously—all Commissioners thought issuance was better than the alternative—three members thought federal intervention was warranted immediately, and others thought it would be warranted if proposed reforms were not made by 1975.⁴¹

It makes a good deal of sense that as “front end” workplace regulation⁴² was being legislatively considered, through an aggressive federal prism, federalization of a traditional state program like workers' compensation would be resisted (or embraced only with extreme caution).⁴³ Still, the words of the National Commission somewhat reluctantly rejecting federalization must have sounded menacing to supporters of state-based workers' compensation, especially given President Nixon's general criticisms of state remedies:⁴⁴ “We recommend that compliance of the States with these essential recommendations be evaluated on July 1, 1975, and, if necessary, Congress with no further delay in the effective date should then guarantee compliance with these recommendations.”⁴⁵

Of course, workers' compensation was not federalized in 1975, or at any time since. Two of three “factions” of commissioners “agreed to the three-year delay before states could be evaluated, and, if necessary, federal standards could be enacted.”⁴⁶ As the Department of Labor's most recent report on workers' compensation recounts,

The National Commission then disbanded, 90 days after issuing the Report, as required under the sunset provision in the enabling statute. An Interagency Task Force in the 1970s attempted to address many of the outstanding issues. Other federal reports in the late 1970s and 1980 continued to focus on inadequacies in the workers'

39. REPORT OF THE NATIONAL COMMISSION, *supra* note 1, at 26.

40. *Id.*

41. For a discussion of the Commission's shifting views on federalization, see Burton Reflections, *supra* note 22, at Item 13.

42. Jason Bent has nicely underscored the relationship between underperforming workers' compensation and workplace safety regulation in his article in this issue of the *ABA Labor & Employment Journal*. See Jason R. Bent, *Compensability, Opportunism, and the Race to the Bottom: A View from (Near) the Bottom*, 37 ABA J. LAB. & EMP. L. ___ (2023) [at Part III.C].

43. See Burton Reflections, *supra* note 22, at Item 11 (discussing the dynamic).

44. See *supra* note 28 and accompanying text.

45. REPORT OF THE NATIONAL COMMISSION, *supra* note 1, at 26.

46. The third faction—three commission members consisting of Samuel B. Horowitz, a Massachusetts attorney and Professor of Law at Suffolk University; James R. O'Brien, Assistant Director, AFL-CIO; Department of Social Security; and Michael R. Peevey, Director of Research, California Labor Federation, AFL-CIO—believed the federal government should intervene immediately. Burton Reflections, *supra* note 22, at response to Question 11.

compensation systems including the persistent failure to compensate occupational diseases.⁴⁷

V. Lingering Questions of Legacy

Thus, the National Commission simply expired. What, in the end, was its value? One answer to this question is that it shone a light on what was (or was not) happening in what remains a strangely decentralized system. The Department of Labor continued to track average state “compliance” with the nineteen essential recommendations until 2004, when it abruptly stopped doing so.⁴⁸ After that date, the political winds shifted, and eventually concern with employer workers’ compensation costs outstripped the political calculus in evidence in 1970. As contributors to this conference have noted, the workplace became “safer.”⁴⁹ Time will tell if the safety came mainly as a result of technologically related improvements to working conditions, or whether dangerous work was simply offshored. If the latter is true, reshoring of work related to broader geopolitical events may change the dynamic.⁵⁰ Nevertheless, the Department of Labor has estimated that as of 2004, when tracking of the number ceased, the average compliance of all states with the nineteen essential recommendations stood at 12.85, up from 6.79 in 1972.⁵¹ But the 2004 figure had barely budged when compared to where things stood in 1980: 12.1.⁵² Significantly,

there has been no reporting or analysis as state legislatures have passed, and governors have signed, significant legislation affecting the availability and adequacy of workers’ compensation for more than a decade. A bill to create a new national commission was introduced in Congress in 2009, but it was not enacted.⁵³

Conclusion

Still, the *approach* of the National Commission is *remembered*. It may be true, as reported by ProPublica, that only seven states now follow at least fifteen of the essential recommendations, and four states comply

47. U. S. DEP’T OF LAB., *supra* note 6, at 11.

48. *Id.* 12.

49. Fishback & Yuan, *supra* note 4, at ____.

50. Michael Ouelette, *Reshoring Is Soaring in 2022—350,000 New Jobs Predicted*, ENGINEERING.COM (Aug. 28, 2022), <https://www.engineering.com/story/reshoring-is-soaring-in-2022350000-new-jobs-predicted> [<https://perma.cc/477T-N9JJ>] (explaining that while governmental initiatives stimulated reshoring “it’s clear that many of the recent reshoring decisions have been made in response to an unprecedented spate of catastrophic global economic disruptions”).

51. U.S. DEP’T OF LAB., *supra* note 6, app. B.

52. *Id.*

53. *Id.* at 28

with less than half of them.⁵⁴ The employee claimant organization, Workers' Injury Law and Advocacy Group (WILG), claimed in a 2022 study:

The results of these [recent] analyses revealed little change in state compliance over the nearly two decades since DOL's 2004 study. Average compliance with the 19 recommendations was found to be 12.7 in 2022, meaning that states complied with about 67% of the recommendations on average. Compliance varied from a high in Nebraska, which complied with 17 out of 19 recommendations, to a low in Mississippi, which complied with 8 out of 19. Georgia, Michigan, and Mississippi complied with fewer than half of the recommendations. Only four states, Hawaii, Ohio, Nebraska, and New Jersey complied with more than 80% of them.⁵⁵

While some can, and do, complain that the age of the National Commission report renders it irrelevant, in a critically important way this is simply not true. As Price Fishback and Andy Yuan recount,⁵⁶ the National Commission report recommended (and caused states to implement for a time) benefit baselines and then insisted that those baselines be indexed to the cost of living. The entire notion that a state had an obligation to provide "adequate" benefits will always provoke a conversation about the meaning of "adequacy."⁵⁷ Is workers' compensation merely an anti-destitution system; or must it (as I contend) retain connection to a deeper right to tort damages that must somehow be respected? In the final analysis, what drove the National Commission was clear evidence of benefit inadequacy uncovered by a Congress deeply and morally concerned about the plight of injured workers.

54. Michael Grabell (ProPublica) & Howard Berkes (NPR), *The Demolition of Workers' Comp*, PROPUBLICA (Mar. 4, 2015), <https://www.propublica.org/article/the-demolition-of-workers-compensation> [<https://perma.cc/B7EW-Y8C3>].

55. Elliot Schreur, Workers' Inj. L. & Advoc. Grp., Review of State Compliance with the 19 Essential Recommendations for Workers' Compensation Laws 3 (2022) (unpublished manuscript on file with author).

56. Fishback & Yuan, *supra* note 4, at ____.

57. See *supra* notes 18–20 and accompanying text.